

NATIVE TITLE POLICY PAPER 3

Dispute management: Constitutions of Prescribed Bodies Corporate

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JULY 2017



AIATSIS

AUSTRALIAN INSTITUTE OF ABORIGINAL
AND TORRES STRAIT ISLANDER STUDIES

FINDINGS

The default rule for dispute management

The Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (CATSI Act) requires all constitutions to include a process for dealing with disputes.

For the purposes of this research, the default rule for dispute management was understood to be the process outlined within the Condensed Rulebook and the Info-kit.¹ Taking this process as the default, the constitutions were assessed to see whether they followed this process, made additions or alterations, or adopted a new process of dispute management.

The ORIC Info-kit and the Condensed Rulebook provide similar suggestions for dispute resolution procedures.

1

Changing the default rule

The majority of constitutions included changes to the default rule on dispute resolution

The research demonstrated that
64%
of constitutions included changes to the default for dispute resolution

The changes that were made to the default rule varied from minor adjustments (such as changing the amount of time designated for each stage of the process) to more significant additions (such as in using an independent mediator).

2

Membership disputes

Although not a requirement of the CATSI Act, some constitutions included specific processes to resolve disputes regarding membership

Membership dispute resolution processes were included in
14%
of constitutions

Member dispute processes recommended that PBC boards:

- referred membership disputes to an Elder's Council, the NTRB/SP or other committee, and/or
- brought membership disputes to a general meeting for members to resolve.

Additionally, some constitutions allowed individuals to appeal a negative decision about their own membership application at a general meeting.



The research demonstrated that **6%** of constitutions referred to the use of an NTRB/NTSP in helping to resolve disputes

3

Using NTRB/SPs

A small number of constitutions referred to the use of NTRBs/NTSPs in helping to resolve disputes

For example, the constitution for Githabul Nation included a process where the PBC engages NTSCORP or another independent person to help them arbitrate disputes about membership.²

Rules about using the NTRB/NTSP in dispute management included,

- referring to the NTRB/NTSP to help resolve disputes about membership
- listing the NTRB/NTSP as one of several options that the PBC can choose from to resolve disputes
- using the NTRB/NTSP further on in the dispute resolution process if the informal negotiations, directors and a general meeting have all been unsuccessful in resolving the dispute
- involving the NTRB/NTSP if a dispute has been unesolved for a three month period.

32% of constitutions

mentioned the use of independent mediation or arbitration

44% of these constitutions

did not provide additional details about mediation and arbitration besides stating that the parties must agree on a mediator.

27% of these constitutions

did include additional information on the process of mediation and/or arbitration. This additional information included setting time limits for mediation, explaining how costs for mediation are to be awarded, describing what to do if the parties cannot agree on a mediator, and/or outlining a process of what to do if mediation is unsuccessful in resolving the dispute.

The remaining 29% of these constitutions

were from the Torres Strait Islands. Constitutions from the Torres Strait differed from the norm by including mediation and arbitration as the first stage of dispute resolution. They also detailed an additional dispute resolution processes specific to resolving intra-Island disputes and competing claims. This process referred to the use of Torres Strait Islander law in dispute management.

4

Independent mediation

Almost a third of constitutions referred to the use of independent mediation and/or arbitration in resolving disputes

Additional information was included in some of the constitutions: setting time limits for mediation, explaining how costs for mediation are to be awarded, describing what to do if the parties cannot agree on a mediator,³ and/or outlining a process of what to do if mediation is unsuccessful in resolving the dispute.⁴

Generally, mediation and arbitration were included at different stages of the dispute resolution process. The constitutions detailed that mediation and/or arbitration may be used:

- as one of several options that can be chosen by directors or the PBC to resolve a dispute
- as an intermediary stage between the directors trying to resolve the dispute themselves and the dispute being taken to a general meeting
- only if directors cannot resolve the dispute
- as the final stage of dispute resolution, to be only used if all other options are unsuccessful.

Just under half of the amended constitutions for dispute resolution stated that parties must agree on a mediator, but did not include further information.

