



AIATSIS

AUSTRALIAN INSTITUTE OF ABORIGINAL
AND TORRES STRAIT ISLANDER STUDIES

Alternative Dispute Resolution and Elders Councils as decision making bodies

**Native Title Conference 2018: One land
Many Laws**

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Native title jurisdiction

- Native title recognises not just a property right, but a system of laws and customs
- The courts will normally not (and should not) decide matters internal to the group
- PBCs are increasingly responsible for managing internal disputes that involve decisions of law and custom

Types of Disputes

- Who is a native title holder
 - who can register as a member
 - Who can benefit from native title payments
- Who speaks for a particular area of country
 - Internal boundaries between families
 - Rights of inheritance within families
- Who can exercise native title rights and interests (eg commercial enterprises)
- Who can be involved in/agree to a native title decision

Types of dispute resolution

The parties reach a solution

Mediation

- an independent person assists parties to reach a solution for themselves

Conciliation

- An independent person assists parties to identify issues, options and reach a formal agreement

Someone in authority decides

Arbitration

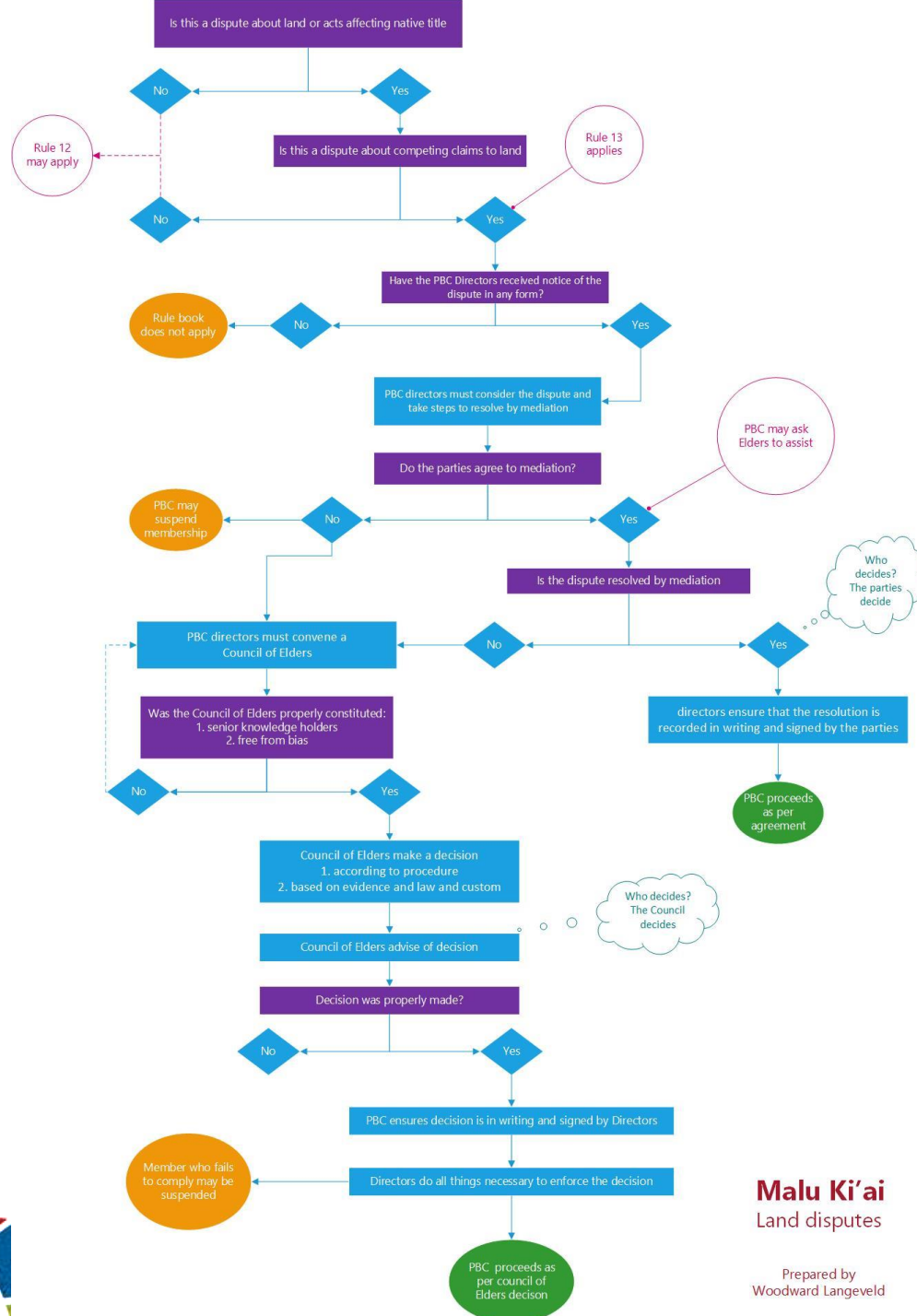
- Is a formal process that the parties agree to be bound by a decision of the arbitrator

Adjudication

- Is a decision in accordance with law as well as fact where the adjudicator or judge makes a final decision that has legal force

PBC Rule Books

- All PBC Rule Books must contain a dispute resolution clause
- 64% of PBCs have adopted dispute resolution rules that differ from the ORIC default rules
- Most Rule Books require Directors to attempt to resolve a dispute as the first step
- 32% of PBC Rule Books mention the use of independent mediation or arbitration



Elders' Councils

- 25% of Rule books referred to the use of law and custom, Elders' Councils and/or other Aboriginal or Torres Strait Islander advisory groups in resolving disputes
- Some refer to Elders Councils only for disputes, others have additional roles for cultural advice, negotiations

If its not in the Rule Book?

- Even if you do not have a provision for referring disputes to mediation or an Elders' Council or similar
- The Directors may access such processes in their effort to resolve disputes
- These processes could be included in a policy or procedure

Discussion:

What is current practice?

- Are Elders' Councils established or being convened by PBCs?
- What kind of advice, decisions, disputes are Elders' Councils involved?
- What good outcomes have Elders' Councils achieved
- What challenges have Elders' Council members experienced

Mediation versus decision-making

- Elders' Councils may engage in either mediation or arbitration/adjudication
 - Helping the parties reach an agreement that they are both happy with
 - Making a decision in accordance with law and facts

Discussion:

How are Elders' Councils working

- How are Elders' Council members chosen?
- What kind of decisions are they being asked to be involved in?
- How have decisions been accepted within the community?

Challenges of arbitration/adjudication

- There is likely to be a winner and a loser
- Weighing evidence and disputed facts
- Applying the right law and custom
- Transparency and consistency of decisions
- Ensuring the right people are making the decision
- Confidence to make decisions that impact families over the long term
- Making hard calls when there is not necessarily a clear choice
- Choosing not to decide

Making decisions stick

- Membership Rules can strengthen decisions:
 - bind members to decisions of an Elders' Council
 - Require Directors to make every legal effort to enforce the decision
- Establishing agreed procedures and processes before a dispute is required to be heard
- Seeking written agreement from parties to be bound by decisions
- Making it clear what, if anything, can be appealed

Discussion:

What would assist Elders' Councils

- What kind of tools and resources do we need?
- What kind of training or advice would be useful?
- What kind of research should we do?
- What can we learn from other contexts – eg elders involved in criminal law and diversionary processes?

Concluding comments

- Elders' Councils are not recognised courts of law in Australia
- Its time to strengthen the recognition of Indigenous law and jurisdiction