
A SACRED LAND, A SOVEREIGN PEOPLE, AN ABORIGINAL CORPORATION

Prescribed Bodies and the Native Title Act

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Introduction*

When, in 1992, the judges in *Mabo v State of Queensland* decided that Australian common law recognises a form of customary land title that Australian Aborigines possess despite colonisation, the excitement in many Aboriginal communities went beyond the simple expectation of the return of land. At least in the Kimberley, where meetings were organised by the Kimberley Land Council to discuss the implications of the *Mabo* judgement, there was a strong optimism that this decision would recognise Aborigines' prior existence as a separate and distinct people, and from this would flow a new political relationship with the Commonwealth and the states of which it is made up. This has not happened. Of course, it was recognised that the Judges in *Mabo* had explicitly stated that the Crown had acquired sovereignty of Australia on settlement, and that the issue of sovereignty could not be tried in Australian courts (Bartlett 1993:x). It is easily understandable that the authority of an institution, such as the Crown, cannot be challenged by reference to a subsidiary body, such as a court, established by that institution – where would it find the authority to rule that the Crown has no sovereign authority? However, the acceptance that a people existed on the Australian continent prior to settlement with a system of law over land recognisable by Australian law necessarily leads to acceptance of their prior political autonomy, whether or not the consequences of this are justiciable. No system of land law can exist without being embedded at the same time in a cultural, social and economic system which taken together describe a political entity (Sullivan 1996a). On this basis the optimism that the Australian state would at last begin to recognise the distinct political rights of its colonised people seemed justified.

As the Australian government moved to control, and at the same time give effect to, the consequences of the *Mabo* judgement by introducing legislation in 1993 to identify the continued existence and register the newly recognised native title of Aborigines, this optimism declined. Indeed, as Aboriginal negotiators assembled in Canberra to try to gain some influence over the drafting (which otherwise would have proceeded without them) one of them, Noel Pearson, publicly appealed to the others to drop any consideration of arguments based on prior Aboriginal sovereignty. His reasoning was that this assessment of history was so far from the grasp of present politicians and the broader Australian public that it would be better to accept a form of property right that would benefit large numbers of remote area Aborigines, than aim for a political solution that may benefit the rest if achieved but would, more likely, mean a loss to both (Pearson, 1993). The *Native*

* This report is based on a report commissioned by the Native Title Branch of the Aboriginal and Torres Strait Islander Commission (ATSIC). I am grateful for permission to revise it for this publication. The views expressed in this report are my own and not necessarily those of ATSIC.

Title Act 1993 (NTA) that resulted from these negotiations successfully divorces the fact of property in land from the need for recognition of political rights flowing from the recognition of prior ownership of territory. This report details how this is achieved by the Act, the complexities that this approach to the problem produces, and the consequences in the continued denial of self-determination to the Australian Aboriginal people.

The report was commissioned by the Aboriginal and Torres Strait Islander Commission (ATSIC) with a much narrower aim in mind. It was to address ATSIC's concern with the funding and administration of corporate bodies while they claim the continued existence of their title, and those that might hold and deal in land returned under *Mabo* principles. It is thus highly detailed and tailored for a specialist audience, even though its fundamental concerns and conclusion are of more general applicability. The report looks at the ways that land holding bodies are to be set up and finds that the legislation is fraught with problems for Aboriginal people and their organisations both in the claims process and for the granting of a determination of native title. It then questions the form of incorporation required for claimants and land holders and finds this in many ways contravenes the customary law from which native title is derived.

The report also addresses the problem that some form of administrative mechanism is required to hold and deal in the land, and as long as Aboriginal people remain distinct in culture, language, history and social organisation these administrative mechanisms will act as substitutes for appropriate political organisation. Under the Native Title Act these begin life as 'prescribed bodies' – corporations set up according to the Act's regulations in such a way as to meet the criteria of organisations prescribed by the Act. When a determination that native title exists is made by the Federal court one of the bodies prescribed by the Act must be registered as the native title body when the title is registered. The regulations place some limits on the way that an organisation can become incorporated to meet the criteria of a prescribed body. Principally, it must incorporate under the *Aboriginal Councils and Associations Act 1976* (ACAA). Thus the terminology that permeates this report is produced: it deals in detail with prescribed bodies corporate, registered native title bodies corporate, Aboriginal corporations and associations under the *Aboriginal Councils and Associations Act 1976* and representative bodies. These last are also established by the *Native Title Act 1993* which sets out their functions.¹

While this report dwells in more detail on the complexities of establishing prescribed bodies and registered bodies under the NTA, their relationship with representative bodies, and the problems of incompatibility between their needs and the requirements of the ACAA, its conclusion is more fundamental. This is simply that a significant abuse of

¹ Representative bodies are not assumed to be representative in the same way as representative government. It is a statutory term arising out of their determination under s.202 of the Native Title Act 1993. To receive a determination the Minister of Aboriginal Affairs simply has to be satisfied that the organisation is 'broadly representative' of indigenous people in the area and that they are and will continue to satisfactorily carry out their functions under s.202(4). The Review of Native Title Representative Bodies (Commonwealth of Australia 1995:5-23) gives a clear analysis of the role and tasks of representative bodies. For a more general examination of the problem of representativeness in Aboriginal community organisations see Sullivan 1996b:5-42, 71-126.

Aboriginal human rights has been perpetrated by the technicalities of these Acts. This is the denial of the right to independent political organisation and to freely determine the relationship of the sovereign land owning territorial group with the state in which it now finds itself.² Aboriginal customary law communities do not simply own land as title holders under Australian common law, they own land as self-regulating communities with distinct rights. Their administrative expression, however, is that of a voluntary association recognised under a form of Australian corporate law – not a social community but an incorporated association. Incorporated associations require certain administrative and accountability procedures. Social communities have quite different administrative structures, are differently accountable to their people, and have different relationships to the states within which they are embedded or to which they are subordinated. This report details the way that the Native Title Act and its regulations, in tandem with the Aboriginal Councils and Associations Act, reduce social communities, for administrative purposes, to corporate entities capable of regulation and administration in a manner that continues the denial of special political status begun with colonisation.

Native title as a British legal concept lies neither in Aboriginal law nor in the common law but somewhere between the two (Pearson, 1996). On the Aboriginal side it is not strictly speaking an alienable proprietary right, but is bound up in the totality of social and political relationships of the territorial group. The *Native Title Act 1993* and the prescribed body corporate Regulations are a means of registering and giving effect to one system of land tenure in another. If in the process the rights found in the Aboriginal system of land tenure are reduced in scope, or limited to a reduced group of individuals, this is discriminatory and it may breach domestic and international racial discrimination laws. Both legal and political challenges can be expected to continue.

