



Kimberley Land Council

# Directors of a PBC

Issue # 4 July 2018

# PBC Essentials

*The KLC welcomes you to the 4th Edition of the PBC Essentials...*

PBC Essentials is a quarterly publication that provides information to PBCs across the region on many different subjects. Each edition will have a different theme and will address issues common to PBCs in the Kimberley. This edition is based on being a director and what this position requires of you.

# What is a Director?



A Director is one of the people who govern a corporation. A PBC can have between 1 and 12 directors who work together – the exact number depends on the type of PBC and what the PBC's rule book says. The directors meet to talk about business and make strategic plans for the PBC.

There are rules about who can be a director. For example, all directors have to be 18 years old or above. A majority of directors have to be a member of the PBC. Your PBC may have other rules about who can be a director and how they are chosen – you can find these in your rule book.

## Eligibility for appointment as a director

The CATSI Act which governs how a PBC is run has some rules about who is and isn't eligible to be a director of a corporation.

An individual who is disqualified from managing Aboriginal and Torres Strait Islander Corporations under part 6-5 may only be appointed as a director of an Aboriginal & Torres Strait Islander corporation if the appointment is made:

- With Permission granted by the registrar under section 279-30; or
- with leave granted by the Court under section 279-35

*Your PBC Rulebook will be more specific on how you can become a director for your PBC.*



## What is a chairperson?

A Chairperson is someone who helps to run the PBC's meetings. The Chairperson makes sure that the directors' meetings and general meetings run smoothly and all the business on the agenda is taken care of.

The directors choose who will be the chairperson and how long they will have that position. The chairperson is usually a director on the PBC board of directors.

When a vote is taken at a meeting, a chairperson has one vote, like everyone else. If there is a tie, the chairperson has an extra vote called a casting vote.



# Directors' Duties



Directors have special legal duties to the PBC. These duties come from the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act). They are:

Once appointed the directors have full authority of the corporation and are ultimately responsible for its management. This is why directors duties exist.

Directors should always know their corporation's financial position. Only then can they be sure that their PBC is not trading while insolvent

## 1. Duty of care and diligence (s 265.1)

Directors have to carry out their responsibilities with reasonable care and diligence. This means they have to take their responsibilities seriously.

For example, a careful and diligent director knows what's happening at the PBC and comes to the meetings ready to make decisions.

*A breach of any of these duties may lead to a civil or criminal penalty...*

## 2. Duty not to improperly use their position or information (s 265.10 & s 265.15)

Directors are not allowed to use their position to benefit themselves or someone they know – they must only use their position to act in the best interests of the PBC. For example, directors should not tell other people about a business opportunity the PBC is interested in. The duty is the same for information the directors have because of their position – directors must not use this information to benefit themselves or anyone else.

## 3. Duty not to trade while insolvent (s 531-1)

A PBC is 'insolvent' if it does not have enough money to pay its debts. Directors must not allow their PBC to trade (i.e. buy goods or services) if the PBC does not have enough money to pay its bills when they are due. Directors must always know the PBC's money position to be sure the PBC is not trading while insolvent. Even if a Director does not know that the PBC is insolvent, they are still liable for a breach of this duty if they let the PBC keep doing business while insolvent!

## 4. Duty of good faith (s 265-5)

Directors have to carry out their responsibilities in good faith in the best interests of the PBC, and for a proper purpose. This means they must be honest and loyal to the PBC.

For example, a director who acts in 'good faith' always thinks about what is best for the PBC and acts that way. They would never make a decision that helps themselves personally and doesn't help the PBC or other native title holders as well.

## 5. Duty to disclose material personal interests (s 268-1)

Directors have a duty to tell the PBC about their personal interests in matters relating to the PBC's business. This is so directors can avoid making decisions about the PBC which could personally benefit them, their family, their business or another organization that they work for or are on the board of. This is also known as a 'conflict of interest'.

