The High Court Mabo decision in 1992 and the passing of the Commonwealth Native Title Act in 1993 mark a fundamental shift in the recognition of indigenous rights in Australia. The Act, like the High Court decision on which it is based, transforms the ways in which indigenous ownership of land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation, however, raises a number of crucial issues of concern to native title claimants and to other interested parties. Many of these will have to be decided in the courts. Nevertheless, information about and discussion of the issues are important for those needing to address the matters raised by the claim process.

This series of papers is designed to contribute to the information and discussion. The papers address the shift from notions of statutory land rights to the rights of indigenous peoples that pre-existed colonisation and exist within the broad spectrum of their human rights. Within these rights, land is an essential component.

This second paper in the series looks at the important practical question of how native titles, once they have been determined to exist, will be managed. The paper aims at encouraging discussion about the issues, and ultimately helping native title holders to choose the most suitable body to act on their behalf as required by the Native Title Act. In addition, this paper may assist people in making inputs to the current regulation-making on this subject. Dr Fingleton is head of the Native Titles Research Unit at AIATSIS.

**NATIVE TITLE CORPORATIONS**

James Street Fingleton

1. **Introducing the 'prescribed body corporate'**

The Native Title Act 1993 is a law first and foremost for the recognition and protection of native title, but also it establishes ways in which future dealings affecting native title may proceed (see S3). A key element in how the Act handles such dealings is the 'prescribed body corporate' - what the Commonwealth Government called 'the contact point for dealings in native title'. The Act itself does not specify who or what these prescribed bodies corporate are, leaving that to be spelt out in follow-up regulations. But it does say that every native title must have one, and that who that body is must be determined at the same time as the native title determination is made (S55). Therefore, all people claiming native title have a strong interest in the issues surrounding prescribed bodies corporate -

- who or what are they?
- what are their functions and powers?
- how are they controlled?

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Explanatory note to Government amendment no. 75 to the Native Title Bill 1993 in the Senate.
what is the relationship between a prescribed body corporate and the members of the native title-holding group?

Answers to these questions could have a big impact on how well native title holders can enjoy the benefits of their newly-recognised titles.

Answers to some of these questions can be found in the Native Title Act itself, although often a fair bit of tracking through the Act is required. As we shall see, a prescribed body corporate's main role is to carry out title management functions on the native title holders' behalf. In Part 2 Division 6 (Ss 55-60) of the Act, detailed provision is made for the way in which the prescribed body corporate is identified, and the capacity in which it will manage the title - either as a trustee, or in some other representative capacity. Various title management functions are set out in other provisions of the Act, but many of the important questions about who these bodies will be, what functions they will have and how they will exercise them have been left to be settled in greater detail in regulations to be made under the Native Title Act.

At the time of writing (July 1994) these regulations are in the course of preparation by the Government, in consultation with ATSIC and representative Aboriginal and Islander bodies. The Government is committed to a process of consultation on the issues underlying this vital matter of native title management, but at the same time it is keen to see regulations on prescribed bodies corporate in place soon, so that the first determinations of native title can be made without delay. Present indications are, therefore, that there will be a two-stage approach to the regulations. In the first stage, only the essential matters will be dealt with. In the second stage, following further consultations, a more comprehensive set of regulations will be introduced.

2. The scope and purpose of this paper

This paper is not principally concerned with the contents of the forthcoming regulations on prescribed bodies corporate - which are still in any case, under Government consideration. The main purpose of this paper is to examine some of the basic issues underlying native title management, and in particular to see whether there is the need for a new, tailor-made legal entity - a native title corporation - to carry out native title management functions. The idea is simply that, now that Australia's legal system has given legal recognition to native titles, a further adjustment may be required to give legal recognition to native title-holding groups.

Every idea has its background context, and in order to explain the idea of a special native title corporation it is necessary first of all to set out the background in which the idea is being developed. The main things we need to know about are -

(a) why the need for a corporate body at all?
(b) how is that body chosen, under the Native Title Act? and
(c) what are those bodies intended to do?

Once these matters have been clarified, the argument can be made in favour of providing for a special native title corporation.

3. The background - three main issues

(a) Why the need for a body corporate?