There are three problem areas in the process of establishing and registering native title bodies corporate that this discussion paper will address. The first is in the intricacies of the process of setting up a prescribed body corporate, the needs of the legislation and the Regulations to the Act. These are complex, they leave many areas of uncertainty that need to be tightened up and lead to the possibility of a multitude of prescribed bodies competing with each other during a single claim and for the eventual status of registered native title body corporate. The first half of this report addresses these issues in detail, and assumes some familiarity with the legislation. The second series of problems arises out of the requirement of the Regulations that the prescribed body corporate be incorporated under the *Aboriginal Councils and Associations Act 1976*. The point of view taken in this discussion paper is that there should be no incompatibility between the customary system of land tenure of the common law title holders and the structure and procedures of the organisation that is empowered to give effect to these. As it currently

2 Article 3 of the draft Declaration on the Rights of Indigenous Peoples, now being elaborated by a working group of the United Nations Commission on Human Rights, states: "Indigenous peoples have the right of self-determination. By virtue of this right, they freely determine their political status and freely pursue their economic, social and cultural development." (United Nations 1994). Australian government representatives, confident that international law offers guarantees against secession and the dismemberment of states, have repeatedly supported this Article (Pritchard 1996:26).

stands the *Aboriginal Councils and Associations Act 1976* has a number of provisions that could operate to reduce or deny the full enjoyment of common law rights as these derive from customary law. The Act has recently been reviewed, but the analysis below will show that it cannot be an appropriate Act for native title managing bodies without introducing a new section tailored for this purpose. This would lead to improvements but would not deal with the third problem which the introduction to this report has already broadly discussed. This is that there is a fundamental flaw in the way that Aboriginal groups are viewed as being appropriately represented by corporate bodies. The holders of native title in Aboriginal customary law are a social community, and their land holding is part and parcel of their territorial political structure as much as it is a form of property. The necessary mechanisms for regulating a corporation dealing in property are not appropriate to regulating an entire social community owning a territory.

Yet some form of statutory administration is required in the name of fairness, efficiency and equity. This is the dilemma that this discussion paper concludes by addressing. Is the political entity of customary law land holders to be represented as closely as possible in the structure of the organisation established to manage the land, thus bringing the community under state regulation? Or should they be separate? If separate, how is expression to be given to the primacy of the social community over the management body? The report begins with the more immediate and technical problems of implementing the legislation, follows this with a consideration of the appropriateness of the *Aboriginal Councils and Associations Act*, and concludes with a consideration of these deeper questions that are at the core of the colonial relationship between Australia and its original sovereign peoples.

1. Prescribed bodies, representative bodies and social groups

The need for correspondence between social groups and title bodies

Some broad conceptual issues must be dealt with initially, to clearly understand the nature of the Aboriginal land holding group under discussion and its relationship with an incorporated body under three related, but not precisely coincident, regimes – Aboriginal customary law, the common law, and the *Native Title Act 1993* and its Regulations. Justice Brennan said in the *Mabo* judgement “Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs”. Further down, when addressing the issue of alienability he says “native title, though recognised by the common law, is not an institution of the common law and is not alienable by the common law. Its alienability is dependent on the laws from which it derives” (Bartlett 1993:42). Registered native title bodies corporate will come into existence as a result of a determination that common law native title rights exist over claimed land. These common law rights themselves depend upon the existence of a system of land holding in Aboriginal custom, a custom which the *Mabo* judgement recognises is no less valid if it has changed and adapted to present circumstances (Bartlett 1993:51). Yet matching the prescribed body corporate to the customary land holding group is not a simple matter.

In most cases there will be no natural and obvious social boundaries of the group that holds title rights in common. The nature of the group is to be demonstrated hand-in-hand with the assertion of title. For instance, all members of a linguistic group could be said to share certain rights over the domain of that language and its associated ethnicity. All members of a ceremonial and religious grouping could be said to share certain rights of title over the land to which the ceremonies and associated mythologies relate. Other large scale forms of community have been identified by anthropologists from time to time and varying from region to region. Berndt, for example, in 1959 described the ‘widest functionally significant group’ as a ‘society’ and said of it “It is those who meet regularly and consistently, even if intermittently – and are closely involved in reciprocal duties and obligations – who make up the widest functionally

significant group" (Berndt 1959:105).³ At the other end of the scale very small family groups will often assert particular rights over tracts of land of a type that other members of the same social community do not share.

Describing the dimensions of the social group for the purposes of determining whether they jointly hold native title at common law will depend on the particular culture of the group as it has developed over 200 years of occupation, which varies considerably throughout the country. It is also affected by the current alignments of individuals within the group such that they can be described as a community, the nature of the claimable land and the practical requirements of mounting the claim. A balance must be found between the material benefits to individual common law native title holders (which may be maximised by limiting the claim to the smallest possible group) and the interest of other major parties such as a wider community grouping, development agencies such as ATSIC, the National Native Title Tribunal and representative bodies, which achieve economies of scale by dealing with the largest group possible.

The nature of the Aboriginal land holding group also determines the appropriate customs under which land use is regulated by the communal native title holders. Clearly, large 'tribal' federations will regulate and control access and benefits differently from the small family groups or clans which may be among their components. Added to this is the problem of the assessment and ranking of disparate types of rights within the one group. It is not simply a matter of one group having rights and the other none. Nor is it a matter of 'primary' and 'secondary' rights. It is more commonly the case that nearly everybody involved in a claim links in at some point to a system of overlapping categories of rights which cannot be comfortably ranked one against the other. These issues are of great concern to the claimants themselves, and those who have to put together the case for a registration of native title. They also concern ATSIC because of the potential for conflict, during and after a claim, over competing demands on ATSIC funds. A group whose particular rights have been submerged in the general rights of a larger group can justifiably argue that their rights at common law have been taken away, diminished, or at best not afforded recognition. Conceivably they would have recourse to the courts. Conversely, a large group whose members feel they have certain general rights of access and use over land in common, but are shut out by the recognition of a much smaller group's particular rights to an area of land, could be similarly aggrieved.

Getting the size of the claimant group right for the management of a claim, as much as for management of land, is extremely important. As far as possible groups should be encouraged to incorporate for the purposes of a claim and determination at the largest practical level. They are more likely to do this if they can be persuaded that their particular rights can be met within the ordinary workings of a representative structure, rather than through the conflict of competing structures. Unfortunately, in neither the

³ In the same article he identifies a range of smaller groups also with various relationships to land, only one of which he characterises as a 'land owning' (as opposed to land-using) group. This is the local group or 'clan'. Necessarily, then, he states that some of the society members are not necessarily 'owners'. I would propose, however, that the group as a whole does have ownership rights over a definable territory, and that Berndt's approach to local land owning groups is no longer sustainable, while these other aspects of his insights are.

Native Title Act 1993 and the Regulations nor the *Aboriginal Councils and Associations Act 1976*, is support given to the establishment of such appropriate structures, and indeed the *Aboriginal Councils and Associations Act 1976* in many ways works against this. Some suggestions on how this could be achieved are made after the mechanics of setting up a prescribed body corporate have been described.

Prescribed bodies, registered bodies and the legislation

A prescribed body corporate can be set up at any time after the 20th of December 1994 simply by incorporating under the *Aboriginal Councils and Associations Act 1976* for the purposes of receiving a determination that native title exists in a particular area, and meeting the other requirements of the Regulations (see below). It then is 'prescribed' in terms of s.59 of the *Native Title Act 1993*. It has been commonly thought that a prescribed body corporate will only come into existence at the point of receiving a determination that title exists which would then very shortly make of it a registered native title body corporate, and it has also been assumed that the nature of the determination would provide the structure for the prescribed body corporate/registered native title body corporate. Probably this was the intention of those who framed the *Native Title Act 1993* and the Regulations, but in practice they have provided the opportunity for numerous claimants to incorporate as prescribed bodies corporate even before lodging a claim to registration of native title. This poses obvious difficulties for running claims as well as for receiving a determination, which will be discussed below.