*It is very important to remember that at all times the corporation's interests come first!*



# Responsibilities of Directors



## A director has special responsibilities, including:

- To attend regular directors' meetings.
- To take an active part in directors' meetings.
- To keep fully up to date on what the PBC is doing.
- To know about the PBC's money position.
- To find out for themselves how a proposed action will affect the PBC's business, especially if it is a big decision. For example, a director should not make a decision that involves a lot of the PBC's money, unless they understand how it will affect the PBC.
- To ask for outside advice from an expert if they need it to make an informed decision.
- To achieve the objectives in the PBC's rule book.
- To make sure the PBC complies with its legal obligations.

## Directors' meetings

A directors' meeting is a meeting of the directors. It is different from a general meeting which is a meeting of the directors and members.

At directors' meetings, the directors talk about the PBC's business. For example, the directors might cover this business:

- approving the minutes of a previous PBC meeting
- strategic planning
- economic development ideas
- checking the list of members
- making sure the PBC is compliant
- ranger updates on land and sea management
- financial or money position of the PBC
- business projects or contracts. For example, Indigenous land use agreements (ILUAs)
- planning the next annual general meeting (AGM)

Any of the directors can ask to have a meeting. The directors who organize the meeting have to give notice to each individual director. A meeting can only go ahead if a majority of directors come to it. Your PBC might have other rules about how often your directors have to meet and how they make decisions – you can find these rules in your PBC's rule book.

# Consequences of directors doing the wrong thing

Directors who breach (don't comply with) their duty have done the wrong thing and will face consequences. ORIC actively prosecutes Directors who breach their duties. The consequences of a breach of a directors' duty depends on the type of duty the director has breached and how serious the breach is. For example, a director could be:

- removed from their position as director
- banned from managing a corporation
- ordered to pay a penalty of up to \$200,000
- ordered to pay back the PBC for the loss it suffered as a result of their breach
- fined
- sentenced to prison

### Action by the Corporation

The corporation can take its own action to remove or dismiss the person involved in the breach. The corporation can also take its own civil action to restrain the person involved in the breach and recover compensation for any loss.

### Disqualification

In some circumstances a person is automatically disqualified from managing a corporation, including if they:

- have been convicted of certain serious criminal offences (including fraud)
- are bankrupt.

### Civil penalty proceedings by the Registrar

If a person breaches a civil penalty provision—for example, if a director fails to exercise reasonable care and diligence in carrying out their duties—the Registrar may apply to a court for a 'declaration of contravention'. The court's declaration provides conclusive evidence of the breach. If the contravention is serious a court may then order that person to pay a penalty of up to \$200,000 for each contravention to the Commonwealth. A court may also order payment of compensation to the corporation for the damage it has suffered as a result of the contravention and/or disqualify that person from managing a corporation.

### Criminal prosecution

A breach of certain duties may attract criminal prosecution and heavy penalties. If a person is found guilty by a court of breaching a duty to the criminal standard and where a criminal penalty applies, the person may be fined and/or sentenced to imprisonment.



# What is a conflict of interest?

A 'conflict of interest' is when a director has a personal interest that clashes with the corporation's interests. The conflict of interest could be something that personally benefits the director or the directors family or it could be something that benefits another organization that the director works for. These are some examples of when a director might have a conflict of interest:

- The director is a board member of the Community Council.
- The director has an outside job or business.
- The director wants to be part of a tourism opportunity or business.
- The directors are interviewing people for the PBC's CEO position and one of the applicants is related to a director.
- Managing a conflict of interest
- There is nothing wrong with having a conflict of interest if you manage it properly. You must follow these rules:

## 1. Disclose the conflict

A director with a conflict of interest should not keep it a secret – you have to tell the other directors about it. If you are not sure if something is a conflict of interest, you should tell the other directors anyway. It is always better to tell them, than to risk doing the wrong thing.