A 'body corporate' is the legal expression used for an artificial 'person' (as opposed to a natural person) created by law. A company, or corporation, is an example of a body corporate, and the key point about them is that the law regards the body corporate as having its own existence, and rights and duties, which are separate from the existence, rights and duties of the individual persons who make up the body from time to time. There are parallels in Aboriginal and Islander societies, where language groups, sections, clans and lineages can be recognised as having a particular existence - and even rights and duties - distinct from those of the individual members which make them up.
Native titles are, by their nature, essentially communal or group titles. The reason given by the Government for why a body corporate is needed is so that there will be a 'contact point' for dealings between the native title holders and outsiders. In other words, instead of an outsider having to deal with every member of a native title-holding group - and in large groups, the membership would be constantly changing, with births and deaths - it would only be necessary to deal with the body corporate which represented all the native title holders concerned. This, clearly, is more convenient to an outsider, and the Government's stated aim was to facilitate dealings in relation to native title land.2

Another reason given by the Government for having bodies corporate was to protect the interests of the native title holders - the body being 'essentially a protective carapace over native title rights'.3 So the need for bodies corporate is explained partly by legal reasons - the need for a legal entity with its own separate existence - and also by practical reasons (to facilitate dealings), and by a desire to protect the interests of the individual members of the native title-holding group. It might be noted here that many other countries where land is held by customary groups under traditional ownership have also adopted the device of giving management functions to bodies corporate, examples being a number of Pacific Islands states and New Zealand.4 In Australia, some State and Territory land rights laws make use of land trusts (eg, Northern Territory and Queensland), but, in South Australia, the 'body corporate' approach was adopted for the return of land to its traditional owners in the case of Pitjantjatjara and Maralinga lands. So there is nothing new in the bodies corporate approach.

(b) How is the body corporate chosen?
The first requirement under the relevant sections of the Native Title Act is that it must be a prescribed body corporate. The term 'prescribed' here means as laid down in the regulations (S59). So the regulations now being prepared (see above) will lay down the kinds of bodies corporate which can be given native title management functions under the Act. In making their choice of the body that they wish to carry out title management functions, the native title holders must choose one of the kinds of bodies corporate which will be prescribed in the forthcoming regulations. The time when that choice must be made is just before the National Native Title Tribunal (NNTT) - or, if the native title claim is opposed, the Federal Court - makes its determination of native title (see S55). That is, it has already become clear that native title does exist, and who the group is that holds it (see S225). The steps involved in identifying the prescribed body corporate which will manage the title on that group's behalf are then as follows --

Step 1: The NNTT (or Federal Court) asks a representative of the native title holders whether they wish to nominate a prescribed body corporate to hold the native title on trust, or not - S56(2)(a).

Step 2: Either-
(a) a nomination is made, in which case the nominated body corporate is declared to hold the native title as trustee for the native title holders - S56(2)(b);

or

(b) a nomination is not made, in which case the native title is declared to be held by the 'common law holders' - ie, the native title holders themselves - S56(2)(c).

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2 See the Prime Minister's Second Reading Speech to the Native Title Bill, Hansard, House of Representatives, 16 November 1993, p. 2879.
3 See the Submissions to the Senate Standing Committee on Legal and Constitutional Affairs, Native Title Bill 1993, No. 71: Commonwealth Government Submission.
4 I look briefly at the position in these countries, and in Australia (see next sentence in the text), in "The range of options for prescribed bodies corporate", a paper prepared for a forthcoming ATSIC publication.
Step 3: If a nomination of trustee at Step 2 is not made, then the NNTT (or Federal Court) must ask the representative of the native title holders to nominate a prescribed body corporate to carry out the title management functions on their behalf- S57(2)(a).

Step 4: Either-
(a) a nomination at Step 3 is made, in which case the nominated body corporate is declared to be the body which carries out the title management functions - S57(2)(b); or
(b) a nomination at Step 3 is not made, in which case the NNTT (or Federal Court) declares which body corporate is to carry out the title management functions on the title holders' behalf - S57(2)(c).

