



Image: Malcumba-Coongie Lakes National Park, South Australia. Country of the Yandruwandha Yawarrawarrka People.
Taken by Michael Pagsanjan on 31/7/12

Tips and Traps for PBC rule books

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Tips and traps for PBC rule books



1. Introduction
2. Regulatory framework
3. Tips for improvement

1. Introduction



- ▶ What is a PBC?
 - ▶ A PBC is a 'Prescribed Body Corporate'.
 - ▶ PBCs are registered pursuant to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)*.
 - ▶ Currently there are some 140 PBCs nationally.

1. Introduction



- ▶ Why are PBCs needed?
 - ▶ PBCs are required to ‘hold’ (if on trust) or ‘manage’ (if as agent) native title after a determination of native title (see *Native Title Act 1993 (Cth) Part 2 Division 6*, and *Native Title (Prescribed Bodies Corporate) Regulations 2006 (Cth)*).
 - ▶ Note, technically speaking, we should be referring to PBCs as RNTBCs (Registered Native Title Bodies Corporate). This is because, once a PBC is nominated and there is a determination, and it is entered on the National Native Title Tribunal Register, it becomes a RNTBC.
 - ▶ For today’s purposes, we will be using the term ‘PBC’ but referring to RNTBCs.

1. Introduction

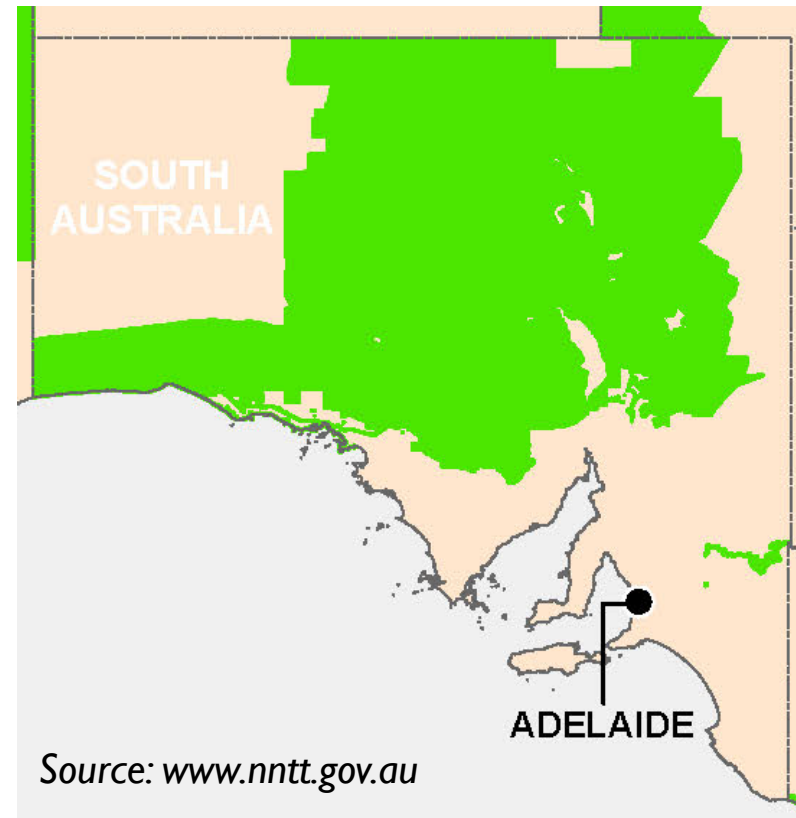


- ▶ Why are PBCs needed?
 - ▶ For an excellent plain English summary on PBC functions, see AIATSIS website: <http://aiatsis.gov.au/research-and-guides/prescribed-bodies-corporate>
 - ▶ For analysis on the difference between trustee and agent PBCs, see: Memmott and Blackwood, 'Holding Title and Managing Land in Cape York – Two Case Studies' (2008) 21 Australian Institute of Aboriginal and Torres Strait Islander Studies (available online at http://aiatsis.gov.au/sites/default/files/products/discussion_paper/memmottp-blackwoodp-dp21-holding-title-managing-land-cape-york.pdf) pp 12-13.

