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NATIVE TITLE AND GOVERNANCE: THE EMERGING CORPORATE SECTOR PRESCRIBED FOR NATIVE TITLE HOLDERS[1]

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ABSTRACT

Prescribed Bodies Corporates (PBCs) are a corporate body designed for the native title sector. Native title holders are required under the Native Title Act 1993 *(Cth) to hold and manage their native title rights and interests through the establishment of a PBC. In this paper, I find that PBCs are an important new form of Indigenous governance which is thwarted by the complicated and cluttered PBC governance context. To do this I review Indigenous governance issues, with a focus on the native title context. My discussion includes the recent Federal Government reforms and policy recommendations that are designed to support more efficient PBCs.*

[1] I would like to thank Toni Bauman, Tony Lee, Lisa Strelein, Luke Taylor, Tran Tran, and two anonymous peer reviewers for helpful comments on an earlier draft of this paper. Any errors or omissions remain my responsibility.

INTRODUCTION

There is a growing body of corporations across Australia known as prescribed bodies corporate (PBC), a form of corporation specifically for native title holders to manage and protect their native title rights and interests. As at June 2007, there were 48 such registered corporations: 38 in Queensland (including 22 in the Torres Strait); 18 in Western Australia; eight in the Northern Territory, with a smaller number in New South Wales (1), Victoria (2) and South Australia (2).[2] Altogether, these corporations form a specific and growing 'PBC sector'. Their presence represents a new era in native title. They provide the corporate structure for the post-determination landscape: a place where native title claimants are no longer in a legal and anthropological battle for recognition, rather they are recognised as native title holders with native title rights and interests. For native title holders this work involves embracing PBCs as part of exercising their traditional authority and managing their native title rights and interests into the future.

In this paper, I find that PBCs are an important form of Indigenous governance for both Indigenous peoples and governments. However, this governance potential is challenged by the complicated PBC governance context, including the different views held on what a native title determination means. PBCs have the potential to take on many roles but this has to be balanced with their main role to manage and protect native title, and the roles of other Indigenous and non-indigenous governance structures. I will make these arguments by backgrounding relevant research on Indigenous governance, with a specific focus on the governance context of native title, and recent Federal Government PBC policy and reforms.

To date there has been little research on PBCs, with the major exceptions of Christos Mantziaris and David Martin's comprehensive review of technical, policy and cultural issues and Paul Memmott and Scott MacDougall's two case studies in Cape York.[3] This paper serves as a literature review and issue setting document for future case study research planned by the Native Title Research Unit.

GOVERNANCE

Background

Research into Indigenous peoples' governance issues in Australia has developed since the introduction of the 1970s government policy known as 'self-determination'. Prior to this, the post-World War II period had seen the gradual removal of constraints on the freedom of movement and employment of Aboriginal people, and public campaigns for land and citizenship rights. The 1970s self-determination policy recognised the right of Indigenous people to participate in and have more control over their own affairs.[4] Self-determination was also desirable from the government's point of view because of the distance it established

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[2] For these statistics I am grateful to Lara Wiseman, the Office of the Registrar of Aboriginal Corporations and the National Native Title Tribunal. When a PBC is registered on the National Native Title Register they become a Registered Native Title Bodies Corporate (RNTBC), however in this paper the term PBCs will be used for both corporate forms, for convenience but also because once a PBC becomes a RNTBC it is known by the corporation name.

[3] C. Mantziaris & D. Martin, *Native Title Corporations: A Legal and Anthropological Analysis*, The Federation Press, Sydney, 2000; and, P. Memmott & S. MacDougall, *Holding Title and Managing Land in Cape York: Indigenous Land Management and Native Title*, National Native Title Tribunal, Perth, 2003. ATSIC commissioned another major report into PBCs: Anthropos Consulting Services, Ebsworth & Ebsworth Lawyers, and Senatore Brennan Rashid, Research Project into the Issue of Funding of Registered Native Title Bodies Corporate, October 2002. The report was completed but is yet to be released. Other papers on PBCs are limited but include: D. Ritter, 'So, what's new? Native Title Representative Bodies and Prescribed Bodies Corporate after Ward', *Australian Mining and Petroleum Law Journal*, vol. 21, 2002, pp. 303- 310; M. Riley, 'Winning' native title: the experience of the Nharnuwangga, Wajarri and Ngarla People' and F. Flanagan, 'Pastoral access protocols: the corrosion of native title by contract', *Land, Rights, Laws: Issues of Native Title*, vol. 1, no. 2, 2002; A. Murphy, 'Prescribed Bodies Corporate in the post determination landscape', *Balayi: Culture, Law and Colonisation*, vol. 5, 2002, pp.162-165; J. F. Weiner, 'The Law of the Land: a review article', *The Australian Journal of Anthropology*, vol. 14, no. 1, 2003, pp.97-110; D. Martin, 'Designing Institutions in the 'Recognition Space' of Native Title' in Sandy Toussaint (ed), *Crossing Boundaries: Cultural, Legal, Historical and Practice Issues in Native Title*, Melbourne University Press, Melbourne, 2004.