The *Native Title Act 1993* says that when the Federal Court (or National Native Title Tribunal prior to *Brandy* decision amendments)⁴ is on the point of making a determination that native title exists it shall ask a representative of the common law native title holders to nominate a prescribed body corporate for the purposes of holding the title in trust (s.56). If they do not nominate one the determination is made that the rights and interests are held by the common law native title holders.⁵ In this case s.57(2) comes into play. A representative of the common law holders is again asked to nominate a prescribed body corporate, this time without the stipulation that the prescribed body corporate is to hold the rights and interests in trust. If one is nominated the Federal Court determines that it is to carry out the functions under s.58. If one is not nominated the Federal Court determines which prescribed body corporate is to perform the functions. Section 58 empowers the Regulations to determine the functions of a prescribed body

4 An amendment bill to the Native Title Act was introduced into parliament on 27 June 1996 to deal with the High Court decision in the *Brandy* case that administrative tribunals cannot make judicial decisions. Following these amendments claims for determination of native title will be made to the Federal Court which will refer them to the National Native Title Tribunal. Only the Federal Court will be able to make a determination. The Court will monitor the mediation of the Tribunal more closely and questions of law or fact will be referred to the Court for ruling (AIATSIS 1996:3).

5 Section 56 of the NTA appears to make a distinction between the holding in trust of the common law native title and the holding of the rights and interests that from time to time comprise the native title. The distinction, however, is not consistently maintained and it is not readily apparent to what extent it is intended and what its effect may be.

corporate, including that a s.57 prescribed body corporate may act as an agent. The Regulations duly do so (s.4(1)b). The Registrar, on registering the title, records the prescribed body corporate, which then becomes the registered native title body corporate.

In summary, prescribed bodies corporate are set up prior to a determination. One is nominated to hold or to manage the rights and interests associated with the title determined, and it may do so either as trustee or as an agent.

The Regulations say:

- 1) An Aboriginal association is prescribed for the purposes of paragraph 59(a) of the Act if it is incorporated under the *Aboriginal Councils and Associations Act 1976*:
 - a) after the commencement of the Regulations; and
 - b) for the purposes of being the subject of a determination under section 56 or 57 of the Act.
- 2) An Aboriginal association is taken to be incorporated for the purpose of being the subject of a determination under section 56 or 57 of the Act only if:
 - a) all of its members are persons proposed to be included in a determination of native title as the native title holders; and
 - b) the purpose of becoming a registered native title body corporate is set out in the objects or in the Rules; and
 - c) provision is made in the rules for the performance of its functions as a registered native title body corporate, including provision in relation to consultation and consent in accordance with regulation 5.

Thus a group believing its members to be common law native title holders can incorporate under the *Aboriginal Councils and Associations Act 1976* prior to lodgment of a claim for registration of native title if the other requirements are met. It had been assumed until recently that corporate bodies cannot lodge the claim, but, following the judgement of O'Loughlin J in *NT v Lane*, it seems to be possible to do so not as the common law holder but on behalf of the common law native title holders (Irving pers. comm. see Irving, 1996:9). If the corporation is a prescribed body corporate the situation may well arise where numerous prescribed bodies corporate will lodge claims and counter-claims and vie for determination as the registered native title body corporate. Under proposed amendments to the *Native Title Act 1993*, and under existing ATSIC guidelines, they will have to be represented by a single representative body, and funding for the claim channelled through that representative body. More than one prescribed body corporate could conceivably receive a determination and make claims on ATSIC for continued funding. Prior to this, competing prescribed bodies corporate would introduce uncertainty into the mediation process by offering alternative bodies with which to conclude negotiated settlements.

Difficulties produced by the prescribed body requirements of the Native Title Act

The prescribed body problems divide into three major issues:

- The problem of running a claim with multiple actual or potential prescribed bodies.
- The problem of getting a determination with multiple prescribed bodies and the possibility of more than one registered native title body corporate.
- The problem of funding for prescribed bodies and registered bodies, and the relationship between them, both before, during and after a claim.

In the early stages of the operation of the *Native Title Act 1993* it was felt that some claims would move swiftly to determinations. The need for Regulations concerning the administration of the determined land was a priority. Consequently, it may have been overlooked that there is a need for common law native title holder organisations with statutory status prior to a determination in order to conduct negotiations during the mediation phase of a claim. In practice negotiated settlements are occurring not over areas of land but over case-by-case proposals for its development while still subject to claim. A significant impediment in some of these deals has been the lack of an organisation that can legitimately stand for the common law native title holders. Some agreements affecting native title rights have been signed by individuals on behalf of all native title holders, potentially putting these individuals at some financial risk. The proponents of development also perceive risks. In one instance the individuals standing for the native title holders were required in a development agreement to certify, not only that they were the common law native title holders, but that if any counter claims were made at any time in the future they would, at their own expense, attempt to defeat them in the courts.

While there is a need for a prescribed body at the start of a claim, and setting one up under the Regulations is not difficult, arriving at an organisation with legitimacy in both Aboriginal and non-Aboriginal terms is much harder, and requires considerable time and effort precisely when the claimants have the most demands made on them for the claim itself. When it is known that there are dissident individuals or groups the uncertainty for developers is very great. In one case the group currently negotiating settlement of land issues in the National Native Title Tribunal is not incorporated. Simply by making a claim it has the status to be able to negotiate. On the other hand, in this case, there are also competing groups that are incorporated and can be prescribed bodies under the Act which cannot join the negotiations except as interested parties unless they make counter claims. Accreditation of a group to negotiate is an important issue that is not presently being addressed.

This raises the question of the relationship between a prescribed body corporate, or other negotiating body, and ATSIC the statutory representative body, the Indigenous Land Corporation or other potential funders. The problem is complicated because the actual needs of a situation are not a function of the incorporated status of a group and its progress in the determination process. One group may negotiate for several years, acquire substantial land and business interests, relinquish or concede other interests in the land

and may, as a requirement of the negotiations, never move to seek a determination. It need not be a prescribed body under the *Native Title Act 1993* as it would never seek registered native title body status. Or it could arrive at a determination very late. Another group, for instance converting a pastoral lease to native title, may rapidly find itself the subject of a determination as common law native title holders with a registered native title body corporate and a fraction of the resources, expertise, administrative structure and funding needs of the first group.