1. Introduction



- ▶ **Background to PBCs in South Australia:**
 - ▶ The number of PBCs has increased in SA over the last 10 years:
 - ▶ 2004 - no PBCs
 - ▶ 2009 - 6 PBCs
 - ▶ 2014 - 14 PBCs
 - ▶ Areas of northern and western SA
 - ▶ Positive outlook for further determinations and PBCs



1. Introduction



▶ The 14 PBCs in SA are:

- ▶ Adnyamathanha Traditional Lands Association AC
- ▶ Antakirinja Matu – Yankunytjatjara AC
- ▶ Arabana AC
- ▶ De Rose Hill Ilpalka AC
- ▶ The Dieri AC
- ▶ Far West Coast AC
- ▶ Gawler Ranges AC
- ▶ Irrwanyere AC
- ▶ Kokatha AC
- ▶ River Murray and Mallee AC
- ▶ Tjauwara Unmuru AC
- ▶ Walka Wani AC
- ▶ Wangkangurru Yarluyandi AC
- ▶ Yankunytjatjara Native Title AC

1. Introduction



- ▶ Common issues for PBCs in South Australia:
 - ▶ **Resource Poor:** lack of human, financial and institutional capital
 - ▶ **Capacity:** two-speed economy.
 - ▶ **Survival vs capacity building:** PBCs don't know what they don't know.
 - ▶ **Triage:** PBCs have competing priorities and are reactive.
 - ▶ **Identity crisis:** searching for a collective purpose following native title recognition.
 - ▶ **Drifting:** lack of strategy and direction.

1. Introduction



- ▶ **Common issues for PBCs in South Australia:**
 - ▶ **Complex regulatory framework:**
 - ▶ *Native Title Act 1993 (Cth)* and relevant regulations.
 - ▶ *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)* and regulations.
 - ▶ Heritage and environmental legislation.
 - ▶ Native title and heritage agreements.
 - ▶ Tax laws.

1. Introduction



- ▶ As a result, the PBCs may experience:
 - ▶ Persistent ‘opportunity gap’
 - ▶ There are lots of ideas, aspirations and opportunities, but these aren’t being realised
 - ▶ Deficit focussed
 - ▶ What PBCs don’t have dominates agenda
 - ▶ Compliance treadmill (or spiral)
 - ▶ Directors are all consumed by complying with regulatory framework and are thus constrained and unable to add value

- ▶ So the challenge is: how do PBCs ‘comply’ and ‘fly’?

1. Introduction



- ▶ Common issues for PBCs in South Australia:
 - ▶ For more information about issues that PBCs face, see Chapter 3 of the Aboriginal and Torres Strait Islander Social Justice Commissioner's 'Native Title Report 2012' available at https://www.humanrights.gov.au/sites/default/files/document/publication/native_title_report_2012.pdf
 - ▶ See also AIATSIS publication 'Living with native title: the experiences of registered native title corporations' (2013) by Bauman, T, Strelein, LM and Weir, JK, available at <http://nativetitle.org.au/documents/3%20Living%20with%20native%20title%20book%20interactive%20PDF.pdf>

2. Regulatory framework



- ▶ CATSI Act and Rule Books
- ▶ Issues with monitoring and compliance
- ▶ Rule book 'traps' in South Australia

2. Regulatory framework



- ▶ Rule Books:
 - ▶ PBCs have four sources of governance rules:
 - ▶ Common law
 - ▶ Rules in CATSI Act that can't be replaced
 - ▶ 'replaceable' rules, that can be modified or replaced by the PBC rule book (if not 'replaced', CATSI continues to apply).
 - ▶ The PBC rule book (or Constitution)
 - ▶ Let's look at one example.
 - ▶ This example will cover some (not all) of the issues.

2. Regulatory framework



▶ Rule Books:

▶ Let's look at **cancelling/adjourning Annual General Meetings:**

▶ **Common law** says:

- ❑ You can't adjourn or cancel an AGM once notice has been given, unless power is provided in a rule book. That is, once notice has been given, you must hold an AGM (see *McKerlie v Drillsearch Energy Ltd* (2009) 74 NSWLR 673).

▶ **CATSI Act** says:

- ❑ AGM must be held before 30 November (s 201-50);
- ❑ A resolution passed at a general meeting resumed after an adjournment is passed on the day it was passed (s201-85(1)).

▶ **'Replaceable' rules**, that can be modified or replaced by the PBC rule book, says:

- ❑ Only unfinished business is to be transacted at a general meeting resumed after adjournment (s 201-85(2)),
- ❑ Meetings adjourned because of a lack of quorum to be adjourned to the same time and place a week later (s 201-70(5)),

▶ **The PBC rule book** might say:

- ❑ Business other than unfinished agenda items can be talked about (replacing s 201-85(2)).
- ❑ Meetings adjourned because of a lack of quorum must be held a month later (replacing s 201-70(5)).
- ❑ AGMs can be cancelled, after notice has been given, for cultural reasons (addressing the common law position that meetings can't be cancelled).

- ❑ **Rule Book will still need to comply with what the CATSI Act says.**

2. Regulatory framework



- ▶ Issues with monitoring and compliance
- ▶ Note that this is our interpretation of the law.
- ▶ Our interpretation may differ to ORIC's interpretation.
- ▶ ORIC is the regulator for PBCs.
- ▶ ORIC, or the person within ORIC, may not know the particular issues relevant to your PBC.
- ▶ Experienced differing levels of utility in engaging with ORIC on rule book interpretation.
- ▶ Don't assume that ORIC (or our view) is right.