[4] S. Brennan, L. Behrendt, L. Strelein, & G. Williams *Treaty*, The Federation Press, Sydney, 2005, p.62.

from colonial policies.[5] As part of this self-determination policy, the government increased funding to Aboriginal community organisations, and Aboriginal corporations burgeoned across Australia. For many people, the establishment of the Aboriginal and Torres Strait Islander Commission (ATSIC) in 1990, with its regionally elected councils and policy and service delivery roles, was a watershed moment in Indigenous governance. However, problems with its representative structure meant that ATSIC was also heavily criticised by its constituents until its controversial abolition by the Commonwealth government in 2004.

Without ATSIC, Indigenous peoples' governance continues in a range of forms, both pre-existing and following on from ATSIC, including regional alliances, government appointed advisory boards, incorporated bodies formed under specific legislation or corporations legislation, specific purpose organisations, and informally organised Elders, language and kin groups. The *Native Title Act 1993* (Cth) (NTA) introduced another two forms of governance: native title representative bodies (NTRBs) and PBCs. As part of this growing governance sector, in 2007 the NTRBs formed their own peak association, the National Native Title Council.

Theorising governance

Indigenous peoples' governance issues have attracted the attention of researchers interested in social organisation and the recognition and management of Indigenous peoples' rights and interests, including self-determination. Effective governance is appreciated by Indigenous people, academics and government as one of the keys to overcoming colonial legacies of socioeconomic disadvantage and social dysfunction, and for building a sound base for local development.[6] In this paper, governance is understood as fundamentally about power, jurisdiction, control and choice, and includes people, relationships and processes, as well as formal structures and corporate technicalities.[7] This broad definition encompasses concerns ranging from political identity to financial auditing. Within this, the influence of corporations law and Western corporate norms on Indigenous peoples' practices cannot be underestimated, particularly since the passage of the *Aboriginal Councils and Associations Act 1976* (Cth). For instance, democratic voting arrangements have transformed relationships held among diverse Indigenous peoples residing in the same community.[8] Indigenous people have also effectively appropriated and incorporated European forms for their own purposes and organisational ends.[9]

Because of government and private sector preference for legal security in their transactions, corporate structures for Indigenous people will continue to be a part of business in the 21st century.[10] The Federal Parliament's creation of PBCs is an example of this. Indeed, Tim Rowse argues that the role of corporations is critical in the recognition of Indigenous peoples' communal rights as they are realised through those organisations which are judged by government as credibly representing the group.[11] Indigenous people also have their own legitimacy criteria. This raises the issue of how Indigenous people can best work with these corporate structures to create a governance environment that meets both the expectations of government and of their own community.

Academic thinking on Indigenous governance in Australia has been informed to some extent by the findings of the Harvard Project on American Indian Economic Development which has conducted extensive

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[5] P. Sullivan, *All free man now: culture, community and politics in the Kimberley region*, North-Western Australia Report Series, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1996, p.9.

[6] For example, as reported by the Council of Australian Governments' Communique, 3 November 2000, viewed 30 May 2007, <http://www.coag.gov.au/meetings/031100/index.htm,>.

[7] Summarised from J. Hunt & D. E. Smith 'Building Indigenous community governance in Australia: Preliminary research findings', Working Paper 31/2006, CAEPR, The Australian National University, Canberra, 2006, pp.4-5.

[8] F. Peters-Little, *The Community Game: Aboriginal Self-Definition at the Local Level*, Research Discussion Paper, AIATSIS, Canberra, 2000.

[9] D. Martin, *Rethinking the design of indigenous organisations: The need for strategic engagement*, CAEPR Discussion Paper 248, The Australian National University, Canberra, 2003, p.8.

[10] Mantziaris & Martin 2000, above n 4, pp.100-1.