This all looks rather complicated, but the main points are that -
• the title-holding group must have a prescribed body corporate to act on its behalf;
• it can choose which body it wants, but if it doesn't choose one then one will be chosen for it; and
• it has a choice whether the body acts on its behalf as a trustee, or in some other representative capacity (eg, as an agent).

Regarding this last point, in general trustees have more powers and discretions than agents or other representatives, and this is also the case under the Native Title Act. The most important difference is that, in the case of a trustee, the native title will actually be held by the body corporate, which will be the legal native title holder for all purposes under the Act, and is even defined as such by S224. As we will see in the next section of this paper, sometimes the Act specifies that an action can only be taken by the 'native title holders' (eg, an agreement with a government authorising a future act affecting the native title). In the case of a trust, the prescribed body corporate can take the action (after carrying out any necessary consultation), but if the body is not a trustee it will have to be specifically authorised to take the action by the native title holders themselves.

A key element in the operation of prescribed bodies corporate under the Native Title Act is consultation with the native title holders themselves. This consultation is required by the Act whether the prescribed body corporate has been chosen to act for them as a trustee, or only as an agent. The consultation requirements will be spelt out in greater detail under the forthcoming regulations, but what people need to know in making their choice is that, as the Act works -
• a prescribed body corporate which is a trustee has full legal power to manage the title, subject to the requirements for consultation set out in the regulations;
• a prescribed body corporate which is not a trustee has no legal power to manage the title, except when it is authorised to do so by the native title holders themselves.

There are advantages and disadvantages in each method, but people need to know more about the intended operations of prescribed bodies corporate before considering which option might be preferable.

(c) What are the functions of a prescribed body corporate?
The main thing the Commonwealth Government intends a prescribed body corporate to do is to facilitate dealings on behalf of the native title holders it represents, although we have also seen that there is some idea that it should protect their rights. These two roles are not always compatible, and indeed there is some inconsistency in the official attitude to this newly-recognised title. It will, of course, take time for Australia's regime of property rights and land management practices to adjust to native titles, and the whole subject is complicated by the distribution of powers between Commonwealth and State levels under the federal system. But the Native Title Act itself is rather schizophrenic in its conception of native title.
On the one hand, the Act carves out a wider sphere for the operation of native title rights and interests than the High Court's decision in the Mabo Case might, by itself, have justified, but in other important respects the Act fences in those rights and interests.

In particular, the Act takes a restrictive line on the ability to enter into dealings affecting native titles, making no provision for direct dealing between the native title holders and outside interests. Governments can grant mining leases over native title land, but, as the Act now stands, if the native title holders want to grant a commercial or residential lease to an outsider - or even to one of their own members - they can only do so in one of two ways:
- either by first surrendering their native title to the government in exchange for a freehold title (thereby extinguishing all native title rights and interests);
- or else by a government entering into an agreement with them to grant a Crown lease to the person concerned (S21).

Such restrictions impose a significant constraint on the ability of native title holders to enjoy the benefits of their title in accordance with their changing needs and wishes, and it seems inevitable that this area of the legislation will have to be revisited soon. Here, it is enough to note that the Act imposes major restrictions on the freedom of native title holders to deal with their titles, and so also on the functions and powers of a prescribed body corporate acting on their behalf.

In tracking down the functions of prescribed bodies corporate under the Native Title Act, the job is made more difficult by the two facts that -
(i) the sections giving the functions do not refer to prescribed bodies corporate, but use the terms 'native title holders', 'native title party' and 'registered native title body corporate'; and
(ii) the term 'native title holder' has two alternative meanings -
- if the native title holders have chosen the trustee option (see above), then the term means the prescribed body corporate, but
- if they chose not to have their prescribed body corporate act for them as trustee, then the term refers to the native title holders themselves (S224).

This second point is mainly relevant to the procedure by which a prescribed body corporate enters into a dealing. As explained above, a prescribed body corporate which is a trustee has full legal power to enter into the dealing, but one that is not a trustee must specifically be given that power by the native title holders in each case.

