TRADITIONAL DECISION MAKING IN NATIVE TITLE

Finding a Pathway through the cultural, legal and administrative maze

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1. Introduction

The *Native Title Act* (**NTA**) allows for, and even requires, traditional decision making processes to be used when making important decisions concerning native title. This legislative approach recognises that native title has its foundation in the traditional laws and customs of the relevant society. It therefore makes sense that traditional decision making processes should be promoted in the statutory regime governing native title decisions.

Such an approach is also consistent with the *United Nations Declaration on the Rights of Indigenous Peoples* (**UNDRIP**)[iv] which promotes the right of indigenous peoples to participate in decision-making matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures. The UNDRIP also seeks to guarantee free, prior and informed consent before actions take place which will impact on the rights of indigenous people.

While this emphasis on traditional decision making has merit, many groups have been forced to combine these cultural processes with more contemporary, western notions of corporate governance. This in turn has contributed to cultural clashes, internal disputes, confusion and multiple accountability for many native title groups.

This paper examines the role of traditional decision making in native title decisions under the current law; examines some of the difficulties associated with the current scheme; and considers the implications of proposed law reform. The paper also highlights one example of an approach taken by a recently appointed native title holding Prescribed Body Corporate (**PBC**) to decision-making within this context.

2. Hypotheticals

Before examining the legislative scheme applying to these matters, it is worth considering the following hypothetical examples as a way of highlighting particular difficulties.

Hypothetical 1

A native title claim group is meeting to make an important decision in relation to a proposed mining agreement. There are five main families who make up the claim group and the mining agreement will affect the traditional lands associated with two of the families in a more significant way than the other 3.

There is disagreement as to whether a traditional decision making process applies to the making of the decision. Some members consider that the group's traditional practice is to have each family meet and decide whether it supports or opposes a significant proposal, but that the families most affected should have the most influence. Others believe that the group has never had to traditionally deal with mining proposals and that a simple majority vote should be taken once the group as a whole has been fully informed.

The matter is eventually put to a vote of the whole group over the protests of a substantial number present. At the end of the vote there is a slender majority in favour of the mining agreement notwithstanding that no members of the two most affected families supported the proposal.

Hypothetical 2

A group of determined native title holders meet to decide whether to enter into an ILUA with a large mining company. The meeting is both a meeting of the common law native title holders and a general meeting of members of the PBC. Not all common law native title holders are members of the PBC.

It is agreed within the group that a traditional decision making process applies to this matter which involves holding several meetings and giving the opportunity for everyone to talk out all concerns until the whole group is ready to either move forward with the proposal or reject it.

The PBC's rule book states that native title decisions should be made by consensus but this does not necessarily require all members to vote in favour or the decision. The rule book also states that members must vote by a show of hands unless a poll is demanded.

The meetings go on for several hours and many objections are raised and talked out. Eventually the group is asked if they are ready to move forward and accept the ILUA and there is a general verbal expression of assent. The CEO of the PBC then asks for a show of hands in favour of the ILUA. Many of those attending are uncomfortable at the idea of putting their hand up as this is not a normal part of their traditional practice. Ultimately, about 70% of those attending put their hand up. When asked if any are opposed, no one puts their hand up.

3. Traditional Decision Making under the NTA and Regulations

The NTA and Regulations require traditional decision making processes to be employed in the following circumstances:

(a) Authorising the applicant for a native title claim – under section 251B of the NTA, if the proposed claim group has a traditional decision making process that must be complied with in relation to authorising 'things of that kind', the group must use that process to authorise an applicant;

(b) Authorising an ILUA – section 251A of the NTA requires persons holding native title to use a traditional decision making process for authorising an Indigenous Land Use Agreement (**ILUA**) if they have such a process for 'things of that kind';

(c) Giving consent for a 'native title decision'[v] – Regulation 8 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (**PBC Regulations**) provides that common law holders must use a traditional decision making process in relation to giving consent for a 'native title decision' if they have one. If they do not have one, they must use a decision making process agreed to and adopted by the common law holders.