[11] T. Rowse, *Indigenous Futures: choice and development for Aboriginal and Islander Australia*, UNSW Press, Sydney, 2002, p.178.

comparative case study research with Native American tribes living on reservations, focussing on the factors that have distinguished economic development success.[12] The research found that natural, human and financial resources are not the key to economic development, rather that development is a political problem, requiring sound institutional foundations, strategic thinking, and informed action.[13] The Harvard Project identified three key good governance factors: sovereignty, institutions, and culture. Successful Nations had been able to turn sovereignty into a fact and practice, making their own decisions instead of defaulting to external decision-makers.[14] Central to their success were stable, fair and effective governance institutions, including the separation of politics from business. The research also found that success depended on the correlation between corporate structures and cultural norms – "cultural match" – which underscores the legitimacy of the governing authority among its constituents.[15]

In Australia, the communication of the Harvard Project's research findings has been met with enthusiasm for the confluence between Indigenous objectives and government policy, but their findings have also been subject to academic debate.[16] At The Australian National University the Indigenous Community Governance Project is conducting comparative case study research into Indigenous peoples' governance in Australia across a range of organisations (but not including NTRBs or PBCs).[17] Project Research Fellows Janet Hunt and Diane Smith contextualise Indigenous governance by describing it as a developmental issue, requiring a comprehensive government policy framework which recognises the social environment, local cultural 'capital', and a whole of community framework.[18] They emphasise that governance cannot be considered in isolation from the socioeconomic context of the organisation, particularly where Indigenous organisations are a vehicle for addressing socioeconomic disadvantage.

Hunt and Smith concur with the Harvard Project's general findings – that legitimacy is central to strong governance, and that putting processes before structure, including informed choice and local control, is central to that legitimacy.[19] They agree with the need for stable institutions and recommend that Indigenous organisations prioritise fairness and transparency, and that governments' streamline and coordinate resourcing arrangements with Indigenous organisations.[20] Hunt and Smith also note that Indigenous people consider culture fundamental in organisational processes,[21] and they compare how Indigenous peoples' understandings about legitimacy relate primarily to processes, relationships, and cultural institutions, while Western liberal democratic notions relate primarily to compliance, accountability, representation, equity, and capacity.[22] Hunt and Smith emphasise 'cultural match' as a process, and not an achievable design endpoint.[23]

The complexity of the cultural governance context for Indigenous people living within settler societies, and its potential simplification in corporate forms, has intensified academic debate around the theories of

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[12] S. Cornell & J. P. Kalt, 'Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations', in *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development*, S. Cornell & J. P. Kalt (eds), American Indian Manual and Handbook Series No. 4, University of California Los Angeles, 1993, pp.6-7.

[13] S. Cornell & J. P. Kalt, Sovereignty and Nation-Building: The Development Challenge in Indian Country Today, *American Indian Culture and Research Journal*, 1998, pp.190,193.

[14] Cornell & Kalt 1998, above n 13, p.188.

[15] Ibid, pp.196, 201.

[16] P. Sullivan, *Indigenous Governance: The Harvard Project on Native American Economic Development and its Relevance to Aboriginal Australia*, Research Discussion Paper, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2006, p.4; Hunt & Smith 2006, above n 8, p.13.

[17] This project is a collaborative action research partnership between Reconciliation Australia and the Centre for Aboriginal and Economic Policy Research, supported by the Australian Research Council.

[18] Hunt & Smith 2006, above n 7, p.68.

[19] Ibid, pp.18-21,67-8.

[20] Ibid, pp. 75, 78.

[21] Ibid, p.68.

[22] Ibid, p.15.

[23] Ibid, pp.21, 68-9.

'cultural match' and 'cultural appropriateness'.[24] Patrick Sullivan challenges the conflation between governance as political process and governance as organisational management, and proposes instead that functional organisations should focus on the delivery of services, with institutionalised relations established between these organisations and informal Indigenous political forms.[25] Likewise, David Martin emphasises the development of robust relationships between corporations and informal Indigenous political structures, warning that the more that complex values are transformed into formal governance structures, the more likely that the formal structures will supplant informal Indigenous governance.[26]

While the importance of local control and stable institutions are agreed as key to good governance, the extent of the role of culture in governance design is debated among theorists, government and the Indigenous people forming these organisations. Significantly, the interaction between the Harvard Project and governance research in Australia is tempered by the different context of governance in Australia where Indigenous communities have weaker political, jurisdictional, resource and legal rights.[27] Native title brings its own specificity to these Indigenous governance issues.

NATIVE TITLE AS A GOVERNANCE CONTEXT

Native title has specific conceptual lenses and legal, political and institutional realities which inform and generate particular governance issues for native title holders who are required to establish PBCs to hold and manage their native title. These governance issues include: different interpretations of native title, the influence of legislation on the role of PBCs and their establishment, the operating context of the PBCs, and the expectations and cultural norms of the native title holders.