Bearing this point in mind, the main functions of a prescribed body corporate under the Native Title Act are:
(i) to enter into agreements with a government for the surrender of the native title, possibly in exchange for a freehold grant over the land (S21(1)(a) and (3));
(ii) to enter into agreements with a government authorising a future act (eg, grant of a Crown lease) over the native title land (S21(1)(b));
(iii) to enter into a regional or local agreement with a government (S21(4));
(iv) to take part in the negotiations relating to the grant of mining rights over native title land, including to -
- receive notice of the government's intention to make the grant (S29(1) and (2)),
- make submissions regarding the grant (S31(1)(a)),
- negotiate with the government and the mining company concerned (S31(l)(b)), and
- agree on what payments the native title holders will receive, and what form those payments will take (S33);
(v) to be consulted about access to any native title land or waters, where the Commonwealth government has determined that acts may take place without the need to negotiate - because they will have a 'minimal effect' on the native title (S26(4)(c));
(vi) to exercise procedural rights (right to object, negotiate, etc) in the event of a compulsory acquisition (S23(6));
(vii) to apply for compensation where it is payable under the Act, and request it in a form other than money (S61 and 51(6), respectively); and
(viii) to apply for a variation of the native title determination (S61).

The forthcoming regulations may add other functions, and in particular they will spell out how they are to be performed by the prescribed bodies corporate (the consultation requirements, and so on). An important thing to note about the above functions is that they relate only to the native title itself - holding, managing, protecting and (to the extent possible under the Act) dealing with the native title, and handling compensation matters arising from the title. The functions do not extend to business decisions over day-to-day land management, and there would be risks in the prescribed body corporate getting too far involved in carrying on a business on the land.

4. The need for a tailor-made body
Mr Justice Woodward, after conducting the ground-breaking commission of inquiry in the early 1970s into the statutory recognition of Aboriginal land rights and related matters, saw the need for a specially-tailored system for incorporation of Aboriginal groups, under which it would be possible to incorporate three main kinds of bodies - local and regional land-owning bodies, town councils having a local government role, and business enterprises. The law which gave effect to these recommendations was the Commonwealth Aboriginal Councils and Associations Act 1976. That Act makes special provision in Part III for Aboriginal and Islander councils having a local government role, but it makes no special provision for land-owning groups. Instead, Part IV of the Act provides for 'Incorporated Aboriginal Associations', which can be formed for any lawful purpose. Justice Woodward's apparent plan for separate provision to be made for land-owning bodies was, therefore, not followed. Over the years nearly 2,000 Aboriginal and Islander associations have been incorporated under the Act, for a wide range of purposes including the ownership of land, provision of training, youth support services, housing, legal and medical services, media production, community supermarkets, and arts and crafts businesses.

The Act has been amended many times, and at the time of writing another set of amendments is before the Parliament, in the form of the Aboriginal Councils and Associations Legislation Amendment Bill 1994. Recent amendments have been aimed at increasing the accountability of association executive officers, and the current proposals would go even further in that direction. While the need for executives to be accountable for their actions - especially where substantial finances are involved - is obvious, it is also clear that the greater the degree of official intervention in the affairs of associations, the less they will be able to satisfy principles of self-management. The formal and procedural requirements of the Act, and the way the Act is administered, have been criticised by representative Aboriginal and Islander bodies, most recently during the process of consultation on the forthcoming regulations on prescribed bodies corporate.

The question which arises is: are Aboriginal and Islander associations incorporated under the Aboriginal Councils and Associations Act the most suitable bodies to be given native title management functions under the Native Title Act? If the answer is yes, then the forthcoming regulations would specify them as the kind of bodies which qualify as a prescribed body corporate. This would allow native title holders to choose an appropriate Aboriginal or Islander association to manage the native title on their behalf. In the previous part of this paper the functions of prescribed bodies corporate were set out. What kind of body is most suitable to exercise those functions? In fact, the range of possibilities is pretty narrow. In the first place, it seems obvious that it must be an indigenous body, and one with which the native

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title holders can have a close and trusting relationship. Self-management principles, therefore, rule out some kind of professional management company. At the same time, in order to perform some of the title management functions in a way which gives maximum protection and promotion to the native title holders' interests, professional expertise would clearly be an advantage. So what we are looking for is a decision-making process which combines -

(i) self-management principles;
(ii) a local profile, with which the particular native title holders in question can identify, and
(iii) a professional competency, so that decisions can be taken in an informed and advised way.

