NATIVE TITLE POLICY PAPER 2

Decision-making: Constitutions of Prescribed Bodies Corporate

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FINDINGS

The research findings demonstrated that **90 per cent** of the constitutions of PBCs had made at least one change to the default decision making processes. Out of seven possible categorical changes to decision making rules, the average number of categorical amendments was 2.5.[1]

2 The use of consensus voting

Voting by consensus was the second most common voting procedure in both director and general meetings

After majority rules, consensus was the most common voting process: **15%** of PBC constitutions included consensus voting within the decision making process for directors' meetings and **32%** of constitutions incorporated consensus voting into the decision making process for general meetings.

Aside from two, the constitutions of PBCs did not include definitions or explanations of the consensus and what would occur if consensus could not be reached within the terms of decision-making.

1 Quorum requirements

The majority of the constitutions of PBCs changed the default quorum requirements for general meetings

Amending quorum requirements from the default rulebook was the most common decision-making change adopted by PBCs:

Alternate quorums were either defined as a percentage of members or a specific number of members. Quorum was usually dependent on the number of members in the organisation. For example, the Bardi and Jawi Niimidiman constitution states that the quorum for general meetings is to be at least 25% of the total membership of the corporation or 20 members, whichever is the lesser.[2]

Furthermore, **24%** of PBCs had an additional quorum rule to ensure family or elder representation at general meetings. This suggests that for at least a quarter of PBCs, family representation is an important factor in decision-making at meetings.

71% of PBCs altered the quorum requirements for general meetings

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

3

Voting Procedures

Whilst most constitutions included the default voting process (voting by a majority show of hands), some constitutions detailed a range of other decision making procedures used by PBCs

A similar proportion of constitutions changed the default voting requirements for both director and general meetings:

36% of constitutions changed the voting requirements for directors meetings

28% of constitutions changed the voting requirements for general meetings

Additional requirements to majority rules or consensus decision-making processes included,

- specifying that voting: 'should be conducted in accordance with any traditions and cultures'
- allowing postal voting
- requiring a **75 per cent** majority in a show of hands vote
- referring tied votes to an elder's panel.

Alternative decision-making processes involved voting with a sub-set of the broader group, such as family, descent or clan groups. For example, Gangali Narra Widi PBC utilised a process in which descent groups may meet separately to agree to the terms of the decision and then report back to the broader meeting group.[3]

Where there were two claim groups represented by one PBC, voting processes were shaped by language groupings. For example, the PKKP constitution outlined a procedure where information is presented to the entire group followed by an opportunity for discussion within the respective language groups before a vote is taken.[4]

4

Structuring the board for decision making

The majority of constitutions altered the default director requirement rules

The research demonstrated that **65%** of constitutions made additions to the default list of director requirements. Common additions included having family representation and/or having elders on the board.

There has recently been some policy discussions about the advantages and disadvantages of family/sub-group representation on PBC boards versus a non-representative, skills based board. The constitutions show greater preference for family representation than skills based boards, although some include both.

For example, **27%** of all constitutions have an extra requirement about family or descent group representation among PBC directors. Additionally, eight per cent of PBCs included an additional rule for elder representation for directors and four per cent required equal gender representation. Less than one per cent of PBCs had criteria for youth representation on the board.

Only four per cent of constitutions included requirements that directors must complete training and only six per cent of all constitutions required a skills-specific board. Of that six per cent, some of the skills required included literacy, financial literacy, leadership experience, experience with directorships and board of directors, a commitment to uphold all the legal duties, responsibilities and obligations of a director, the absence of conflicting commitments; and standing and respect within the community. Two per cent of all PBCs within this sub-set also had requirements about family representation on the board.

For PBCs with large families or sub-groups, representation and skills based boards are not necessarily mutually exclusive ways of structuring a board; they may work together.

Last, five per cent of constitutions had a requirement that directors must live in a certain area and/or to have lived in a certain area for a specified amount of time, indicating a preference for localised knowledge and status.

The Chairperson's casting vote

The research found that the majority of constitutions in all regions adopted the default rule in allowing the chairperson to have an additional casting vote in directors' meetings. There was more variation, however, in how this rule was adopted for general meetings.

The research found that that the majority of PBC constitutions in all regions and 69 per cent overall adopted the default rule on the chairperson's vote in directors' meetings and permitted the chairperson to have an additional casting vote.

The research additionally showed that in most regions there is a relatively even distribution between PBC constitutions that do and do not adopt the default rule on the chairperson's vote in general meetings. Overall, 60 per cent of PBCs adopted the default rule and permit the chairperson to have an extra casting vote in general meetings. As illustrated in the graph below, Victoria, the Torres Strait Islands and the Northern Territory, however, did not fit this trend.