Recognition and self-governance

Native title has a very distinct governance context. Native title holders do not just hold a simple property right or an interest in land, rather, because native title recognises a system of laws and customs held collectively, it is a form of self-governance. As Lisa Strelein writes, native title "is a recognition under the common law of the law-making capacity of the group and it seeks to protect that capacity and make it enforceable."[28] The aspirations of native title holders reflect this outcome; with recognition they expect to have greater management of their own affairs, and address cultural, ecological, economic and social concerns.[29] How they manage their affairs will include the continued exercising of their traditional authority. The experiences of native title holders thus have a great degree of relevance to the Harvard Project's findings about sovereignty and decision making.

Native title does not operate in isolation in a culturally distinct realm. The traditional authority of native title holders is exercised in contemporary Australia within an intercultural realm.[30] An influential part of these interactions with traditional authority is the common law and the parliaments, who have delineated the terms of native title recognition. For example, under the NTA Indigenous peoples' rights can be extinguished by government uses of the land, and will not be recognised under the non-indigenous law even though they continue to exist in Indigenous law.[31] The Australian government has also argued that native

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[24] D. Martin, 'Governance, Cultural Appropriateness and Accountability', in *Culture, Economy and Governance in Aboriginal Australia*, D. Austin-Broos & G. Macdonald (eds), Sydney University Press, Sydney, 2005.

[25] Sullivan 2006, above n 16, pp.6-7.

[26] Martin 2003, above n 9, p.10; Martin 2005, above n 24, p.197..

[27] Hunt & Smith 2006, above n 7, p.14.

[28] L. Strelein, 'Conceptualising Native Title', *The Sydney Law Review* vol. 23, no.1, 2001, pp.95-124, pp.123-4.

[29] L. Strelein & T. Tran, *Native Title Representative Bodies and Prescribed Bodies Corporate: native title in a post determination environment*, Research Report 2/2007, Native Title Research Unit, AIATSIS, Canberra, 2007.

[30] Martin 2005, above n 24, p.190.

[31] Furthermore, in very few instances do these extinguishing acts give rise to compensation.

title rights and interests cannot grow but can only diminish.[32] Whether that argument is accepted by common law is uncertain, with ongoing debate about the notions of tradition and adaptation in current cases, however it remains that native title is vulnerable to extinguishment, and the governance of native title rights and interests needs to manage this vulnerability.

The absence of the recognition of native title in economic and commercial terms is another major challenge to self-governance. Native title rights and interests are yet to be recognised in the common law with a commercial value. As determined by the NTA, native title holders have no rights to the minerals on their lands, nor can they refuse mining on their lands, although they do have the right to negotiate.[33] The government receives the royalties from the sale of minerals on native title lands. Native title holders have to negotiate to receive compensation money when their native title rights and interests are extinguished or affected by the mining activity. Native title holders face similar issues with other natural resources, such as water and forests. The government can grant licenses for forests and water over native title lands and waters. This lack of economic rights has undermined the capacity of the native title holders to establish an independent financial base for their self-governance.

Native title is a complex intercultural setting. The members and staff of PBCs are challenged not only by their community expectations of self-governance, but also by law and custom, and the exercising of those traditions given the legal parameters. This disjunction results in a frustrating local decision-making environment.

The roles of PBCs

PBCs have a key administrative role in the native title system, as legislated by the NTA, to manage native title rights and interests and facilitate the transactions of non-native title holders who wish to access and regulate native title. The Federal Government has summarised the roles and responsibilities of PBCs, and list their core native title functions as:

- receiving future act notices, exercising procedural rights of native title holders including objecting to or negotiating future acts, preparing submissions about right to negotiate matters, negotiating and implementing native title agreements, addressing compensation matters, and, bringing any further native title cases to court; and,
- managing native title rights and interests, holding and investing money, consulting native title holders on decisions that would affect native title, consulting with NTRBs about a proposed native title decisions, and any other function relating to native title rights and interests as directed by native title holders.[34]

Native title holders and PBCs have other responsibilities prescribed under different State and Commonwealth legislation, including cultural heritage. PBCs with exclusive native title will likely have land management obligations, such as maintaining water courses and firebreaks, pest management, and clearing rubbish.[35]

These prescribed roles are now part of their self-governance responsibilities, and are matters of importance to native title holders. In places of dense settlement, or mining activities, transactions with non-native title holders will be a large part of their work, and may provide opportunities for native title holders to negotiate their own outcomes. This is true for the Lhere Artepe PBC which holds native title in the town of Alice

[32] L. Strelein, 'Culture and commerce: The use of fishing traditions to prove native title', in *The Power of Knowledge, the Resonance of Tradition*, L. Taylor, G. K. Ward, G. Henderson, R. Davis & L. A. Wallis, Aboriginal Studies Press, Canberra, 2005, p.65.