It is clear then that funding needs and the relationship between prescribed bodies corporate and representative bodies cannot be tied rigorously to the stage that each group has arrived at in the claims process, nor to its corporate status. That is, it will not be possible to put off the question of appropriate incorporation and adequate funding until after a determination or some other definitive stage in the process has been reached. It would be much easier if it could. There is need for a compulsory conference between the Aboriginal parties early in the claims process resulting in a mandated prescribed body corporate (perhaps more than one) whose funding requirements and relationship with the representative body are determined in advance, and which has standing to negotiate in mediation and for 'future act' notices. If this need were addressed this early it would make the eventual requirement to nominate a prescribed body and register a body to hold the rights and interests on determination much easier. It may be, indeed it is very likely, that in the early stages of a claim the results of such a conference would be a simple umbrella or shell organisation with the representative body shouldering much of the responsibility for negotiation. By mediating among the claimants, consultation over appropriate forms of incorporation, and the community itself gaining experience of the dynamics of the claim, the initial basic organisation could be tailored to more and more specific requirements, and responsibility devolved. At present many of the intra-Aboriginal conflicts and uncertainties that would need to be dealt with during this process may only surface on the point of the Federal Court's determination, and would have to be argued out in that inappropriate setting.

The *Native Title Act 1993* requires the court, when it has the intention of making a determination that title exists, to ask a representative of the common law native title holders to nominate a prescribed body to manage the rights and interests associated with the title either as trustee or agent. It is not clear in the legislation how this requirement is to be carried out, and there is therefore a need for clarification in further Regulations or amendments to the Act. Obviously, by the time that the court is able to make a determination that title exists it will have had available to it enough of the facts to identify the common law native title holders and choose an appropriate representative. The method of choice is not clear, however, nor is it stipulated how that representative of common law native title holders (perhaps a representative body organisation and not actually a common law native title holder individual or group) will go about the process of nomination. There is no requirement for consultation, or process of preferring to register one native title body corporate over another. There is considerable potential for others claiming to be, or to represent, the common law native title holders to intervene before the court and seek to influence the decision.

Nor is it clear what options are available to the Federal Court in accepting or rejecting the nomination of a prescribed body corporate. It is unlikely, in my view, that it would be

able to accept the nomination of more than one without making separate determinations for separate groups of common law native title holders. The process seems to be that the court accepts that title is held and should be registered; the court asks those holding title to nominate a body to hold/manage the rights and interests associated with it; their title is registered and so is the name of the body to hold/manage the rights and interests associated with it. Multiple prescribed bodies corporate and registered native title bodies corporate would require a determination that there are multiple common law native titles in existence. Such a determination would depend on the way that the case had been run, the evidence presented, and the court's assessment of the evidence. Claims and counter-claims for registered native title body corporate status on the point of a determination would effectively require re-running the case. It would certainly be unnecessarily divisive, costly and time-consuming.

The potential for conflict on the point of a determination could be reduced if appropriate prescribed bodies corporate were put in place at the outset – prescribed bodies corporate that are the result of a negotiated outcome of interested parties, that can be monitored and their structure adapted during the conduct of the case, and that are endorsed by the National Native Title Tribunal and the representative bodies, and have their funding needs broadly guaranteed by ATSIC agreement. It is also, in my view, necessary to put in place regulations governing the process of nominating a prescribed body corporate under s.56 and s.57 of the *Native Title Act 1993*. Consideration should also be given to amending the *Native Title Act 1993* so that prescribed bodies corporate are nominated a specified period of time after a determination so that they can be tailored to the nature of the common law native title holder group identified in the determination, if indeed the court makes any precise identification. There is also a need to clarify the intent of the entire Division Six of the *Native Title Act 1993*.

Settling on the prescribed bodies for a claim at the start will mean that ATSIC does not have to adjudicate funding for numerous prescribed bodies corporate incorporating at any stage of the process up until the last minute, although it will still have to consider funding policy for native title claimants and groups gaining recognition of their title to land. The problem for ATSIC of how to fund competing groups in the claims process is not really a prescribed body corporate problem. It exists whether the groups are incorporated as prescribed bodies corporate, Aboriginal corporations, or indeed remain unincorporated. They will assert their right to control over funding and treatment and their requests will have to be heard and assessed.

Minimising and clarifying problems with a compulsory conference

The problems of future prescribed bodies corporate outlined here are intimately linked to the question of the social boundaries of a group already discussed. The representative bodies have mediatory functions in this regard under s.202(4)b of the *Native Title Act 1993*, and the government has proposed to make these mandatory in its amendments. They will also be required to endorse claimant applications prior to registration in the National Native Title Tribunal and to render assistance to prescribed bodies corporate. Since ATSIC has a funding role in this it is appropriate that ATSIC should be involved in

the preliminary discussions and make clear its intentions whether to directly fund any of the claimants, if so for what purposes, and to be apprised of any extraordinary funding needs the representative body may have in meeting its mandatory responsibility for a particular claim. Alternatively, it may be more appropriate for ATSIC to delegate these decisions to the representative bodies for advice. Among other interested parties there is the National Native Title Tribunal which has an interest in the orderly and managed lodgment and mediation of claims, and the common law native title holders who have interests in the fullest recognition of their rights. Regulations governing the National Native Title Tribunal should be amended to require a conference between all of these parties at the outset of a claim. This could either be after application has been made but prior to endorsement by the representative body and registration of the claim, or after the claim has been accepted and prior to mediation.

At this conference the appropriate prescribed body corporate(s) should be identified. Consideration should be given to amending the Regulations so that they can be established only as a result of such a conference. At the same time the question of the prescribed body corporate(s) relationship to the representative body and funding questions should be determined, at least for the initial stages of the claim. There will probably be a need for several such conferences during the course of a claim as the relationships between the common law native title holders becomes clearer, the prescribed bodies corporate gain experience and coherence, and mediated outcomes are realised. Such a series of conferences would put the common law native title holders and other stakeholders in a more secure position to nominate appropriate prescribed bodies corporate on the point of receiving a determination.

The relationship between representative bodies and prescribed bodies corporate

It is understood that ATSIC has pressing reasons for not wishing to fund claimant groups directly to run their claims, nor to allow representative bodies to hand over block funds for this purpose. This is largely because no other Australian groups have the ability to apply for grants-in-aid for legal purposes which are entirely at their own disposal. Native title cases are usually highly contentious with the potential to affect severely the material interests of non-Aborigines. The suspicion that Aboriginal groups may be unfairly advantaged must be avoided, unreasonable though such a perception might be. For this reason tight control of the process by representative bodies with statutory functions is currently the preferred option of ATSIC, the government, and some representative bodies themselves. It may initially seem administratively more practical and less costly to fund representative bodies to run claims and negotiations, and only to fund the registered native title body corporate that results for its social support needs in the normal run of grant allocation. However, there are a number of problems with this approach that will make it difficult to apply in practice.

Some claimants will already be represented by organisations with some ATSIC annual funding for transport, office expenses and communications. It will not be possible for ATSIC to stipulate that these resources not be used for supporting claims. New organisations established to run claims, probably as prescribed bodies corporate, will find

it discriminatory that some organisations use their support services for their claim while they find ATSIC guidelines restrict them from applying for the same purpose. They will probably apply in other terms, and sympathetic Regional Councils will make these guidelines difficult to enforce (they may use their land-needs budgets, for example).

Some organisations will need funds to assert their rights under the *Native Title Act 1993* after they have received a determination and are living on their land. They will not be able to make the distinction between grants to run their community affairs, and resource needs for negotiating over use and benefit of the land by mineral exploration companies or other developers.