(d) Consent to action taken on their behalf by a representative body – under section 203BC(2) of the NTA, a traditional decision making process (if one exists) must be used in the provision of consent by native title holders for action taken on their behalf by a representative body.

Some immediate issues emerge from the wording of these provisions.

For a native title claim to be successful, the interests of the claim group must be established by evidence of continuing practices which are rooted in traditional law and custom. In that regard, it would be

almost inconceivable for a successful native title claim group not to have any traditional decision making processes applying to the use of their traditional lands.

However, the questions posed by sections 251A and 251B are directed at whether there is a traditional decision making process applying to 'things of that kind', i.e. the authorising of an ILUA or the authorising of applicants to bring a native title claim. Similarly, the PBC Regulations require consideration as to whether a traditional decision making process is established for surrendering, or otherwise agreeing to an act which affects, native title rights and interests.

Prior to sovereignty and even prior to the enactment of the NTA, these specific notions were unknown to traditional owners. The making of ILUAs and the authorisation of registered applicants are constructs of the NTA, as is the concept of future acts 'affecting native title. How do groups assess whether a traditional decision making process which has been used by the group since time immemorial can properly be applied to such constructs? Answering such a question requires careful thought and falls more within the anthropological than the legal discipline. According to one school of thought, traditional decision making processes could never apply to such decisions.

Another question arises as to what should happen when there is dispute within a group as to whether such a traditional decision-making process exists[vi]. Even where there is agreement that such a process exists, there may be disagreement as to the extent to which it can still be applied and the manner in which it may have been adapted to meet current circumstances in which groups find themselves.

4. Decision-making under the CATSI Act and rule books

All PBC's are incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (**CATSI Act**). This means that in addition to complying with the requirements of the NTA for decision making, they must also comply with the requirements under the CATSI Act along with the specific requirements of their rule book applying to corporate decision-making.

The rule books of PBCs usually set out processes for making 'non-native title decisions' and 'native title decisions'[vii]. Some rule books require all native title decisions to be referred to members at a general meeting. Other rule books allow the board to make certain native title decisions in accordance with standing authorisation given by members, but require others to be referred to members. For example, the board may approve a mineral exploration agreement to which the right to negotiate under the NTA does not apply, whereas the decision to enter into an ILUA or other productive mining agreements must be referred to members.

The CATSI Act does not provide for traditional decision making processes as part of its administrative requirements. Rather, the CATSI Act (and most rule books) tend to apply standard western model notions of corporate governance for the administration of Aboriginal corporations.

For example:

(a) A corporation's powers are generally exercised through the board of directors, and third parties dealing with CATSI Act corporations may make certain assumptions (consistent with the 'indoor management rule') where the board has executed documents etc.[viii];
(b) Standard notions of quorum are applied, often with a fairly small percentage of total membership being required[ix];

(c) There is an assumption of 'one vote one value' at general meetings[x] (and most rule books allow for resolutions to be carried by simple majority);
(d) Voting is assumed to be carried out by a show of hands or, in some circumstances, a poll[xi].

These types of processes (some of which can be adapted in a particular corporation's rule book) may or may not be consistent with traditional decision making processes. Legislation like the CATSI Act assumes that important decisions are made at meetings, and therefore there is a heavy focus on how meetings should be conducted. Yet traditional decision making processes may not, in some cases, be primarily concerned with 'meetings' as such.[xii]

Difficulties can emerge when common law holders come together to make a decision which is both:

- a native title decision requiring application of the traditional decision making process (if applicable); and
- a decision of the corporation which must comply with the CATSI Act and the relevant rule book.

For example, some native title holders may not be members of the PBC leading to possible questions surrounding quorum and voting requirements. In addition, the CATSI Act or rule book may have requirements for voting which are inconsistent with the traditional decision making process. The blending of these two regimes can cause cultural confusion and disempowerment (as well as creating significant administrative pressure for those charged with management of the PBC).