[33] D. O'Shane, 'Claimant Comment – The Western Yalanji Native Title determination Friday 17th February 2006', *Native Title Newsletter*, no. 1, 2006, p.4.

[34] Summarised from Attorney General's Department Steering Committee (AGDSC), *Structures and Processes of Prescribed Bodies Corporate*, 2006, pp.8-9.

[35] Ibid, p.10.

Springs, and the Miriuwung Gajerrong PBC whose native title lands are part of the intensification of development along the Ord River in Western Australia. However, these transactions place a considerable administrative, consultative, and practical workload on PBCs. This administrative load will compete with other priorities of native title holders if the PBC has limited operational resources.

The prescribed roles for PBCs are just a part of their roles and functions; the PBC community will have different expectations about what a native title determination means. With a successful native title claim, native title holders have an expectation that they will have more self-governance opportunities over their traditional lands and waters. However, much of the PBC regime is a hasty legislative response to Senate debate on group rights,[36] rather than a broad consideration of the future role and potential of PBCs. This tension is acknowledged by the Federal Government, which has observed that community expectations are "clearly relevant" to how the PBCs will perform their statutory roles, however they are of "secondary importance" with regard to the effectiveness of PBCs performing their primary, that is, statutory, roles.[37] This perspective goes against the research findings in Indigenous governance which prioritise local support as central to the success of an organisation.

There are also substantive corporate roles and responsibilities of PBCs, which are determined by an interaction between the NTA and the *Corporations (Aboriginal and Torres Strait Islander) 2006* (Cth) ('the CATSI Act') (formally the *Aboriginal Councils and Associations Act 1976* (Cth)).[38] In terms of corporate governance obligations, the roles of PBCs include holding meetings and elections for the PBC Governing Committee, conducting an annual general meeting, maintaining a register of members, keeping accounts and records, and preparing reports.[39] New legislation now classifies corporations as small, medium or large so as to reduce these requirements for smaller corporations. And the corporate structure required by the CATSI Act does make some specific exemptions for PBCs. However, the accountability requirements under the CATSI Act can still be in conflict with the recognition and protection of traditional laws and customs under the NTA. Mantiziaris and Martin have detailed the consequences that corporate practices have for the ability of native title holders to exercise their traditional laws and customs.[40] Mantiziaris and Martin are particularly concerned about how the fine *balance* between corporate administration, supervision and control is experienced by PBCs.[41]

Administrative requirements which do not match local realities can also disable the operation of the PBC, because of the logistics involved in representing a large group of people who may live over an extensive remote area or across island archipelagos as in the Torres Strait.[42] The exercise of organising a meeting may become futile when the meeting costs are greater than the compensation decision to be discussed. Yet if native title holders are not properly consulted, the decisions made in a PBC are open to legal challenge.[43] It is becoming apparent that the excitement and good will necessary for native title claimants to come together for the native title determination, is suppressed by the externally prescribed administrative obligations which follow that determination.

Memmott and McDougall particularly criticise the mandatory requirement that PBCs be attached to successful native title determinations, which leads to the proliferation of corporate structures in small communities, and confusion about different roles and responsibilities. In the Wik and Coen regions of Cape York, corporations such as land trusts and PBCs have similar membership and have roles with respect to the same lands. Local people are frustrated by the mismatch between Commonwealth and State legislation and

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[36] Mantiziaris & Martin 2000, above n 4, p.94, see also p.98.

[37] Ibid, pp.6,10.

[38] PBCs are not allowed to incorporate under the *Corporations Act 2001* (Cth).

[39] AGDSC 2006, above n 34, p.9.

[40] Mantiziaris & Martin 2000, above n 4, Chapter 6, pp.182-239.

[41] Ibid, p.239.

[42] Murphy 2002, above n 4. Meeting logistics are also challenged by diaspora populations.

[43] Ibid, p.164.

the accompanying legal and administrative burden.[44] The Eastern Kuku Yalanji Indigenous Land Use Agreement, signed in April 2007, has required the establishment of both a land trust and a PBC to support the settlement.

The Commonwealth Government's 2006 reforms are designed to address some of the technical problems with the original legislation, including more flexibility in corporate design, and importantly a narrower interpretation of 'native title decisions' in order to reduce the burden of consultation. However, the focus on statutory roles is a policy failure. This focus does not reflect the context within which native title claims are made, whereby native title holders include broad aspirations – such as health, culture, environmental, and intergenerational issues – in their native title business.[45]

Corporate establishment

The research behind good governance recommends processes before structures in the establishment of a corporation, so as to work through how organisational management will relate to pre-existing governance structures, and to engender community support and ownership of the organisation.

