



**Government of Western Australia
Department of the Premier and Cabinet**

Governance Principles for Native Title Agreements

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Introduction

This document relates to the negotiation and formation of agreements between the State of Western Australia (**State**) and determined native title holders or native title claimants (both of which will be described in this document as a **Native Title Party**) under which the State agrees to provide certain benefits to the Native Title Party. Those benefits may include monetary payments, social initiatives, housing and land transfers.

The State requires that the Native Title Party establish one or more corporate bodies to hold, manage and distribute native title benefits on behalf of the Native Title Party and each member of the Native Title Party (**Beneficiaries**). The State believes that appropriate corporate governance arrangements must be in place to enable the benefits provided by the State to the Native Title Party to be managed responsibly and sustainably for all Beneficiaries. The State advocates eight key ‘Corporate Governance Principles’ to assist in the determination of appropriate corporate governance arrangements.

The State expects that this document will assist Native Title Parties and officers of the State who are involved in the negotiation of agreements between the State and Native Title Parties.

Corporate Bodies

The State intends that the Corporate Governance Principles will:

- (a) apply to each corporate body proposed by the Native Title Party, whether that corporate body is in the form of, or has the status of:
 - (i) a company incorporated under the *Corporations Act 2001 (Cth)*;
 - (ii) a company incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)*;
 - (iii) an incorporated association; or
 - (iv) a prescribed body corporate (or a registered native title body corporate);
- (b) also apply (with appropriate modifications) to any trust forming part of the corporate governance arrangements proposed by the Native Title Party;
- (c) not be the only criteria against which the State will assess the corporate governance arrangements proposed by the Native Title Party; and
- (d) be used to form a preliminary view as to the corporate governance arrangements proposed by the Native Title Party and will not replace legal advice.

Effectiveness of Corporate Governance Arrangements

The State notes that the effectiveness of corporate governance arrangements will depend on a number of factors, including the following:

- (a) the Native Title Party having a clear understanding, and accepting the importance, of corporate governance arrangements;

- (b) detailed, clear and achievable commitments and responsibilities being contained in the corporate governance arrangements; and
- (c) the corporate body having suitable support and resources available to establish and implement the proposed corporate governance arrangements.

Disclaimer

The information, representations and statements contained in this publication are provided for general information purposes only. The State of Western Australia and its officers, employees and agents:

- (a) make no representation or warranty as to the accuracy, reliability, completeness or currency of the information, representations or statements in this document (including, but not limited to, information which has been provided by third parties); and
- (b) shall not be liable, in negligence or otherwise, to any person for any loss, liability or damage arising out of any act or failure to act by any person in using or relying on any information, representation or statement contained in this document.

Principle 1 – Accountable and responsible management and reporting

The constitution of a native title body corporate should establish and disclose the roles and responsibilities of the board and management staff. This disclosure will facilitate accountability of the board and management staff to the native title body corporate and its beneficiaries.

No.	Question	Preliminary View (Circle)
1.1	Are the roles and responsibilities for the board, management staff and/or any committees clearly defined in the constitution or relevant rules governing the body corporate?	<ul style="list-style-type: none">• Satisfactory• Need more information• Not satisfactory

Principle 2 – Board to provide independence and expertise

The board members of a native title body corporate should be of an appropriate size and have an appropriate range of skills and experience to adequately discharge his or her responsibilities and duties. The board must:

- have expertise and understanding to deal with native title body corporate matters;
- exercise independent judgement in its functioning; and
- effectively review and challenge the performance of management.

No.	Question	Preliminary View (Circle)
2.1	Does the size <i>and</i> composition of the board provide for effective fulfilment of its commitments, duties and responsibilities?	<ul style="list-style-type: none">• Satisfactory• Need more information• Not satisfactory
2.2	Is there a suitable number of independent (non-executive) directors?	<ul style="list-style-type: none">• Yes/No• Need more information
2.3	Should there be there provision for a State nominated independent director?	<ul style="list-style-type: none">• Yes/ No• Need more information
2.4	Is there a requirement that the board be representative of the diversity of the native title group?	<ul style="list-style-type: none">• Satisfactory• Need more information• Not satisfactory

Principle 3 - Integrity in financial management and reporting

A native title body corporate must have a procedure in place to independently verify its financial position. Where the State is a party to a native title agreement, measures must be in place so that the State can monitor the management of benefits .

