



Getting it Right for the Future: Aboriginal Law, Australian Law and Native Title Corporations

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My Hypothesis

A corporation that represents a native title group is more effective if the Aboriginal & Torres Strait Islander law governing the group's organisation and decision-making is recognised in corporate structures and operations, and in its dealings with government and resource companies



Two types of law in Australia

1. Traditional Aboriginal & Torres Strait Islander laws
2. Australian law

Recognition of rights and interests arising under traditional law as native title implies recognition in Australian law of traditional law about land



Two types of law in Australia

- After a determination of native title, the Court must also determine a PBC to:
 - hold the native title as trustee, or
 - manage the native title as agent, for the native title holding group
- A PBC is the face in the Australian legal system of a native title group whose identity is determined by Aboriginal law



PBC in Two Legal Systems

Agreements involving PBCs imply an engagement by

- the company or government, and
- the Australian legal system

with

- Aboriginal or Torres Strait Islander people,
- their native title rights and interests, and
- Aboriginal law



PBC in Two Legal Systems

Under Australian law, a PBC has ordinary corporate attributes including:

- Perpetual succession
- Separate legal personality

Company or government need not deal with an amorphous native title group



PBC in Two Legal Systems

Under Australian law, in the native title context, a PBC's role is to:

- Detail 'internal' issues relating to the native title holders
- Identify which particular group can exercise what particular rights.

Gumana v NT [2005] FCA 50



PBC in Two Legal Systems

In practice

- Aboriginal law is a fundamental part of PBC operations
 - the native title process prioritises traditional law and custom
 - Aboriginal law is central to the PBC's role in making decisions about land
- PBCs are bound by Aboriginal law



PBC in Two Legal Systems

In practice, Australian law is a fundamental part of PBC operations:

- it must be incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*
- it makes contracts that are enforceable under Australian law



PBC in Two Legal Systems

- A PBC is a meeting place where Aboriginal law interacts and engages with Australian law
- Potentially, Aboriginal law can be expressed in and through a PBC in a way that allows it to operate in the Australian society and economy consistently with that law



Challenges for PBCs

- Different roles and obligations of a PBC in two legal systems
- Relationships with the native title group
- Relationships with government and resource companies
- Limited resources and capacity



How to address these challenges?

- Legal Positivism – Yorta Yorta
- Harvard project – cultural match
- Pearson – recognition space
- Legal pluralism



Legal Positivism

- Only one source of law in Australia
- Traditional law and custom must be 'recognised' by that law before it can have any effect
- Does not account for the 'fact' of continuing existence of Aboriginal law
- Australian law not likely to recognise Aboriginal law in corporate structures and processes

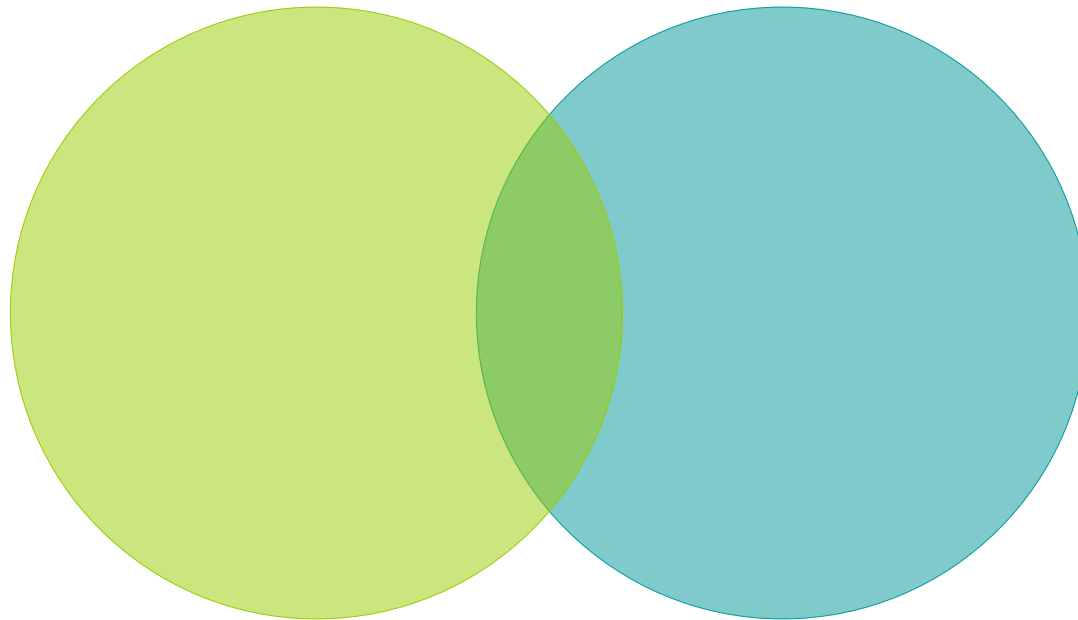


Harvard Project: cultural match

- Governing institutions should match ideas in the community about how authority should be organised and exercised
 - Respective of cultural norms
 - Delivers practical outcomes
 - Confers social legitimacy