As PBCs are required to hold and manage native title rights and interests, the timing of their establishment coincides with the positive recognition of native title by the Federal or High Court. There is a high level of uncertainty in deciding PBC governance structures for native title claimants in litigated determinations, as they do not know the outcome of their application in advance. However, it is not possible to delay the establishment of the PBC because the native title holders will no longer have applicant rights. The Federal Court has addressed this by undertaking a 'part hearing': the Court makes a determination about the recognition of native title but that determination is not final under the PBC is nominated by the Court, which could be six months later. With this level of certainty, the applicants can prepare for a PBC, while they continue to hold applicant rights until the Federal Court concludes the matter.

Native title holders face an immediate choice when establishing a PBC: deciding between a statutory trust PBC and an agency PBC (the two types of PBCs designed under the legislation). This prescribed choice is intended to streamline the native title recognition process by creating legal entities ready to operate, while also allowing some choice in corporate arrangements. However, Mantiziaris and Martin strongly criticise this as a structural conflict.[46] The arrangement does not allow for the considerable period of time required by a community to workshop and design their priorities after determination. Anecdotal evidence suggests that the choice presented between a statutory trust or agency PBC is diverting attention away from more fundamental governance questions.

The time pressures of this PBC establishment context are different for those native title claimants establishing a PBC as part of a consent determination. Such claimants have the opportunity to begin planning the corporation once the connection requirements are agreed upon. However, this is not always a straight forward option. The Gunditjmara people in south-west Victoria and western South Australia found much of their PBC plans were on hold until the day before the consent determination was handed down. They had negotiated operational resources for their PBC as part of the consent determination, but they had to wait for all the respondents to agree before the funding agreement was confirmed and signed.[47] It is also not uncommon for native title claimants to be simultaneously engaged in negotiating a consent determination and litigation, as is the experience of the Noongar people in south-west Western Australia.

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[44] Memmott & McDougall 2003, above n 4, p.viii.

[45] National Native Title Council *submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment Bill*, 2007.

[46] Mantiziaris & Martin 2000, above n 4, p.94, see also p.97.

[47] Pers. Comm. Damein Bell.

Funding

Compounding this cluttered and complicated governance context, PBCs operate in an unstable, ad hoc and short term funding environment. In only a very few circumstances have State or Territory governments provided operational and, or, establishment funds for PBCs. There has also been confusion about the arrangements between PBCs and NTRBs, which has obscured the support that may have been available to provide services in the pursuit of statutory functions. The Commonwealth Government now explicitly directs that NTRBs should take a greater role in providing assistance to PBCs.

In the 2006 reforms, the Commonwealth government prioritised bringing clarity to the funding relationship between PBCs and NTRBs.[48] The Commonwealth government also recently announced the Federal provision of some limited operational costs for PBCs.[49] At this stage the funding is expected to be very limited and there is yet to be clear criteria as to what PBCs might be able to reasonably expect. The States and Territories now have an opportunity to respond to the Commonwealth's recommendation that they take on more responsibility for PBCs, although they are not formally required to do so. The Commonwealth has also recommended that development proponents shoulder more responsibility for negotiating native title matters.

External funding is particularly important for PBCs because native title rights and interests do not have a commercial value, and because there is no settlement of the historical appropriation of lands. In addition, because native title holders are often working in a situation of socioeconomic disadvantage, they have few financial resources to draw on from within their communities. Indeed, addressing this socioeconomic disadvantage is an aspiration of native title holders, and it is also government policy.

While funding does not guarantee good governance outcomes, a lack of funding creates a range of basic logistical hurdles in the operation of a corporation, including establishing and maintaining an office, holding meetings, responding to external communications, and complying with the auditing and reporting arrangements that are necessarily required by legal entities. Many, if not most, PBCs are struggling to operate with neither establishment nor operational funding.[50]

A GOVERNANCE FUTURE FOR PBCS

As part of thinking through their future, PBCs are examining what their roles and responsibilities will be in relation to other Indigenous organisations, including NTRBs. This includes how roles are perceived as shared or separate, and whether relationships held are dependent, independent, or interdependent.[51] These are also important questions for governments. Indeed, government reforms have recently been very influential in the clarification of relationships between PBCs and NTRBs. The May 2007 Federal Government funding guidelines for PBCs direct that the new monies for PBC funding be managed by NTRBs, and that PBCs apply for those funds through NTRBs.[52] The Commonwealth argues that NTRBs are better set up to manage the administrative load of a funding relationship, and that this is a more efficient administration process for the Commonwealth.[53]

PBCs and NTRBs will have to carefully negotiate this new funding arrangement. There is a diversity of relationships held between PBCs and NTRBs across Australia, and the dependency created by this new

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[48] AGDSC 2006, Recommendations 1, 9, 10, and 12, pp.3-4.