While it is efficient and necessary that the representative bodies supply professional services, it is impractical that they should also provide all the administrative support in a long-running negotiation. This would result in a representative body branch office in every area of claim, something which the forward plan of the organisation may not call for, and which would be inappropriate if a claim were to fail or the registered native title body corporate were to become self-funding as a result of negotiations.

While it is possible to control the use of ATSIC funds, it would be seen as grossly inequitable if amendments to the *Native Title Act 1993* or the Regulations forbade all direct funding from whatever source. Claimant groups have the right to go elsewhere for funding if the opportunity arises, as do all other parties to the claim. Consequently, some groups may attract industry funding to run their claims. These would probably be groups with which industry feels it can come to amicable arrangements. Other groups with interest in the same land may have more extensive demands and may not find industry support. In such a case they would feel hamstrung by the need to rely on ATSIC and the representative body entirely while other groups are directly funded.

Taking all of these problems into account it is clear that a distinction needs to be made between provision of legal advice (and associated expert advice such as anthropologists) and the provision of equipment and personnel to enable a claimant group to best use these services in the process of negotiation, the hearing, the determination and subsequent use of the land. It is very firmly suggested that ATSIC consider funding community groups for costs associated with negotiation and claim, either as an increment on top of existing funding or as seed grants for groups not at present receiving funding. ATSIC, of course, has had its 1996 budget cut, and even prior to this had difficulty funding any new projects as this involves the difficult task of de-funding existing recipients. This leads to the need to consider overall funding implications for ATSIC, and as part of this, the relationship of the representative bodies to the prescribed bodies corporate/registered native title bodies corporate.

If the native title legislation lives up to its apparent purpose of returning land owned by Aborigines, Aboriginal grant needs for housing, community infrastructure, communications and transport will expand enormously. There is no escaping this, plans need to be made now to ensure that government is aware of these expanding needs in the context of a shrinking budget. Some groups will be able to gain financial reward from negotiating access and use of their land by non-Aboriginal interests, but even to do this effectively they will need to be funded. Government needs to be persuaded that benefits will accrue to all parties if native title is efficiently administered, and discussions should

take place on ways to get industry to finance a proportion of the burden. A number of models could be proposed.

- Representative bodies could be funded from consolidated revenue with a proportion repayable by industries that benefit from negotiated access to native title land and from royalty-type benefits to prescribed body corporate/registered native title bodies corporate.
- A loan pool could be organised from other sources with repayment options linked to benefits.
- Certain industries, notably mining, could be levied to provide a pool of funding for representative bodies which ATSIC could administer.
- Prescribed bodies corporate and registered native title bodies corporate that benefit from negotiated agreements using representative body resources could be required to repay the representative body on a fee-for-service basis thus routing some funding for representative bodies from industry through the prescribed body corporate to the representative body.

Some of these options will not initially be received with enthusiasm by claimants to registration who will probably wish to retain all of the benefits for themselves, especially when they have no choice about using representative body services. Net loss to them, however, will be minimised in practice since this cost component will be added into agreements where presently it is discounted, as the present ATSIC funding of the outcome is 'invisible'. Industry can be expected also to be unenthusiastic initially because it has not yet been fully accepted that the costs are incurred as a result of wishing to make use of Aboriginal property, a use that has hitherto been granted without the involvement of the owners. The benefits in speeding up the process while finding non-government funding could be expected to be a powerful argument for government support of such proposals.

There remains to be discussed the ideal relationship between the representative bodies and the prescribed body corporate during a claim and in negotiations over use of the land. It has already been suggested that it is to the advantage of the representative bodies, as well as the claimants and those they negotiate with, that the claimants should be funded for support services required in order to access their rights under the *Native Title Act 1993*. Representative bodies should provide them with specialist personnel. There are three models for this:

- i. using a central staff base supplemented by centrally contracted consultants for all claims, with central allocation and re-allocation of tasks on a daily basis,
- ii. briefing out claimants' cases to specialist consultants with central coordination and administration,
- iii. secondment of staff and consultants to claimants on a case-by-case basis.

The initial stages of a claim can be handled with staff resources, but as the claim develops this will become impractical. Claims will require at least a core of specialist personnel who will, ideally, stay with it to a conclusion. This is not to say that specialists cannot handle more than one claim. Depending on the nature of the claims they may

handle several, but they cannot be re-deployed at will across a broad range of claims in the way that other staff and resources may be. There is a further problem with using staff lawyers where there are disputing parties that may contest each other in court. The lawyers cannot remain employees of an organisation that is representing their client's opponents, because the various solicitors in an organisation are deemed to be in possession of all the information received by the organisation. They are therefore, technically, in receipt of privileged information. Indeed, if a lawyer begins to work for a group in formulating its case and the group later splits, the lawyer cannot work for either party as he/she has privileged knowledge of the opponent's case.⁶

Briefing out claims for legal advice and anthropological services is one way of dealing with this problem and achieving consistency throughout the claim, but it has drawbacks. Using staff legal and anthropological services, or such specialists on retainer to the representative body, will be significantly less expensive. It also allows for greater policy control over the cases by the organisation that is responsible for coordinating the 'big picture' across a region. Where there are disputes between claimants, separately briefing out each case tends to entrench the parties' differences, leads to win/lose outcomes, and provides obstacles to the representative body's mediating role.

Secondment of professional services, which have been contracted by the representative body then provided to the prescribed body corporate removes some of these difficulties. It also allows for costings to be made that may later be recovered, as it is the representative body that is directly providing the service. Secondment can take the form of simply allocating professionals to work with certain claimants and relocating them to the claimants' district. Where there are disputing parties it will have to be more formalised than this. Secondment of different personnel to disputing parties allows the representative body to retain oversight of the dispute, and may avoid the legal ethical difficulties for lawyers as officers of the court and members of their respective Bar Associations.

⁶ Irving pers. comm. Irving, a solicitor with the Kimberley Land Council in Broome, is preparing a paper for the AIATSIS *Lands, Rights, Laws* issues papers series that draws attention to this problem among other issues for legal practitioners.

2. The Aboriginal Councils and Associations Act and customary law

Regulating social communities with the Aboriginal Councils and Associations Act 1976

The *Native Title Act 1993* Regulations insist that prescribed bodies (and resulting registered native title bodies) must incorporate under the *Aboriginal Councils and Associations Act 1976*.⁷ The report of the Ministerial review of the *Aboriginal Councils and Associations Act 1976* addresses the problems of the *Aboriginal Councils and Associations Act 1976* for existing Aboriginal corporations, including its cultural appropriateness. There are also problems for common law rights, and rights exercised under the *Native Title Act 1993*. It is crucial to understand the nature of a registered native title body corporate and its relationship to the common law native title holders, so this will be discussed in general terms first. Following this the sections of the Act with most potential to impact on custom and common law rights will be assessed.