2. Regulatory framework



- ▶ **Key message:**
 - ▶ What may look simple, may be more complex.
 - ▶ What you may think is 'right' or 'practical', may not be compliant.
 - ▶ You will need to seek legal advice relevant to the issue for your PBC.

- ▶ If you want to see other PBC rule books, you can access them on the ORIC website (www.oric.gov.au).

2. Regulatory framework



- ▶ Rule book 'traps' in South Australia.

- ▶ Look at four examples:
 - ▶ Adjourning/cancelling AGMs
 - ▶ Progressing matters outside of a directors' meeting
 - ▶ Establishing 'circular' membership rules
 - ▶ Establishing 'committees within committees'

2. Regulatory framework



- ▶ Rule book ‘traps’ in South Australia:
 - ▶ **Adjourning and cancelling meetings.**

 - ▶ Scenario:
 - ▶ AGM has been called in a remote location for a PBC with no income.
 - ▶ Notices are sent to members.
 - ▶ A senior elder dies.
 - ▶ It is against traditional law to hold the meeting.
 - ▶ Even if directors tried to hold the meeting, no-one would come!

 - ▶ Most Rule books do not include provisions to cancel AGMs
 - ▶ CATSI Act is silent on cancelling a meeting (but can adjourn if no quorum, so would still need to rock up to hold the meeting).
 - ▶ Common law says you can’t cancel the meeting after notice has been given, unless rules provide otherwise.

2. Regulatory framework



- ▶ Rule book 'traps' in South Australia:
 - ▶ **Progressing matters outside of meetings:**

 - ▶ Scenario:
 - ▶ Directors are dispersed and it is expensive to hold a face-to-face meeting.
 - ▶ Invoice to corporation arrives and needs to be paid, or an issue requiring a resolution (say in relation to disputes about a specialist for a heritage survey).
 - ▶ What if the cost of holding a meeting is more than the cost of the invoice itself, or, than the cost of a heritage survey?

 - ▶ CATSI Act says you can use technology consented to by **all** directors (s 212-10). What if not all directors consent? This is a replaceable rule.
 - ▶ CATSI Act also says that resolutions without a directors' meeting can be passed if **all** directors sign a statement saying they're in favour of the resolution (s 215-1(1)). What if you can't get a hold of all directors? This is also a replaceable rule.

2. Regulatory framework



- ▶ Rule book ‘traps’ in South Australia:
 - ▶ **Establishing membership rules:**

 - ▶ Scenario 1:
 - ▶ PBC has membership eligibility requirements including descent, knowledge and activation
 - ▶ Rulebook does not define extent of ‘knowledge’ required, or how someone might ‘activate’ their rights and interests
 - ▶ There is likely to exist differences in how individual Directors and members view what level of information and ‘evidence’ is required
 - ▶ Rulebook provides for an applicant to appeal the decision of Directors if application is not accepted

2. Regulatory framework



- ▶ Rule book 'traps' in South Australia:
 - ▶ **Establishing membership rules:**
 - ▶ Scenario 2:
 - ▶ PBC has membership eligibility requirements which refer to 'common law holders'
 - ▶ Directors must refer to determination of native title
 - ▶ Determination reflects 'law and custom' but requires unpacking to support decision-making by Directors
 - ▶ Directors may have different understanding of law and custom and different responsibilities
 - ▶ Applicants may not be able to share how they are common law holders through a written application process
 - ▶ Rulebook makes no provision for an applicant to appeal the decision of Directors if application is not accepted

2. Regulatory framework



- ▶ Rule book 'traps' in South Australia:
 - ▶ **Establishing membership rules:**
 - ▶ Scenario 1 and 2:
 - ▶ CATSI Act says that Directors are responsible for considering (accepting/rejecting) membership applications and Directors must not accept anyone who is not eligible
 - ▶ CATSI Act is silent on whether there is an appeal process for applicants whose application is not accepted (thus unless Rulebook defines process, no right of appeal)
 - ▶ How do Directors obtain relevant information? How do Directors agree on particular eligibility requirements where there is uncertainty?
 - ▶ Who handles disputes? What protection is there for native title holders whose membership is refused?
 - ▶ How do you avoid membership issues snowballing? How do you maintain integrity and avoid being influenced by personal/political views?

2. Regulatory framework



- ▶ Rule book ‘traps’ in South Australia:
 - ▶ **Establishing ‘committees within committees’:**
 - ▶ Scenario:
 - ▶ Corporation has a representative structure ‘between’ members and Directors
 - ▶ This is to ‘build-in’ more ‘cultural’ governance arrangements than the elected, non-representative Board
 - ▶ This requires ongoing support of members and Directors, and an acceptance of the representative base and multiplicity of traditional decision making processes
 - ▶ CATSI Act allows different internal structures, but also provides that Directors must have certain responsibilities and that these can’t be delegated
 - ▶ How do you balance ‘perceived’, ‘legislative’ and ‘cultural’ power in corporate structures and decision-making processes? How do you resolve disputes? Does the PBC have any role in defining or questioning ‘cultural’ processes?