[49] Presentation by Greg Roche, Assistant Secretary, Land Branch, Department of Family and Community Services and Indigenous Affairs, to the Prescribed Bodies Corporate, National Meeting, 12 April 2007, Canberra.

[50] T. Bauman & T. Tran, 2007, *First National Prescribed Bodies Corporate Meeting Canberra, 11-13 April 2007: Issues and outcomes*, Research Report 3/2007, NTRU, AIATSIS, Canberra. See also Ritter, above n 4, 2002.

[51] Strelein & Tran 2007, above n 29, pp. 18-21.

[52] Land Branch, *Draft Guidelines for Support of Prescribed Bodies Corporate*, Department of Family and Community Services, Canberra, 2007.

[53] Presentation by Greg Roche, Assistant Secretary, Land Branch, Department of Family and Community Services and Indigenous Affairs, to the Prescribed Bodies Corporate, National Meeting, 12 April 2007, Canberra.

funding arrangement may generate problems even where good relationships are held. PBCs are concerned about how this funding process will affect their capacity to prioritise their own decisions, while NTRBs are worried about being placed in the position of monitoring and managing a separate native title corporation.[54]

There are issues of corporate legitimacy, stability and resilience here for the government to consider when determining such funding arrangements. Arguably PBCs have strong potential for local legitimacy and resilience as they are the result of a locally initiated native title claim. For example, under the 2006 reforms to the NTA, native title holders may consolidate several native title determinations under one PBC, however this is their choice. While PBCs are created by government legislation, this governance structure remains a political identity determined by local political processes. This resilience is distinct to many other Indigenous governance structures created by government, including NTRBs and ATSIC. For example, in June 2007 the Commonwealth announced that four Queensland NTRBs are to be amalgamated into the one NTRB.[55]

However, describing the legitimacy of NTRBs vis a vis PBCs in this way is overtly simplistic, particularly as NTRBs and PBCs often hold close supportive relationships. Some NTRBs have strong roots in local political processes, such as the Kimberly Land Council which was established by Aboriginal people in 1978. And the native title reforms have introduced instability to arguments about PBC resilience – because they have created a corporate entity which can replace a PBC: the default PBC. Where there is no functioning PBC, the Federal Court is empowered to establish a default PBC as a measure of last resort.

Something for both PBCs and governments to keep on considering is the relationship between corporate design and corporate function, and how this relationship relates to the 'cultural match' process. ATSIC's governance was greatly complicated by being both a representative body and a service delivery organisation.[56] As raised earlier, Sullivan argues that service delivery should be separated from representation in organisational structure. Mantziaris and Martin shift the focus of the debate away from design models to the importance of process. They argue that the governance debate about the appropriateness of corporate design – or 'cultural match' – should move on and consider instead to what extent Indigenous people have *control* over their corporate design and operation.[57] This argument reflects the importance of local support for good governance. Furthermore, the diversity of local circumstances undermines the capacity for governments and Indigenous people to devise a solution which can be applied nationally.

The role of Indigenous corporations in making political decisions about intra-Indigenous matters, and as a site of engagement with non-indigenous governance structures, currently relies on the limited flexibility of corporations law to accommodate local political forms. For PBCs, the challenging interaction between the Aboriginal corporations law and the NTA, and their highly prescribed nature more generally, has led Mantziaris and Martin to argue that it may be more appropriate for native title claimants to set up independent but related corporations, through which to achieve their wider goals. However, the creation of more corporations will surely stretch local resources even further, including the time people have to give to meetings, and could create more tensions between the roles and responsibilities of different corporations.

There is the potential for better planning in relation to the roles and responsibilities of PBCs when a PBC is formed as part of the emerging trend of alternative settlements. An alternative settlement is an alternative or augmentation to the recognition of native title through the Courts, including Indigenous Land Use Agreements (ILUAs), and is worked out through negotiation between Indigenous people and government.[58] Alternative settlements are an opportunity for government to address broader issues of public policy in

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[54] Participant feedback given at the workshop on the relationship between PBCs and NTRBs, at the *National Native Title Conference 2007: Tides of Native Title*, Cairns, 6th June 2007.

[55] The Hon Mal Brough, *Reforms to Native Title Representative Bodies to benefit Indigenous Australians*, Media Release, viewed 1 July 2007, <http://www.facsia.gov.au/internet/Minister3.nsf/content/ntrb_7jun07.htm>.