If these three requirements can be met in the same body, then that body would be an ideal prescribed body corporate. If not, then we should be looking at what sort of combination of inputs will meet the above three requirements. There are a number of possible candidates.

(a) The representative Aboriginal / Torres Strait Islander body for the area concerned

These bodies are determined by the Minister under S202 of the Native Title Act, their main functions being to facilitate the making of native title claims, and to assist in negotiations over acts affecting native title and in compensation claims (S202(4)). These latter functions relate to those given to prescribed bodies corporate (see above), but the role set out by the Act for representative bodies is more to advise the native title holders than to act on their behalf. Such bodies meet the above requirements of local profile and professional competency, but not self-management. Their main role over native title management should be advisory.

(b) The native title holders themselves

They definitely meet the first two requirements, of self-management and local profile. They may already be a body corporate, but if not then they will have to incorporate, before they can qualify to be included as a prescribed body corporate. They may also have the necessary professional skills, but this depends largely on what kind of decisions they are called upon to make. This will vary greatly from one native title to another. A possible weakness in the area of professional competency must be acknowledged, however, under this approach.

(c) A sub-set of the native title holders

This approach would involve a few members of the native title-holding group becoming the prescribed body corporate. In the first place, they would have to be incorporated. The biggest problem with this approach, however, is the old one of representation. It has proven very difficult to find a workable and acceptable system of selecting a few people to represent a whole group. In particular, the group usually wants to exercise continuous control over when and how the representatives can act on the group's behalf. It is a possible solution, but a risky one.

(d) A super-set, which includes the native title holders

The approach here is for the native title-holding group to include itself within a bigger social unit - which could be a language group, local community, or a body established on cultural lines. Again, the bigger unit would probably have to incorporate. Such a body would meet the first and second requirements above, and would have a greater chance of meeting the third requirement, because of its larger size. But there will be decision-making complications, because some members of the larger unit will always be involved in decisions over native title land in which they are not among the native title holders. This problem might be dealt with by imposing controls, so that decisions over any area of land are only made by the members who are native title holders in that land.

Each one of the above possible candidates meets some, but not all, of the main requirements I have suggested must be met to carry out the functions of a prescribed body corporate. There is no major objection to any of the four doing the job, although a representative body is more
suitable for an advisory role, and probably should only act as the prescribed body corporate in exceptional circumstances and on an interim basis - eg, when, for some reason, the native title holders fail to nominate a prescribed body corporate. Of the three remaining possibilities above, I would personally favour the second one: the native title holders themselves incorporating, and becoming the prescribed body corporate for managing the native title. This option most closely reflects the practices of Aboriginal and Islander communities, and it gives the maximum direct participation by the membership of the title-holding group in decisions over their native title. A possible lack of professional expertise to handle the statutory management functions has been acknowledged, but the way to deal with this is by requiring the incorporated body to take the necessary advice in appropriate cases, before a decision can be made.

The question which now needs to be addressed is: what is the best way for the native title holders to incorporate? From the above discussion, the necessary elements of their incorporation are -

(i) the body corporate must include all the members of the title-holding group, and no-one else;
(ii) its powers will be limited mainly to the management of the native title and related matters;
(iii) its rules for self-management should provide for two main aspects of decision-making:
   • *internally*, the rules should cover consultation, dispute settlement, and how the group's decisions are arrived at;
   • *externally*, the rules should show outsiders when a group decision has been reached, and what it is.

Further rules will be necessary, but the general aim should be for minimum bureaucratic interference in the conduct of the native title holders' affairs. The *Aboriginal Councils and Associations Act* does not meet these requirements. It is both too broad to apply to the particular needs of native title corporations (eg, re membership and powers), and too narrow to allow them the necessary freedom of decision-making (eg, in its emphasis on public accountability). Rather than attempt to adapt the present law, what is needed is new legislation providing specially for native title corporations. Justice Woodward's plan for a simple method for incorporation of landowning bodies should now be realised.

ISBN No.: 0-85575-263-7

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