Image: Bardi Jawi country, Dampier Peninsula, Western Australia
Credit: Belinda Burbidge

5

Elder's Councils

A quarter of the constitutions referred to the use of law and custom, elder's councils and/or other Aboriginal or Torres Strait Islander advisory groups in resolving disputes

Rules about using law and custom, elder's councils and/or other advisory groups for dispute resolution varied across the constitutions of PBCs, such as referring disputes to an elder's council after a general meeting, using elders to help mediate disputes, and/or including a condition that the PBC will endeavour to resolve all disputes 'in accordance with Traditional Law and Custom.'⁵ For example, Ilkewartn Ywel refers unresolved membership applications to the senior apmerek-artwey and kwertengerl who then put their resolution on the application to the directors to vote.⁶

Most of the constitutions from the Torres Strait Islands outlined the structure and decision making procedures, including arbitration, of the elder's councils for resolving intra-island disputes and competing claims. They also state that following a decision of the elder's council, the directors must ensure that the decision is enforced by whatever lawful means available to the Corporation. The directors can suspend the membership of any member who fails to comply with the decision of the council of elders.

The constitutions of Miriuwung and Gajerrong #1 and Miriuwung and Gajerrong #4 PBC refer disputes to the Garralyel or the Dawang Council if they can't be resolved in 20 days. The decision of the Council is final and binding on all parties.⁷ Gawler Ranges established a review panel to deal with disputes over membership.⁸ Similarly, the Saibai PBC refers disputes to the Saibai Island Court if they cannot be resolved by mediation and Mer Gedkem Le use the Meriam Tribal Council to assist in making decisions about membership application.⁹

Unlike the Torres Strait, most constitutions do not specify the membership criteria, structure or rights of elders' councils.

6

Membership disputes

Although not a requirement of the CATSI Act, some constitutions included specific processes to resolve disputes regarding membership

The constitutions generally only included a small section on dispute management and lacked specific details. This meant that this research was limited in what it could tell us about how PBCs managed disputes. There may be additional structures and processes outlined in PBC policies that are not included within the constitutions and further research engagement with PBCs is required in this area.



FUTURE RESEARCH DIRECTIONS

Further engagement with PBCs will help us to understand how dispute resolution works 'on the ground' including PBC governance structures, processes and policies. More specifically, the native title sector would benefit from research on:

- the structures PBCs put into place to manage decisions, such as elders councils and elected panels
- the role of Aboriginal and Torres Strait Islander governance in managing decisions
- the kinds of decisions PBCs must make which require dispute management processes
- where PBCs turn to seek advice or assistance in managing decisions.

About the PBC Constitution snapshot series

The PBC constitution snapshot series has been developed to share findings from the Native Title Research Unit's (NTRU) investigation into the constitutions of Prescribed Bodies Corporate (PBCs).¹⁰ The findings in this series are based on research conducted within the broader NTRU 2017 PBC Capability Project, and included an examination of the constitutions of the 164 PBCs registered with

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the Office of the Registrar of Indigenous Corporations (ORIC) at the time. This research involved an assessment of changes to PBC constitutions and whether PBCs included or changed the standard recommended rules offered by ORIC – the default rules.

ORIC has released three different guides and tools that PBCs can use to design their constitutions.¹¹

For this research, the 'default rules' were taken to be the most widely recommended processes across the ORIC rulebook guides.

1 The default rule for dispute resolution is detailed in ORIC, Condensed Rulebook, p. 21:

- If a dispute arises, the parties must first try to resolve it themselves.
 - If the dispute is not resolved within 10 business days, any party may give a dispute notice to the other parties. The dispute notice must be in writing and must say what the dispute is about. It must be given to the corporation.
 - The directors must help the parties resolve the dispute within 20 business days after the corporation receives the notice.
 - If the directors cannot resolve the dispute, it must be put to the members to resolve it at a general meeting.
- Seeking assistance from the Registrar
- If a dispute or any part of a dispute relates to the meaning of any provision of the CATSI Act or the corporation's rule book, the directors or any party to the dispute may seek an opinion from the Registrar about the correct meaning of the relevant provision.
 - The Registrar's opinion will not be binding on the parties to a dispute.
 - The right to request assistance from the Registrar does not create a right to request a formal mediation. However, in an appropriate case the Registrar may provide assistance in having the matter resolved. For more information on members' rights see rule 3.3.