No.	Question	Preliminary View (Circle)
3.1	Are financial reporting guidelines, requirements and timeframes in place. Is the financial reporting guidelines consistent with the Australian Accounting Standards? ¹	<ul style="list-style-type: none">• Satisfactory• Need more information• Not satisfactory
3.2	Is there an independent entity responsible for verifying the accuracy of financial reports? For example, an audit committee or external auditors.	<ul style="list-style-type: none">• Satisfactory• Need more information• Not satisfactory
3.3	Does the native title agreement provide for the body corporate to report to the State about: <ul style="list-style-type: none">- how the benefits are intended to be allocated in the next reporting period,- how the benefits were allocated; and- forecasts of how funds will be spent in the next few years?	<ul style="list-style-type: none">• Satisfactory• Need more information• Not satisfactory

¹ The relevant accounting standards of the Australian Accounting Standards Board:
<http://www.aasb.gov.au/Pronouncements/Current-standards.aspx>

Principle 4 - Recognise and manage risk

A native title body corporate should establish a system of risk management. Risk management is the ongoing identification of risks, their incidence and severity, and the measures that will be taken to avoid or mitigate them.²

No.	Question	Preliminary View (Circle)
4.1	What is the system for identifying and managing risk to the corporation and its ability to deliver ongoing benefits? Does the system comply with an accepted risk management standard or method? Is there a requirement to maintain a risk management system?	<ul style="list-style-type: none">● Satisfactory● Need more information● Not satisfactory
4.2	Should a risk assessment be provided to the State?	<ul style="list-style-type: none">● Satisfactory● Need more information● Not satisfactory

² See for example Office of the Registrar of Indigenous Corporations *Healthy Corporation Checklist* [112] and [113].

<http://www.oric.gov.au/Content.aspx?content=training/healthyCorporationChecklist.htm&menu=training&class=training&selected=healthyCorporationChecklist>

Principle 5 - Equitable and responsible distribution of native title benefits

A native title body corporate should distribute native title benefits in accordance with the rules set out in the native title agreement, the constitution and all other appropriate documents. The State is particularly concerned that native title benefits are used and distributed equitably amongst the beneficiaries for the purposes stated in the native title agreement, any trust deeds and any other relevant document.

No.	Question	Preliminary View (Circle)
5.1	Does the native title agreement provide for the equitable allocation of benefits? For example: - does the native title agreement mandate legal instruments (e.g. trusts) that will hold the benefits and ensure that they are used and distributed equitably? - Do the trusts contain clauses that ensure that benefits will be used and distributed equitably?	<ul style="list-style-type: none">• Satisfactory• Need more information• Not satisfactory

Principle 6 – Ethical and responsible decision making processes

The State expects native title bodies corporate to make ethical and responsible decisions, in accordance with the agreed purpose of the organisation, and in fulfilment of obligations under native title agreements. The body corporate must be capable of assessing if its decisions are correct in light of criteria that are set down in the agreement, the constitution and in other instruments. Decision making can involve complex processes and it is important the body corporate communicates how certain types of decisions are to be made to the native title beneficiaries.

No.	Question	Preliminary View (Circle)
6.1	Does the native title agreement provide for general meetings and board meetings in compliance with legal obligations?	<ul style="list-style-type: none"> • Satisfactory • Need more information • Not satisfactory
6.2	<p>Does the agreement, the constitution or trust deed clearly specify what decisions can, and cannot, be made by the body corporate?</p> <p>Is there a requirement in the above instruments that decisions must be consistent with the specified criteria?</p>	<ul style="list-style-type: none"> • Satisfactory • Need more information • Not satisfactory

Principle 7 - Timely and balanced disclosure and communication

The constitution of a native title body corporate should provide for mechanisms to ensure that all its members have equal and timely access to information concerning the body corporate, such as its financial position, performance and governance. A body corporate should ensure that communications are factual and presented in a clear and balanced way, including both positive and negative information.

No.	Question	Preliminary View (Circle)
7.1	<p>Is there a process to ensure that all members of the body corporate have the opportunity to be involved in and/or know the outcomes of meetings held?</p> <p>For example:</p> <ul style="list-style-type: none">- Is there a method by which decision making about the benefits will be communicated to beneficiaries and relevant stakeholders?	<ul style="list-style-type: none">• Satisfactory• Need more information• Not satisfactory

Principle 8 – Effective dispute resolution

A native title body corporate should recognise that disputes about how to run a corporation may occur. A native title body corporate should have a plan for the effective management and resolution of disputes.

No.	Question	Preliminary View (Circle)
8.1	Is there a clear and practical and equitable internal dispute resolution process?	<ul style="list-style-type: none">• Satisfactory• Need more information• Not satisfactory
8.2	Is there a clear and practical and equitable external dispute resolution process?	<ul style="list-style-type: none">• Satisfactory• Need more information• Not satisfactory
8.3	Are the outcomes of the dispute resolution processes documented and appropriately distributed?	<ul style="list-style-type: none">• Satisfactory• Need more information• Not satisfactory