There seems to be no intention in the *Native Title Act 1993* that prescribed bodies corporate should be the institutional embodiment of the common law native title holders, only that they should act for them. This intention is modified by the Regulations concerned with membership. The *Aboriginal Councils and Associations Act 1976*, on the other hand, could be said to have come into existence to give simple shape to pre-existing Aboriginal social and cultural groupings, though the review has shown that in practice it does not do this. The administration of the *Aboriginal Councils and Associations Act 1976* is very heavily weighted to a mainstream Australian interpretation of corporate accountability and very little in it encourages culturally appropriate incorporation. In effect then the *Aboriginal Councils and Associations Act 1976* produces Aboriginal corporations that are distinct from and differently structured to the communities they are often taken to embody.

This distinction must be born in mind. In practice in the functioning of Aboriginal corporations, and in potential in the functioning of prescribed bodies corporate and registered native title bodies corporate, there are two entities: the social and political community, and the corporation. The community operates according to customary laws.

⁷ While the following concentrates on the *Aboriginal Councils and Associations Act 1976*, it will be seen in parts of the initial commentary and in the Conclusion that all forms of incorporation diminish customary law unless the corporate structure embodies the community, reflects customary practice, and allows for self-government.

The corporation operates according to statute. There is no structural reason why the two should not be distinct and separate, or why the second should attempt to reflect in European terms the dynamics of the first. There are, however, compelling social reasons that the two should either coincide or be functionally linked to each other, with the social community in dominance.

As long as the community (whether it be made up of common law native title holders or not) does not have any other institutional expression the organisation established to act on its behalf, or with its name, or on its land will be taken by the community itself as being properly its own institutional expression. When it is not serious disputes will arise. For instance, an Aboriginal corporation calling itself 'Nowangadja' will, regardless of its rules for membership and its objects, be assumed by Nowangadja people to represent them and be assumed to have responsibility for Nowangadja land and even Nowangadja culture. Unless the Nowangadja people separately incorporate (and here the control of names is an essential question) and put themselves in a structural relationship to the corporation that acts as their agent or trustee, they will believe that agent or trustee to be themselves. This will be all the more the case when they have been determined to be common law native title holders to have their title rights and interests managed by a registered native title body corporate.

It is necessary to say this because what follows is a description of the diminution of common law rights, or the affront to customary law, by the terms of the *Aboriginal Councils and Associations Act 1976*. Strictly speaking the *Aboriginal Councils and Associations Act 1976* has nothing to do with these, it will only regulate the agent or trustee of the common law holders, not the community itself. There may be good arguments for retaining a system of regulating such bodies. However, if the community has no other means of expressing itself and, importantly, no other means of enjoying its rights, regulation of the 'right exercising body' amounts to regulation of the 'right holding community'. For these reasons, as will become clear at the conclusion of this discussion paper, it is necessary to give consideration to either ensuring that the prescribed body corporate agent or trustee body reflects customary practice, or providing for a customary body with statutory mechanisms of control over the trustee or agent body. It may be advisable to amend the Regulations governing prescribed bodies corporate and registered native title bodies corporate stipulating guidelines for their establishment under any suitable Act, not only the *Aboriginal Councils and Associations Act 1976*. If not, it will be necessary to allow for a separate regime within the *Aboriginal Councils and Associations Act 1976* (suitably amended) for prescribed bodies corporate and registered native title bodies corporate. There may also be a need for amending the *Native Title Act 1993* to give greater clarity and detail concerning the operation of common law native title holder bodies registered native title bodies corporate that act for them, and the relationship between them.

The impact of the Aboriginal Councils and Associations Act 1976 on Aboriginal customary law

The *Aboriginal Councils and Associations Act 1976* has five parts. The principal ones for their impact on customary law and common law rights are the first, preliminary, section

that sets out definitions and guidelines, and sections four and five that govern incorporated Aboriginal associations and the rules for investigating and dealing with non-compliance with the Act. Section three allows for the setting up of Aboriginal councils with some measure of ability to govern an Aboriginal group within a defined area. This appears to offer the potential for native title holding groups to regain some of the measure of political self-determination that ought to be a part of recognition of customary land ownership. However, the provisions in the Act relate to a residential group within an area, not the owning group. They confer control over very limited aspects of the life of the group, are subject to very intrusive intervention prior to incorporation by the Registrar of Aboriginal Corporations and encourage non-Aboriginal procedures for representation and decision making. In any case, there have been no successful applications for the establishment of a Council in the twenty years of operation of the Act. Taken as a whole these features of section three are, no doubt, measures of the resistance of non-Aboriginal administrators to the idea even of limited Aboriginal self-government, and this section of the Act will not receive further attention here.⁸

The Regulations adopt the definition of an Aboriginal association that is in the *Aboriginal Councils and Associations Act 1976*. This allows 'spouses of Aboriginals' to be members of the Association. So does s.49(1) on membership criteria. The association, and subsequently the corporation, must have not less than five adult Aborigines as members (s.3, s.45(3A)). In as much as the 'association' is a grouping of people that applies for incorporation, in this instance as a prescribed body corporate, there is a contradiction here both with the Regulations and with customary law. The Regulations say that all members must be common law native title holders. Aboriginal customary law does not automatically give title rights to spouses without further qualifications such as residence and use. Whether customary law may bestow title rights to non-Aboriginals, even with these qualifications, is a difficult question which must be determined by each group (see below). The Regulations requiring all members to be common law title holders limit, and are incompatible with, the membership provisions of the *Aboriginal Councils and Associations Act 1976* and, at the least, pose a drafting problem.

Imposing a lower limit of five adult members also reduces common law rights. In fact, when s.45(3A)(c) of the *Aboriginal Councils and Associations Act 1976* is read in tandem with s.4 of the Regulations, which describe a prescribed body corporate's functions, it is clear that the body corporate must have at least twenty-five adult members to meet the requirements of the *Aboriginal Councils and Associations Act 1976*. This part of the *Aboriginal Councils and Associations Act 1976* says if a corporation is neither formed solely for business purposes nor solely to hold land, ie if it intends to engage in other community activity, it must have twenty five members. Despite the fact that native title is a communal title, it is still possible for only one person to be the sole existing common law native title holder.⁹ Any group of common law native title holders of less than twenty

8 It was, however, dealt with in the interest of thoroughness in the original report to the Native Title Branch of ATSIC on which this paper is based.

9 I am aware of Justice Toohey's decision to the contrary on 'traditional owners', but that related to the terms of the *Land Rights (NT) Act*, which requires the existence of a 'group', not to customary law and native title.

five could not meet the requirements of both the Regulations (that members of the prescribed body corporate be common law native title holders, and that they incorporate under the *Aboriginal Councils and Associations Act 1976*) and the requirements of the *Aboriginal Councils and Associations Act 1976*, both in its definition of an association (s.3) and its membership provisions for a corporation, s.45(3A). Conceivably, twenty four people receiving a determination that they are common law native title holders would not be able to find a legal prescribed body corporate to nominate to hold their title or to act as their agent.

The *Aboriginal Councils and Associations Act 1976*, in addition, requires that the members of the corporation be adults. It is probable that Aboriginal customary law does not deny title rights to those persons under the age of eighteen, as the *Aboriginal Councils and Associations Act 1976* definition of 'adult' requires. It is arguable that an Aboriginal person acquires title rights on birth. A very large proportion of the Aboriginal population are children and by this provision have their title rights denied.