Recognition space





Legal pluralism

- Coexistence of different legal systems in the same legal space
- Relevant to consideration of nature of interaction of Australian and Aboriginal law in PBCs

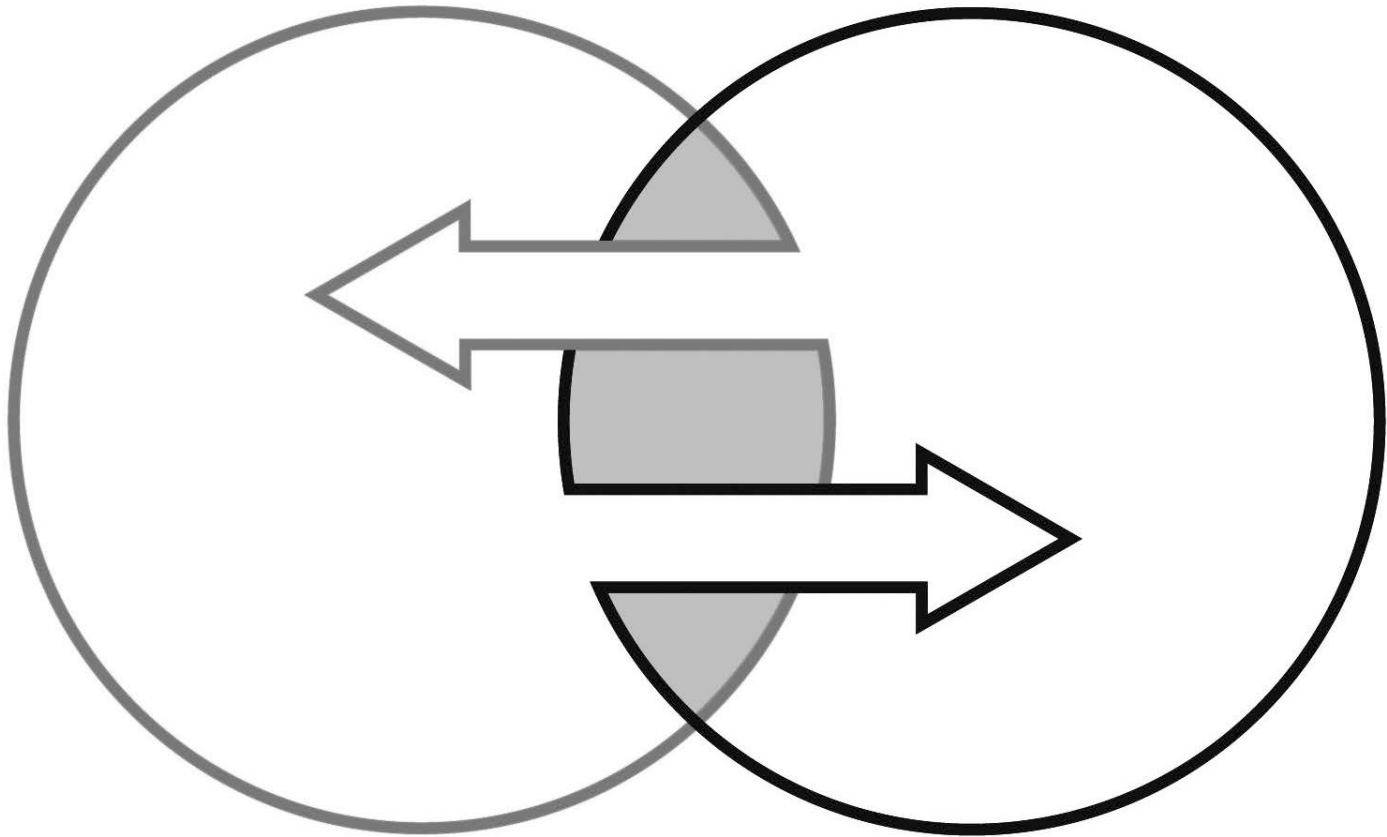


Legal pluralism requires:

- Mutual recognition
- Incorporation of one legal system within the other
 - like native title recognition
- Legal spaces that interact and intersect:
 - Superimposed, interpenetrated and mixed
 - Porous legality or legal porosity
 - Constant transitions and trespassings



Legal pluralism





Colonialism & postcolonialism

- Colonialism
- Law
 - 'Perfect instrument of empire' Williams
 - Terra nullius
 - Legal positivism
- Denial of Aboriginal law



Colonialism & postcolonialism

- Postcolonialism

- Colonisation is a two way transaction, involving complex negotiation & exchange
 - Identities of colonised and coloniser take on aspects of the other, creating hybrids
 - Room for 'the creation and celebration of new identities and new ways of being, which are resolutely anti-essentialist and cross-cultural'
- Bhabha



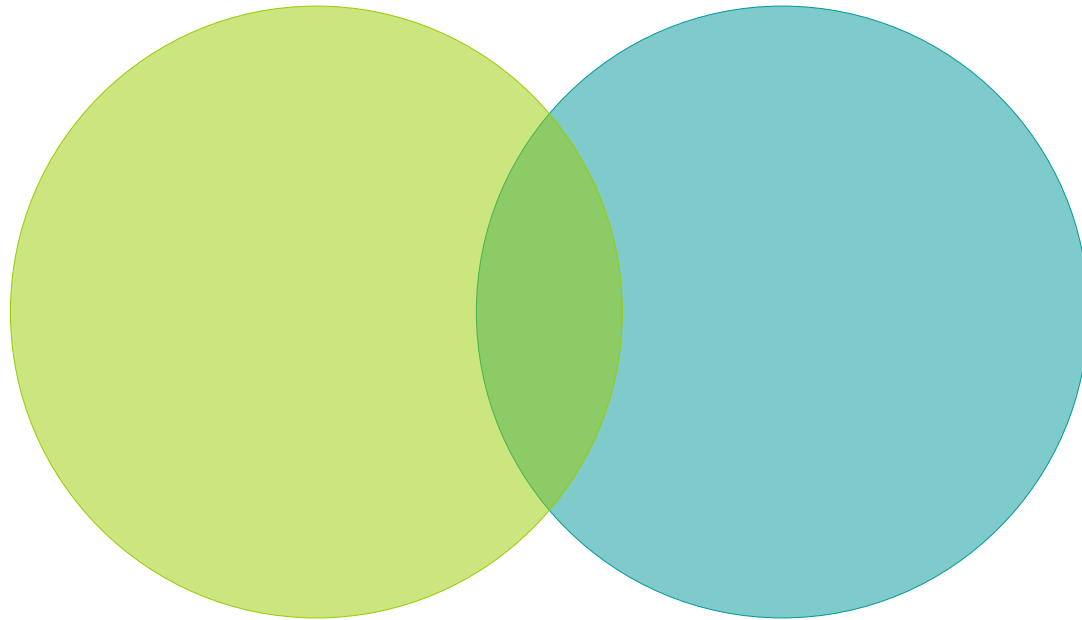
Third space

- The colonial structures that support the colonisers' activities are weakened, leaving room for a hybrid third space
- In this third space, between the spheres of authority of the coloniser and the colonised can be constructed 'a political object that is new, *neither the one nor the other*'

Bhabha



Third space





Third space

The idea of a PBC existing in a third space between Aboriginal and Australian legal systems potentially:

- Enables better engagement with Australian law
- Gives the native title group more control over that engagement
- Helps the PBC to achieve the group's aspirations



Inside the Third Space

- A political object that is new, neither the one nor the other
- Selection and invention from tools available in Australian law
 - Elders' committees
 - Subgroup membership
- Intermingling and active engagement between laws
- Control by native title group



Creating PBC in Third Space

- The corporate form is contingent:
 - has developed in response to social, political, economic and legal conditions
 - can change if something new arises
- If Aboriginal and Torres Strait Islander people are to benefit from the corporate form, it can and should be changed to meet their needs



Creating PBC in Third Space

- Active creation of something new
- Australian law and institutions must:
 - listen and actively engage
 - understand how Aboriginal law operates in PBCs
 - acknowledge that, sometimes, they are subject to Aboriginal law
 - vacate legal space
 - fund PBCs properly for them to be effective