5. Proposed law reform

The Australian Law Reform Commission (**ALRC**) has proposed legislative reform in this area, as detailed in its report 'Connection to Country: Review of the *Native Title Act 1993* (Cth)' dated April 2015[xiii].

Essentially, the ALRC has proposed that the NTA and relevant regulations be amended such that, even if a traditional decision making process exists, the native title group should have the ability to choose to use that process or an alternative decision making process agreed to and adopted by the group.

In support of this proposal, the ALRC made the following observations:

> '*The requirement to use a traditional decision-making process, where it exists, can create problems when it is unclear if such a process exists, and what it is. The lack of clarity is sometimes a result of the community having been denied the opportunity to make decisions about their land for many generations.*
>
> *Where the group has a traditional decision-making process, it may not be one that is suited to making decisions in the native title context. Adapting the process for use in native title procedures can be complex and time consuming. The group may wish to change the decision-making process to be more inclusive.*
>
> *Where the group does not have a traditional decision-making process, it may be reluctant to declare that fact, when seeking recognition of rights and interests ''possessed under traditional law and custom''.'*[xiv]

While there is some merit in the suggestion by the ALRC that more flexible approaches should be available to groups, there are some potential drawbacks associated with going down this path. For example, if a group's traditional decision making process involves making decisions by a group of elders

or by particular family representatives, any change to such a process would in itself need to be the subject of a process which is fair and accepted by all. Would a simple majority vote by all members in a general meeting be considered a reasonable way to change a traditional decision-making process which has been used for many generations?

The ALRC report does acknowledge this potential in the following extract:

> *'For some groups, the process of choosing a decision-making process will always be a difficult one. For example, the choice between one vote per family group (which can disempower members of large families) or one vote per adult (which can disempower members of small families) can be fraught. As AIATSIS noted, there is logical circularity in employing a decision-making process to choose a decision-making process."*[xv]

There is also a concern that being able to adopt an alternative process may encourage internal disputes and, over time, contribute to the gradual erosion of traditional processes which should be at the heart of native title decision making.

My own view is that traditional decision making processes should continue to be enshrined in the NTA but under a more flexible regime. For example, the NTA could require all significant decisions to be made by processes which are consistent with the traditions and customs historically applied by the relevant group when making decisions affecting their traditional lands.

6. Recent PBC example

Kuruma Marthudenera Aboriginal Corporation (**KMAC**) is a recently established PBC holding native title rights on trust for the Kuruma & Marthudenera People within an area ('Part A') of their traditional lands (a hearing has taken place in respect of the remaining 'Part B' area with the Court's decision being reserved).

K&M People have traditional rights to an area covering about 15,759 square kilometres in the Pilbara region of Western Australia.

The K&M traditional lands lie within the Shire of Ashburton and comprise part of the Fortescue River and the complete river system of the Robe River, in the most westerly part of the Hamersley Range.

The K& M People have strong connection to their country and have maintained their core traditional practices. However, they do not consider there to be an established traditional decision making process which must be applied to making native title decisions under the NTA.

KMAC has recently adopted a process for making native title decisions which seeks to balance established cultural practice, administrative efficiency and corporate compliance requirements under the CATSI Act and KMAC rule book. The approach taken by KMAC is summarised below.

In its PBC role KMAC works with the KM people to <u>facilitate</u> the native title decision making process. In facilitating native title decisions, KMAC as the PBC is required to:

- consult with NTH regarding the implications of the Future Acts;
- make sure the NTH understand the consequences and benefits of proposed future act agreements; and

- obtain NTH consent before proceeding with agreements.

So, it's the *native title decision making process and the various roles and responsibilities within in it* that are important to define.