Figure 1: Chairperson's casting vote in general meetings[5]
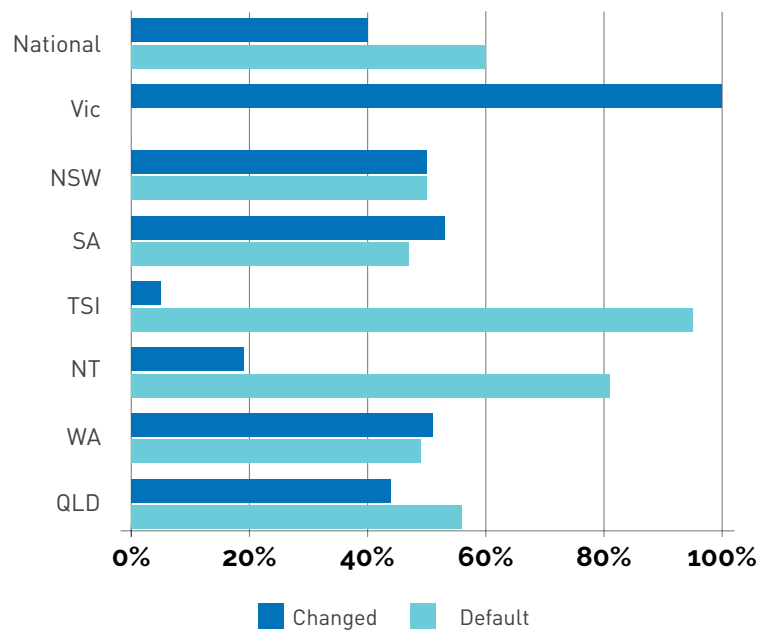
5 Independent Directors on the board

Almost half of the constitutions included a section which permitted independent directors

Just under half (40%) of PBC constitutions had a section that permitted independent directors; however, little detail was provided to the exact rules and responsibilities of independent directors. For example, while **23%** of the PBCs that allowed independent directors specified a required number, only two per cent of PBCs specified the role of independent directors in voting and only three per cent included information about the eligibility requirements for independent directors.

The limited information and wording about independent directors meant that the research was only able to show the number of constitutions that permitted independent directors; not how many PBCs actually implemented this rule and used independent directors.

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) comprehensive investigation into the constitutions of Prescribed Bodies Corporate (PBCs).[6] The findings in this series are based on research conducted within the broader NTRU 2017 PBC Capability Project, which included an examination of the constitutions of the 164 PBCs registered with the Office of the Registrar of Indigenous Corporations (ORIC) at the time. This research involved an assessment of changes to PBC constitutions; 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.[7]

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

FUTURE RESEARCH DIRECTIONS

Further engagement with PBCs is required to examine decision-making processes in more depth, including:

- PBC policies and processes about decision-making
- decision-making structures, such as family representative boards compared to skills based boards
- the types of decisions PBCs are making
- the principles of consensus voting and what decisions it is used for
- the exact role of elders and youth in decision-making
- whether PBCs find the available decision-making structures and processes effective and culturally suitable.

CONTACT

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1   90 per cent of constitutions had at least one change to the default for the following seven categories of decision making rules- proxy voting, quorum rules for general meetings, quorum rules for directors meetings, voting procedures for general meetings, voting procedures for directors meetings, the chairperson's casting vote in directors meetings and the chairperson's casting vote in general meetings.

2   Bardi and Jawi Niimidiman Aboriginal Corporation RNTBC, Consolidated Rulebook, approved 5 May 2016, p. 25. Available from: http://register.oric.gov.au/document.aspx?concernID=202283 (accessed 27 July 2017)

3   Gangali Narra Widi Aboriginal Corporation RNTBC, Consolidated Rulebook, approved 24 September 2016, p.26. Available from: http://register.oric.gov.au/document.aspx?concernID=4184846 (accessed 16 March 2017)

4   The PKKP Aboriginal Corporation RNTBC, Consolidated Rulebook, approved 29 January 2016, p. 18, Available from: http://register.oric.gov.au/document.aspx?concernID=2800781 (accessed 16 March 2017)

5   In this chart 'default' refers to PBCs that have adopted the default rule and allowed the chairperson to have an additional casting vote and 'changed' is where an additional casting vote is not permitted in the constitution.

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

7   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 are '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

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Image: Tableland Yidinji People, Lake Barrie, Queensland.
Credit: Luis Aguilar.