2 Githabul Nation Aboriginal Corporation RNTBC, Consolidated Rulebook, approved 1 March 2015, p. 16. Available from: <http://register.oric.gov.au/document.aspx?concernID=104709> [accessed 16 March 2017]

3 For example, the Birriah constitution explains that if the two disputing parties are unable to decide on a mediator within 10 days then either the registrar or the President of the Queensland law society will decide on a mediator: Birriah Aboriginal Corporation RNTBC, Consolidated Rulebook, approved 16 May 2016, p. 25. Available from: <http://register.oric.gov.au/document.aspx?concernID=3853712> [accessed 16 March 2017]

4 The Yaegl constitution, for instance explains that if mediation is unsuccessful in resolving the dispute, both disputing members are to have their membership suspended for one month, or as determined by the directors: Yaegl Traditional Owners Aboriginal Corporation, Consolidated Rulebook, approved 26 August, p. 14. Available from: <http://register.oric.gov.au/document.aspx?concernID=3850188> [accessed 8 April 2017]

5 The Tatampi Puranga constitution, for example, explains that if the board of Directors are unsuccessful in resolving disputes within 20 business days they will refer the dispute to the Committee of Elders: Tatampi Puranga Aboriginal Corporation RNTBC, Consolidated Rulebook, approved 5 February 2014, p. 49. Available from: <http://register.oric.gov.au/document.aspx?concernID=3743079> [accessed 16 March 2017]

6 Ilkewartn Ywel Aboriginal Corporation RNTBC, Consolidated Rulebook, approved 14 January 2010, p. 4. Available from: <http://register.oric.gov.au/document.aspx?concernID=104595> [accessed 16 March 2017]

7 Miriuwung and Gajerrong #1 RNTBC, Consolidated Rulebook, approved 11 January 2009, p. 70, accessed 25 July 2017, <http://register.oric.gov.au/>

[document.aspx?concernID=104506](http://register.oric.gov.au/document.aspx?concernID=104506), Miriuwung and Gajerrong #4 RNTBC, Consolidated Rulebook, approved 11 January 2009, p. 70. Available from: <http://register.oric.gov.au/document.aspx?concernID=104693> [accessed 25 July 2017]

8 Gawler Ranges Aboriginal Corporation RNTBC, Consolidated Rulebook, approved 8 April 2016, p. 11. Available from: <http://register.oric.gov.au/document.aspx?concernID=2809440> [accessed 16 March 2017]

9 Saibai Mura Buiway RNTBC, Consolidated Rulebook, approved 9 July 2010, p. 14. Available from: <http://register.oric.gov.au/document.aspx?concernID=102993> [accessed 25 July 2017] and Mer Gerkem Le (Torres Strait Islanders) Corporation RNTBC, Consolidated Rulebook, approved 3 May 2016, p. 6. Available from: <http://register.oric.gov.au/document.aspx?concernID=103282> [accessed 16 March 2017]

10 Constitutions, as defined in the Native Title Act 1993, are referred to as 'rulebooks' by ORIC and some PBCs.

11 ORIC, 'The Rulebook Info-kit' 2008, 4th ed. (referred to from here as 'the info-kit')

http://www.oric.gov.au/sites/default/files/documents/06_2013/Rule%20book_info-kit_June_2011.pdf, ORIC, 'A guide to writing good governance rules for prescribed bodies corporate and registered native title bodies corporate' (referred to from here as 'the Guide'), 2008, http://www.oric.gov.au/sites/default/files/documents/06_2013/ORIC-PBCs-guide_May11.pdf
ORIC, 'The Rulebook Condensed' (referred to from here as the 'Condensed Rulebook'), 2016, http://www.oric.gov.au/sites/default/files/documents/05_2016/16_0056_Rule-book-condensed_May2016_lowres.pdf