Section 3 also defines an 'unauthorised name', and s.45(2) allows the Registrar to deny incorporation if in his opinion the name is 'undesirable' or not available to a body corporate under the corporations law. This is contrary to Aboriginal custom, in which the ability to name and to have ownership of names is subject to complex protocols bound up with the ability to 'speak for' and thus have responsibility for land. Denying the rights to name a group amounts to an undermining of traditional Aboriginal practice and a diminution of title rights.

Under s.5 the Registrar can act as an agent for an Aboriginal corporation. This may conflict with the powers of a registered native title body corporate to carry out its functions under s.57(3)b of the *Native Title Act 1993* and s.4(1)b of the Regulations.

Members of an Aboriginal association can apply for incorporation under Part IV by providing the Registrar with, among other things, a copy of the proposed rules. While the rules may be based on Aboriginal custom (s.43(4)), they need to address a number of matters such as membership qualifications, dispute resolution procedures, the make up of a governing committee, rules for meetings, and managing funds (s.43(3)(a)-(h)) which may have no counterpart in Aboriginal custom or may be contrary to it. This is quite possible as under s.45 the Registrar is required to refuse to incorporate an association if he is satisfied that the rules are unreasonable, inequitable or do not give the members effective control over the organisation under section 58B (s.45(3)). Much of Aboriginal social life could be said, from a narrow ethnocentric viewpoint not unknown in Australian history, to be unreasonable and inequitable. Yet it would be difficult to establish that the members of an Aboriginal community do not have effective control over their lives within that community. However, the *Aboriginal Councils and Associations Act 1976* requires them to have control in the terms of section 58B.

This section requires that annual general meetings be held, and also special general meetings which can be called by any member who feels aggrieved unless the Registrar determines otherwise. The Registrar can himself call a special general meeting in some circumstances, in which case he is to conduct the meeting. At such a meeting a member cannot vote if his or her name is not on the latest list held by the Registrar. This section also requires the corporation's rules to stipulate intervals between meetings, quorums,

procedure and voting by proxy. This imposes alien procedures on the common law title holders that are not in keeping with Aboriginal custom, as do other parts of section 58.

The power of the Registrar under s.58A(3) to intervene in disputes without being asked, contravenes Aboriginal customary law.

The need to keep a register of members under s.58(1)(2)(5) and the provision of fines for not keeping one are not compatible with the full exercise of common law native title holder rights as they derive from customary law. This is because the membership of the corporation for the purposes of other provisions of the *Aboriginal Councils and Associations Act 1976* is taken to be those members who are on the list. Indeed, nowadays the Registrar will not generally accept draft rules of a corporation unless they require the members to apply to the governing committee, and be accepted into membership, and that their names and addresses are recorded on the list of members. This makes administration much easier than the simple rule that those belonging to a certain cultural category or geographical area are members, but it limits common law rights.

The possession and exercise of title in Aboriginal customary law is not dependent on application nor on registration, it is a right enjoyed by natural membership of a society. It will be unusual, in my opinion, for a determination of the Federal court to list common law native title holders, rather than describe the characteristics which the evidence proves constitutes the community, because such a list cannot be conclusive. Not only will it miss certain individuals, it will not do justice to the process of negotiation by which people become members of the native title holding community. This is not always by descent. There will always be individuals whose status is still a matter of community uncertainty, debate and contention. Similarly, no rules can be laid down that will capture all future native title holders. It is more workable and more in keeping with custom that the common law native title holders be determined as certain categories of individuals or those engaged in certain processes and relationships. If in the exercise of their rights through prescribed bodies corporate these individuals are to be registered, some will certainly be missed and be unable to exercise their rights, the process of translating one system into another may be open to abuse or confusion, and the integrity of Aboriginal customary procedures will be diminished.

Section 58 was amended, and sections 58A and 58B were inserted, in 1992 with the apparent intention of making an Aboriginal Corporation more accountable to its members. Accountability to constituent communities (not necessarily the members) is an important issue which has been the subject of some of the reports by the *Aboriginal Councils and Associations Act 1976* review team members (notably Finlayson and Martin). Section 58B does not meet the complex problems of community accountability, but imposes on the corporation culturally inappropriate procedures. It is linked in its operation to Section 45(3), and here lies the nub of the difficulty the Registrar has in incorporating culturally appropriate Aboriginal organisations. He is required by it to refuse incorporation if he is satisfied that the rules of the corporation "are inequitable; or do not make sufficient provision (as required by section 58B) to give the members effective control over the running of the association". This provides an extremely narrow interpretation of equity, gives too much power to the Registrar to determine this, and

allows for inappropriate assimilationist measures to be inflicted on groups who are required to incorporate simply to be able to access their common law rights. These provisions of the Act require much greater scrutiny, and need to be formulated in more sophisticated terms, if the customary rights of common law native title holders are to be reflected in the organisations established to manage them.

Section 47 provides that the rules of the corporation have the effect of a contract between the members, the corporation, the public officer and the governing committee. The implications of such provisions for groups of common law native title holders are deep. If, for instance, the prescribed body corporate is incorporated with inappropriate rules it will be possible for these to be enforced by one member against another in court. The existence of a parallel set of customary rules governing land use which may contradict these would not affect this, and Aboriginal custom may be undermined by court decisions which only consider formal contractual relations. If, on the other hand, customary relationships to land were to be formalised in a corporation's rules they would have the effect of a legally enforceable contract where otherwise, in Aboriginal custom, they would be subject to community review, negotiation, arbitration and customary decision-making processes. The appropriateness of such provisions for prescribed bodies corporate is problematic and needs examination.

Notwithstanding the effect of s.49A, which provides for the possibility of conferring limited rights of membership on people not entitled to be full members, s.49(1) does not allow for non-Aborigines, who are not married to members, to be members (conversely it does allow non-Aboriginal spouses to be full members). The appropriateness of this section needs to be determined by the common law native title holders themselves. There are situations where a community wishes a non-Aboriginal, by virtue of cultural association, to participate fully in the life of community, though not married to a member. Such a community is denied the ability to make this decision by this section and by the Regulations. Nevertheless, they are required to accept those non-Aborigines who happen to be married to community members, though unacculturated to community practices, to be full members under the *Aboriginal Councils and Associations Act 1976* (though not under the prescribed body corporate Regulations).

Race cannot be a traditional category among a people who have developed their traditions without races, it must be a new concept belonging to a time of contact of races, and its significance in Aboriginal thought must therefore be different to that of Europeans. In European law there exists the process of naturalisation into a community which confers equal rights. Section 49 denies the exercise of this discretion to common law native title holders. This is not a hypothetical issue, it is a matter of current concern in incorporation of at least one prescribed body corporate with extensive claims in the National Native Title Tribunal.

Sections 49A(1)(2) suggest that the method of decision making at meetings shall be by voting and the method of appointment to the governing committee shall be by election. This is not provided for elsewhere in the *Aboriginal Councils and Associations Act 1976*, but is understood to be the preferred method of the Registrar when assessing the appropriateness of the proposed rules for an incorporating association. This may be contrary to Aboriginal customary law.