[56] K. Palmer, *ATSIC: Origins and Issues for the Future. A Critical Review of Public Domain Research and Other Materials*, Research Discussion Paper No. 12, AIATSIS, Canberra, 2004.

[57] Martin & Mantziaris 2000, above n 4, p.239.

[58] L. Strelein, *Compromised Jurisprudence: Native title cases since Mabo*, Aboriginal Studies Press, Canberra, 2006, pp.141-2.

partnership with PBCs, and for PBCs to address community expectations in partnership with government. They can also helpfully build in the potential for good governance in the establishment of a PBC. This will require more investment by government, Indigenous people and other parties in native title outcomes before the native title claim is handed down by the Courts. Unfortunately, perceptions in the Australian community that native title rights and interests are a 'new' entitlement, rather than a belated recognition of pre-existing rights and interests, challenges the political will of government to invest more in native title outcomes for native title holders. Yet, the limited character of native title rights and interests has undermined the capacity of native title holders to undertake that investment themselves.

All of these governance issues have to consider the scale at which decisions are made. This issue of scale is also known as subsidiarity, whereby roles and responsibilities are located at the most appropriate scale of decision-making.[59] The political principle of subsidiarity argues that:

> No higher centralised level or scale of political aggregation should undertake functions or tasks which can be performed more effectively at a dispersed or local level. Conversely, more centralised forms of governance should undertake initiatives which exceed the capacity of individuals or communities acting independently.[60]

These considerations about scale, decision making and legitimacy are part of the basic building blocks of good governance and are an ongoing process. Clearly, these matters will change over time and will be very much influenced by the local context and local capacities.

CONCLUDING REMARKS

Native title is vulnerable to extinguishment, and yet native title is an important intergenerational asset connected to culture and identity. The long-term maintenance of native title rights and interests, coupled with the pressures of immediate community concerns and day to day priorities, necessarily requires good processes so that native title holders are able to reach agreement on hard decisions. The extinguishment of native title land may be an unwanted effect of building a health facility, but investing in local health infrastructure will facilitate the number of people who can continue living on country, especially the Elders, which is an investment in native title. These complex matters need to be planned for, workshopped, and decided upon by the native title holders.

It is critical that bureaucratic and technical matters do not divert attention away from the necessary strategic planning that PBCs are keen to get on with. With the long delayed recognition of their rights and interests to their lands and waters, native title holders are keen to exercise their authority in a broad range of matters. Unfortunately, Lisa Strelein has found that the seriousness the High Court placed on the obligations of the Australian government in the *Mabo* decision has become lost as native title practice becomes a mundane bureaucratic business.[61] PBCs are not simply working on technical or administrative matters, but are managing difficult decisions, which require short, medium and long term considerations. These corporations are more than a legislative response to incorporating group rights, they are a vehicle for the aspirations of native title holders and hold the rights and interests of future generations. Understanding these different perspectives is critical to the potential for building partnerships between PBCs and government.

In the long term, the government has anticipated that there will be at least 100 PBCs operating across Australia.[62] If native title rights and interests are not extinguished in their entirety, and if default PBCs do not become the operating norm, PBCs can be expected to exist in perpetuity. Arguably this longevity and resilience is an important form of self-identified Indigenous governance. This is an opportunity for both governments and Indigenous people to invest in Indigenous governance. With a greater governance capacity, PBCs would be better able to engage in cultural, economic, and social pathways in a proactive,

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[59] Hunt & Smith 2006, above n 7, pp.19-20.

[60] Ibid, p.19.

[61] L. Strelein, *Compromised Jurisprudence: Native title cases since Mabo*, Aboriginal Studies Press, Canberra, 2006, p.124.

[62] AGDSC 2006, above n 34, p.7.

rather than reactive, fashion and to plan for development which is locally devised and supported. However, in the early twenty-first century government policy changed from self-determination to 'mainstreaming'.[63] The implication for PBCs is that their arguments for operational funds from government will struggle to be heard. Indigenous peoples' governance can occur through mainstream bodies, but what Indigenous corporations offer is a greater understanding of the needs and priorities of their local community.

Unfortunately the time and energy that is invested into native title determinations, is not being invested in protecting and maintaining native title outcomes. Governments need to work together with native title holders to build good governance into the future of PBCs, to ensure that the legacy of *Mabo* is realised today, as well as maintained for future generations of native title holders.

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[63] J. Altman, 2004, 'Indigenous Social Policy and the New Mainstreaming' , *CAEPR Seminar Series Seminar Notes*, 13 October 2004, viewed 30 June 2007, <http://online.anu.edu.au/caepr/Publications/topical/Altman_Mainstreaming.pdf>.

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