## 2. Follow voting restrictions

- When the other directors talk about your conflict business, you need to step out of the directors' meeting until the other directors say you can come back in to the meeting.
  - Alternatively, the directors can pass a resolution confirming that they are aware of the conflict and that you can stay in the room and vote as you normally do.
- These rules make sure that the directors are always making decisions in the best interests of the PBC.

*There is nothing wrong with having a conflict of interest so as long as you, as a director, disclose all of the information about the conflict of interest to the other directors and abide by their decision as to how it is to be managed.*

# What is a conflict register?

One way of managing conflicts of interest is to have a conflict register. This helps the directors to be clear on what conflicts they have and how to manage them. Below is an example entry on a conflict register:

Name of director	Description of interest	Has the board been notified of the interest?	Date of disclosure	Steps taken by board for dealing with the conflict	Actions taken by the board member to address the conflict
John Smith	Board Member of Community Council	Yes		John declares the interest and does not vote when an agenda item relating to Community Council decisions is to be considered	John will remain a Director of both the PBC and the Community Council but will declare the interest at all future meetings until he is no longer a member of the Community Council Board.



# Decision Making



## How do Directors make decisions?

Questions in a directors' meeting about what the PBC should do can be answered by a 'resolution.'

A resolution is when the directors decide whether they agree with a proposed action for the PBC to take. Directors can make decisions in a variety of different ways. Each PBC can make decisions how they want but the ways they make decisions has to be in the rule book.

A resolution can be passed by consensus, if you have a discussion and reach a consensus it means that everyone agrees on the decision. Directors can also pass resolutions by a majority vote, for example, for a PBC with 6 directors,

4 or more directors will need to vote yes to pass a resolution. If there is a tie, the chairperson has a casting vote.

**Can the directors make a decision that affects my native title without telling native title holders?**

No. The directors cannot make a decision that affects native title rights and interests without talking to all native title holders and asking them if they agree to it.

## What kind of decisions do directors make?

Directors make decisions about the day-to-day business of a PBC, things like deciding to apply for funding, making decisions about membership applications or signing off on heritage agreements. Directors do not make decisions that affect native title unless they are satisfied that the affected

native title holders have been consulted and have consented to the decision.

Directors cannot make decisions about amending the rule book and they can only make decisions about removing other directors in very limited circumstances.

Decision	Director?	Members?	Native Title Holders
Approving membership applications	✓		
Changing rules in the rule book		✓	
Buying a computer	✓		
Recruiting a staff member	✓		
Electing directors		✓	
Saying yes or no to mining agreements			✓
Identifying the affected native title holders	✓		
Agreeing to extinguish native title rights in exchange for benefits			✓
Removing directors before the end of their term		✓	
Removing directors who don't turn up to meetings	✓		
Organising the AGM	✓		
Agreeing to leases on parts of country (even if it is a lease to native title holders)			✓
Agreeing to let other native title holders be represented by the PBC			✓
Signing off on heritage agreements	✓		





## How does a person become a director?

A person becomes a director by being 'appointed' to the position. A person is 'appointed' if:

1. the members pass a resolution in a general meeting choosing that person as their director; and
2. the person agrees in writing to be a director.

Directors are appointed for a term of one or two years. After their term, they can be reappointed or replaced by a different person.

### Electing directors

Your PBC will have a special process for electing directors in your PBC's rule book. Generally, elections happen at an AGM. People can nominate themselves or another person to be a director and the members vote on who they want in the position.

It's very important you choose the 'right people' as directors – this means people you can trust, who have good leadership skills, are available to attend meetings and, above all, have the best interests of the PBC at heart. They must also be ready

Sometimes a director can be appointed by the other directors. This can happen if there are not enough directors to make up a 'quorum' for a directors' meeting – the directors appoint someone else so that there's enough of them to continue doing the PBC's business. At the next AGM, the directors have to ask the members to confirm the appointment.