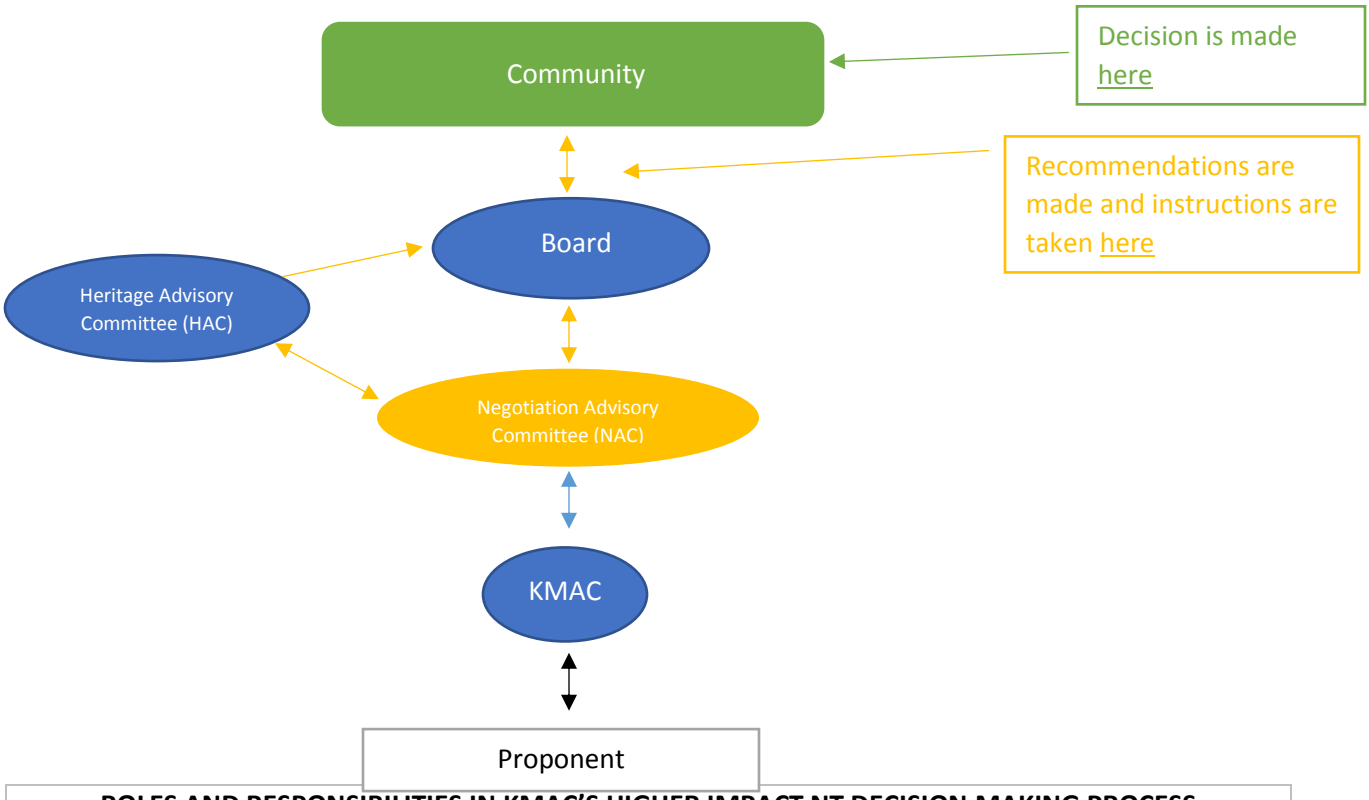
What type of decisions have to be made and how do we make them?

There are two levels of native title decisions, lower and higher impact activity. Because they have different consequences, KMAC will have a different decision making process for each.

- **Lower Impact (low invasive activity such as exploration and prospecting licences):** KMAC has standing instruction from the community, to continue its pre-determination process, whereby it took advice from the Heritage Advisory Committee and negotiated heritage agreements directly with the proponent. Under the PBC regulations, the KMAC Board now signs off on lower impact agreements.
- **Higher Impact (more complex negotiations involving mining and ILUAs)**: KMAC facilitates the negotiation process and brings recommendations to the community for decision.

Negotiations for higher impact activity are more complex. Matters of corporate and cultural governance need to be considered. Therefore the KMAC Board and the Heritage Advisory Committee (HAC) must *work together* to preserve the rights and interest of NTHs. To ensure social, economic and cultural factors are appropriately represented in negotiated agreements, KMAC proposes to establish a "Negotiation Advisory Committee (NAC)". The NAC will comprise a cross-section of representatives and a sub-set of "face-to-face negotiators" that will work with KMAC to directly engage with proponents regarding the terms and conditions expected by the KM people.