Section 49B governs office-holding by persons with criminal convictions. This is another section where good corporate practice runs up against the problem of allowing the corporation to reflect the structure of the community. In a community organisation established to be the institutional expression of that community, such a provision may be a breach of individual human rights. There is a penalty on top of punishment for the crime in not being allowed to be an appropriately functioning member of the community. When the corporation acts for the common law native title holders it may be a breach of that individual's title rights under customary law. This provision allows for appeal that may have the potential to soften its impact, although the appeal is to the Registrar and to the Minister. Section 49E is potentially even less just as it removes the right of bankrupts to take a position that may reflect their customary position in the community. Although this also may be appealed to the Registrar, here again the norms of good corporate governance may breach the human rights of common law native title holders. A measure of the skewed nature of the *Aboriginal Councils and Associations Act 1976* (from the Aboriginal point of view) is gained by reflecting that anyone in breach of Aboriginal customary law cannot be denied access to office holding positions solely on the grounds of that breach.

Section 56(5) gives the Registrar power to direct the public officer to change the official address of the prescribed body corporate. This is culturally inappropriate, so is s.60. The power to copy and extract from documents under this section may be intended simply to refer to financial documents. However, despite the definition of 'document' in s.60(9) it remains broadly worded and secret/sacred information could be required to be copied using this power. As it stands it is culturally inappropriate. Similar provisions under s.68(1)(2) and s.70(1) also undermine traditional authority, have the potential to disturb the life of the community and may require the provision of secret/sacred knowledge.

Under these sections a prescribed body corporate could be wound up on the petition of the Registrar or a creditor and the Court may distribute the assets. The implications of this for the enjoyment of native title land need to be examined. If the assets of the registered native title body corporate are the lands of the common law native title holders there is potential for loss of land over debt. This is in contravention of s.56(5) of the *Native Title Act 1993*. In any case these provisions allow for the removal of the body that gives expression to the rights of the common law native title holders without their consent or involvement.

Consideration must also be given to the consequences of s.63(2)(g) which specifies grounds for a petition to wind up the corporation. One of these grounds is that "by reason of the complexity or magnitude of the activities of the Association, it is inappropriate that it continue to be incorporated under the Act". This is clearly intended for corporations whose business expands to the point where the corporate structure required is not easily achieved, or allowable, under the *Aboriginal Councils and Associations Act 1976*. The intention is obviously to encourage re-incorporation in a more appropriate form. The petition may be made by the Corporation itself (s.63(1)(a)). The Regulations do not make any provision for dis-incorporation and re-incorporation under another Act. Effectively they deny prescribed bodies corporate and registered native title bodies corporate their rights under this section of the *Aboriginal Councils and Associations Act 1976*.

Under s.71 the Registrar, with the approval of the Minister, is empowered to appoint an Administrator of an Aboriginal corporation. The governing committee is abolished and the Administrator takes over the functions of the public officer. The Registrar is required to ask the Corporation to show cause why this should not take effect and to have regard to the reply. Some of the grounds for appointing an administrator are that the governing committee has been acting in its own interests and not those of members, or simply that it is in the public interest to appoint the Administrator. The Administrator acts as an agent or a trustee on behalf of the corporation, and thus, in the case of a registered native title body corporate, of the common law native title holders. Appointment of an Administrator of native title lands and its benefits against the wishes of the common law native title holders is certainly contrary to Aboriginal custom. It may also be contrary to the common law rights that derive from this, and is possibly a breach of the civil and political rights guaranteed by international human rights instruments. In any event, it has the potential to remove control of Aboriginal land from the owners. These provisions as they stand are not appropriate for native title land-holding bodies.

Conclusion

There are clearly numerous elements of the *Aboriginal Councils and Associations Act 1976* that contravene custom, and possibly therefore the common law rights that derive from this. Yet many of these provisions have been seen to be necessary for the efficient and accountable operation of Aboriginal corporations. To remove them could be tantamount to allowing Aboriginal corporations to do anything they like in respect of their members and society at large. The difficulty arises because the *Aboriginal Councils and Associations Act 1976* goes further than the regulation of a corporate body to the regulation of entire social communities. Not surprisingly there is a clash of norms and concepts of right, and the effect is widely experienced as culturally oppressive. The situation can, briefly, be said to have arisen like this: there is a need for a corporate expression of an Aboriginal commonality (today, common law native title holders); there is also the need for corporate bodies that manage Aboriginal needs in a manner compatible with self-determination. Entirely inappropriately, the European model of a voluntary association is applied to cope with both these needs at once. There is assumed to be an 'association' already in existence with common purposes that wishes to incorporate. Membership and leadership are natural products of the fact of an association. On incorporation the association is required to meet certain norms of corporate behaviour for the good of members and the general public. In this way an entire community, with deeply felt sets of social relationships evolved over millennia, is required to assimilate to a narrow and formal series of requirements that are not appropriate to their social characteristics.

One critical point here concerns the concept of membership. If the requirement is simply to have a fair and efficient management body there is no need for a membership. By introducing a membership on the model of a voluntary association the aims of incorporation are obscured and the 'membership', ie the community, itself subjected to inappropriate scrutiny and regulation. Not surprisingly, in most cases the membership and governance arrangements of the corporation do not begin to reflect the complexity of the community. If, on the other hand, the requirement is simply to have an institutional reflection of the community, much greater attention needs to be paid to its structure in the first place, and it would need to be freed from many of the requirements of the *Aboriginal Councils and Associations Act 1976*. But the need for regulation would remain, and regulation of a social community as is required by the *Aboriginal Councils and Associations Act 1976* is culturally oppressive.

One way of approaching the problem is to separate these two kinds of organisations, formulate each on appropriate lines for the particular circumstances of the case, and institute lines of consultation and control between the two. To ensure just and equitable behaviour in such a case the social community would need to be in a position of overall

control. In some ways this simply puts the same problem at one step removed—how is the controlling group to be structured and regulated? There is a view, particularly inherent in the work of H.C. Coombs, that it is actually none of the business of non-Aborigines to concern themselves with the issue of effective community-based systems.¹⁰ However, control of land in a manner that is both commensurate with the custom from which the title derives and meets the just requirements of every owner of that communal title, does require a structure that is clear and open and subject to review. But it does not demand a corporate administrative structure along the lines an association, corporation or trust. What is required is a social and political structure that will unite once more the system of custom with the fact of land holding. The assumption that native title is a property right bearing with it no political rights, and that it therefore need only be administered by a corporation established by the general law, is manifestly contradictory. A parallel political and legal system necessarily exists side-by-side with the mainstream European-based law, it is from this that native title derives in the first place. Of course, it will vary from place to place and be affected by the historical experiences of the group. The parallel system must be recognised or it will continue to clash with non-Aboriginal expectations. The situation is rather like someone who refuses to believe in plate glass doors because he cannot see them; he is doomed to continue walking into them. The systems and structures that need to be devised for social communities are not those of European corporate practice but post-colonial self-governance. This requires institution-building sensitive to local culture and conditions, as it has everywhere in the world. This is not anticipated in the legislation governing prescribed bodies corporate. Until it becomes so the native title legislation will continue to be a disappointment to those who hold it, and those who wish to deal with them.

¹⁰ For further discussion of this view see Sullivan 1997, a review of Coombs' *Aboriginal Autonomy*.

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