*Check your PBC Rulebook for more specific information on how you can become a director*

to participate in directors' meetings, read and understand financial reports, and ask questions when needed.

Sometimes a director can be appointed by the other directors. This can happen if there are not enough directors to make up a 'quorum' for a directors' meeting – the directors appoint someone else so that there's enough of them to continue doing the PBC's business. At the next AGM, the directors have to ask the members to confirm the appointment.

## How does a person stop being a director?

A person stops being a director if the person:

- dies
- resigns as a director (they choose to leave the position)
- is at the end of their term of appointment
- is banned from being a director under the CATSI Act (this happens if the person is bankrupt or convicted of a serious crime)
- is 'removed' as a director

### Removing directors

A director can be removed by the members or the other directors. A special process must be followed to make sure the director is removed in a way that is fair to that director and the PBC.

**If your PBC wants to remove a director, you should ask the following questions:**

#### Removal by resolution of members

##### 1. Has the PBC been given notice of the resolution?

- The members who want to remove a director have to tell the PBC that they want to pass a resolution at the next general meeting to remove the director. They must give 21 days' notice or more. This is so all members can choose whether or not they want to go to the meeting to vote on the resolution.

##### 2. Has the director been given notice?

- A copy of the notice of the resolution must be given to the director who the members want to remove.

##### 3. Has the director put their case to the members?

- The director must be given a chance to put their case to the members. For example, the director can give the PBC a written statement or speak at the general meeting.

##### 4. Has the PBC passed a resolution?

- The members have to pass a resolution in a general meeting to remove the director.

#### Removal by other directors

##### 1. Has the director missed 3 or more directors' meetings in a row, without a reasonable excuse?

- There is only one situation where the other directors have power to remove another director. This is when a director has missed 3 or more directors' meetings in a row, and does not have a good reason why they couldn't come.

##### 2. Has the director been given notice?

- The other directors have to tell the director that they want to remove him or her.

##### 3. Has the director objected?

- The director must be given a chance to 'object' – this means they must be given a chance to say whether or not they want to keep their position. If the director objects, the other directors cannot remove the director. The director can only be removed by the members in a general meeting.

##### 4. Have the directors passed a resolution?

- The directors have to pass a resolution at a directors' meeting saying that they want to remove that director.





Tjurabalan Directors - 2018



Karajarri Traditional Lands Association AGM 2017

# PBC Meetings



KTLA Directors 2017



Balangarra Directors - August 2017



Tjurabalan Directors Meeting - April 2018



# KLC Update

## 2018

This year got off to a flying start and we are now half way through the year. Its a big year for the KLC and along with providing assistance to PBCs, we also have some pretty big events scheduled for the year:

- National Native Title Conference: 5-7 June 2018, Cable Beach Club Resort Broome

This years conference is being co-convened by AIATSIS and the KLC and hosted by Yawuru. this years conference was a major success and welcome any feedback from PBC Directors on what they got out of the conference

- KLC 40th Anniversary Celebrations: This year will see a variety of events happening to help celebrate the 40th Anniversary of the KLC.

## CASP Framework

We are looking to run the phase 1 of the Capabilities Assessment Services Prioritisation with those PBC we have not yet had the chance to workshop this with last year. For those PBCs that have undertaken phase 1 of the assessment we are now looking to run the second phase.

## Training, Development & Resources for PBCs

This year we will be running more training and development for Kimberley PBCs. This will include running the Director Governance training for the second year which is especially tailored to PBCs.

The PBC governance training will be held on the following dates and locations (more information will be provided closer to the date):

- Kununurra Region Tuesday 6th and Wed 7th Nov
- Fitzroy Region Monday 12th and Tuesday 13th November
- Broome Region Wednesday 14th and Thursday 15th

The PBC team have also developed many helpful resources such as fact and information sheets that are available for PBCs to utilise. The directors induction manual will also be available soon to start being used.