HIGH IMPACT DECISION MAKING FLOW CHART



ROLES AND RESPONSIBILITIES IN KMAC'S HIGHER IMPACT NT DECISION MAKING PROCESS		
STAKEHOLER	**ROLE**	**RESPONSIBILITY**
COMMUNITY (NTH)	Decide on terms of agreements and provide instruction to PBC.	Act in the best interest of current and future generations
KMAC BOARD/DIRECTORS	Balance economic, social and cultural interests of NTHs in Higher Impact negotiations. Receive advice from NAC and HAC. Consult with, make recommendations to and receive instruction from NTHs regarding high impact agreements.	Ensure compliance with statutory requirements. Accept HAC advice as cultural custodians. Uphold NTHs rights by listening to concerns and ensuring understanding about the consequences of NT decisions. Seek NTH instruction and act accordingly.
HERITAGE ADVISORY COMMITTEE (HAC)	Provide advice to Board and management on matters relating to cultural governance (the KM way of being) and custodianship of country (protection of land, water and significant sites). Via representatives, contribute to negotiation process.	Cultural governance – providing advice that protects and preserves KM's country and customs.

KMAC MANAGEMENT	Manage the PBC compliance framework. Facilitate the information gathering and advisory process. Liaise with advisers and proponents. Agreement administration.	Sound advice regarding the risks/opportunities associated with future acts. Effective provision and management of information. Inclusive and transparent communication.
NEGOTIATION ADVISORY COMMITTEE (NAC) • **BOARD REP** • **HAC REP** • **MANAGEMENT REP** • **COMMUNITY REPS** • **LEGAL AND COMMERCIAL ADVISERS**	Gathers and provides sound advice to inform and influence successful negotiations with proponents. Enters discussion with proponents to negotiate heritage and commercial inclusions in agreements that best represent the interest of the KM people. Takes direction from and provides advice to the Board on negotiation terms and conditions.	Diligent input on the social, economic and cultural interests of KM. Highlight risks and opportunities.

7. Conclusion

The current regime for native title decision making places a great deal of pressure on native title groups. The promotion of traditional decision making processes combined with accountability to corporate governance requirements such as those under the CATSI Act and rule book can give rise to internal tensions and legal challenges particularly for groups who are not adequately resourced.

It is very important that every group considers what changes it can make to its governance structure to ensure these processes are as closely aligned as possible. The governance structures which are put in place need to serve the interests and aspirations of the community (and not the other way around).

There is no one size fits all approach to this issue as native title groups vary considerably in terms of characteristics such as resources, cultural mores, and level of cohesion. While the law reform currently proposed by the ALRC has some merit, there is a concern that it may cause more confusion and potential dispute for groups who have previously agreed on a traditional decision making process to apply to these important decisions.

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[iv] *United Nations Declaration on the Rights of Indigenous People*, GA Res 61/295, UN GAOR, 61st sess, 107th plan mtg, Supp No 48, UN Doc A/RES/61/295 (13 September 2007)

[v] A 'native title decision' is defined as a decision to surrender native title rights and interests, or to do or agree to any other act that would affect those native title rights and interests.

[vi] An example of this occurring can be found in the facts of *Butchulla People v Queensland* (2006) 154 FCR 233.

[vii] See note v above.

[viii] CATSI Act section 104-5

[ix] CATSI Act section 201-70

[x] CATSI Act section 201-115
[xi] CATSI Act section 201-125
[xii] As noted by Justice Reeves in *Burragubba* [2017] FCA 373, '…a process of decision-making under the traditional laws and customs of a native title claim group…can exist quite independently of such a meeting' (para [29]).
[xiii] ALRC Final Report 126, April 2015
[xiv] Paragraphs 10.51 to 10.53.
[xv] Paragraph 10.56