2. Regulatory framework



- ▶ Other notes on issues with interpretation generally.
- ▶ Not rule book issue but relevant to PBC interpretation of governance rules.
 - ▶ Related party benefits – when do the exceptions apply (for example, CATSI Act s 287-10 and benefits that do not discriminate unfairly) ?
 - ▶ Directors duties – what do they mean in practice (for example, CATSI Act division 265-5 and the obligation to act in good faith)?
 - ▶ Native title decisions – alternative processes (for example, PBC regs r 8A)?

2. Regulatory framework



▶ **Key messages:**

- ▶ Your Rule book can include rules which are practical and meet the particular requirements of PBCs
- ▶ Need to review 'Replaceable' rules and identify what will work for your PBC
- ▶ There may still be gaps between 'common law' and 'CATSI' which you could address through your Rule book

3. Tips for improvement



1. Planning
2. Rules and policies
3. Plain English summaries
4. Reviews
5. Is the rule book the problem?

3. Tips for improvement



1. Planning

2. Rules and policies
3. Plain English summaries
4. Reviews
5. Is the rule book the problem?

- ▶ To the extent possible, workshop rule books before a native title determination.
- ▶ Focussing on 'replaceable rules' may be beneficial (along with identifying what is practical for your PBC circumstances).
- ▶ PBC should have ownership of the rules.
- ▶ ORIC has developed a rule book 'info' kit. This is available at: http://www.oric.gov.au/sites/default/files/documents/06_2013/Rule%20book_info-kit_June_2011.pdf

3. Tips for improvement



1. Planning
 2. **Rules and policies**
 3. Plain English summaries
 4. Reviews
 5. Is the rule book the problem?
- ▶ Rule books can be hard to understand and may not be very 'prescriptive'.
 - ▶ Rule books can also be hard to change.
 - ▶ Rule book changes may not be able to adapt to developments quickly.
 - ▶ Many PBCs have not developed 'corporate policies' which can set out processes for particular issues and can be (mostly) set by Directors.
 - ▶ Policies can provide further guidance, are flexible and promote transparency and consistency.
 - ▶ Policies can also further embed good governance in the running of the PBC without the perceived shadow of the Rulebook clouding decision-making.
 - ▶ Explore the opportunities for the PBC to develop policies including on 'Code of Conduct', 'Meeting Procedure', 'Travel', 'Membership' or 'making money decisions' policies.
 - ▶ We have found the Australian Public Service Code of Conduct to be a helpful starting point (see <http://www.apsc.gov.au/aps-employment-policy-and-advice/aps-values-and-code-of-conduct/code-of-conduct>).

3. Tips for improvement



1. Planning
 2. Rules and policies
 3. Plain English summaries
 4. Reviews
 5. Is the rule book the problem?
- ▶ To the extent possible, incorporate plain English summaries into the rule book (or policies) to help directors and members understand the rule book.
 - ▶ For example, before each section, a brief plain English summary can help to explain what the section is about, particularly in relation to related party benefits.
 - ▶ This government summary about plain English may assist:
<http://www.business.gov.au/news-and-updates/News-and-features/Pages/How-to-write-in-plain-English.aspx>

3. Tips for improvement



1. Planning
 2. Rules and policies
 3. Plain English summaries
 4. **Reviews**
 5. Is the rule book the problem?
- ▶ Encourage PBCs to be continually review their rule books.
 - ▶ It may be helpful to appoint a sub-committee of some of the directors to help that process.
 - ▶ Be open to seeking legal advice. Consider asking for pro bono advice on discrete legal issues.

3. Tips for improvement



1. Planning
 2. Rules and policies
 3. Plain English summaries
 4. Reviews
 5. Is the rule book the problem?
- ▶ Be mindful that there are some issues that, no matter how good a rule book may be, may persist.
 - ▶ If so, explore whether or not the PBC is the right 'vehicle' to deal with that issue.
 - ▶ To the extent possible for your PBC, are there other options available? For example, if the PBC is continually encountering related party benefit issues, should the PBC be making those decisions?
 - ▶ Be open to seeking advice about developing your structures.

Conclusion



In summary, we have:

- ▶ Provided some background to PBCs, looking at the status of PBCs in South Australia.
- ▶ Attempted to unpack some of the regulatory frameworks that PBCs need to navigate, identifying some of the traps PBCs in SA have overcome.
- ▶ Proposed some practical tips in addressing issues with PBC rule books.



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