

Mediation and Dispute Resolution Report: Disputes and decision- making in Prescribed Bodies Corporate and Aboriginal Corporations

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Acronyms

AGD – Attorney-General’s Department

AIATSIS - Australian Institute of Aboriginal and Torres Strait Islander Studies

CLC – Central Land Council

CYLC – Cape York Land Council

FNLRS – First Nations Legal & Research Services (formerly NTSV)

GLSC – Goldfields Land and Sea Council

NTA – *Native Title Act 1993* (Cth)

NNTC – National Native Title Council

NNTT – National Native Title Tribunal

NQLC – North Queensland Land Council

NTRB/SP – Native Title Representative Bodies/Service Provider

NTSV – Native Title Services Victoria (now FNLRS)

ORIC – Office of the Registrar of Indigenous Corporations

PBC – Prescribed Body Corporate

QSNTS – Queensland South Native Title Services

PM&C – Department of the Prime Minister and Cabinet

RNTBC – Registered Native Title Body Corporate

TOGE – Traditional Owner Group Entity

TOS Act – *Traditional Owner Settlement Act 2010* (Vic)

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Introduction

This report is designed to address issues and challenges concerning dispute resolution and decision-making within Prescribed Bodies Corporate (PBCs) in the native title space nationally. It is also particularly concerned to investigate the significance for the National Native Title Tribunal (NNTT) of the reforms to the *Native Title Act 1993* (Cth) (NTA Reforms) proposed by the Attorney-General's Department (AGD).¹

At its inception, the research was envisaged as a joint research collaboration between the NNTT and the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) on behalf of the Dispute Resolution Working Group of the PBC Support Forum. However, owing to time and resource constraints on the part of AIATSIS, the report has been written by the NNTT. It should be noted that consultation between the two organisations was ongoing throughout the research project, with AIATSIS supplying the questionnaire sent to Native Title Representative Bodies/Services Providers (NTRB/SPs) along with suggested headings for the final report format.

The rationale for the research was to address the growing concern that PBC disputes are increasingly interrupting the ability of PBCs to function (particularly with regard to making native title decisions) and are beginning to drain the resources of the Office of the Registrar of Indigenous Corporations (ORIC) and the Federal Court (FCA) (Court). The research took its lead from the Dispute Resolution Working Paper presented to the PBC Support Group by Native Title Services Victoria (NTSV) (now known as First Nations Legal & Research Services (FNLRS)) in 2017.²

The intended methodology was to consult with stakeholders in order to create a survey by which to collect and collate data concerning current and possible future methods of dispute resolution within PBCs. After encountering problems engaging stakeholders to provide sufficient feedback for this to occur, it was decided that the survey be sent out in its original form to NTSB/SPs to collect their input. This, too, encountered engagement problems with only one of the NTRB/SPs completing the survey.

In August 2018, an interim report was produced by the NNTT which focussed on the proposed NTA Reforms contained in Attachment F of the Options Paper - *Post-determination dispute*

¹ (2017) *Reforms to the Native Title Act (Cth): Options Paper*. Australian Government, Attorney-General's Department.

² NTSV (FNLRS) Dispute Resolution Working Paper.

*management*³, and their ramifications on the operation of the NNTT and its capacity in the dispute resolution space. This interim report was prompted by the NNTT President (President) and the Native Title Registrar (Registrar) to better prepare for a possible future role of the NNTT in mediation and dispute management/resolutions in light of these amendments. The following report is the final version of the earlier interim report and contains a fuller discussion of the issues presented in the interim report with the benefit of additional research.

Methodology

This report is informed by a review of relevant literature conducted with the assistance of The Aurora Project intern, Julia Daitche. The literature review focussed on dispute resolution within Aboriginal Australia and in the contexts of native title in the pre-determination and post-determination phases. Attention was also given to the subject of risk management, with the functions and reputation of the NNTT foremost in mind.

The research and findings presented in this report arise also from a series of meetings conducted with state and federal native title stakeholders, and the information contained in the completed survey from Goldfields Land and Sea Council (GLSC). The issues raised by these stakeholders are, in my opinion, generally applicable across the country and resonate with those experienced by Traditional Owners and other stakeholders throughout each state and territory.

The meetings from which this research discussion was drawn are as follows:

- 25/06/2018 – Meeting between the Department of Prime Minister and Cabinet (PM&C), ORIC, AGD, and the NNTT regarding Attachment F of the NTA Reforms (with specific focus on proposal F11).
- 26/06/2018 – Meeting with The North Queensland Land Council (NQLC), Cape York Land Council (CYLC) and the NNTT regarding dispute management, resolution, mediation and the role of the NNTT.
- 28/06/2018 – Discussion with Dr Valerie Cooms (accompanied by former Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda) regarding dispute management/resolution and operations within the Quandamooka Yoolooburrabee Aboriginal Corporation (Quandamooka) RNTBC and the future role of the NNTT regarding mediation and dispute resolution.
- 28/06/2018 – Meeting with Queensland South Native Title Services (QSNTS) regarding dispute management, resolution, mediation and the role of the NNTT.

³ (2017) *Reforms to the Native Title Act (Cth): Options Paper*. Australian Government, Attorney-General's Department. Attachment F, pp: 31-34.

- 04/07/2018 – Meeting with First Nations Legal & Research Services (FNLRS) regarding dispute management, resolution, mediation and the role of the NNTT.
- 17/07/2018 – Interview with Chris Marshal (Manager, Administration and Corporate Development) of Taungurung Clans Aboriginal Corporation regarding Traditional Owner Group Entity (TOGE) dispute management/resolution.
- 07/08/2018 – Interview with Wathaurung Aboriginal Corporation CEO Paul Davis regarding TOGE dispute management/resolution.
- 20/09/2018 - Interview with Central Land Council's (CLC) PBC Support Manager regarding PBC dispute management/resolution.
- Completed dispute management/resolution questionnaire – GL&SC.

Notes from these discussions have been recorded and analysed in order to form an overview of the main issues and developments facing the NNTT, and the native title sector, should the proposed amendments become law in the immediate or near future. The headings presented in this report have emerged from the analysis of this material.

The section entitled *Framing* presents themes which have emerged from the research and have framed discussion about the functionality of PBCs, the need for the proposed amendments and the future role that the NNTT might play in the dispute management/resolution and mediation spaces within the PBC context.

The section entitled *Risk Environment* discusses the risk environment generated by ongoing PBC disputes with respect to Traditional Owners groups, PBCs as ongoing entities and other Native Title stakeholders (including the NNTT).

The section entitled *Disputes* describes the various PBC disputes emerging from the research data and discusses the possible mediation and dispute management/resolution roles of the NNTT in light of the proposed amendments to the NTA.

The section entitled *Existing Dispute Resolution Strategies* discusses the different strategies that PBCs, NTRB/SPs and Land Councils have deployed to manage and/or resolve internal and external disputes. It also identifies current concerns about barriers to dispute management/resolution within PBCs and the broader native title context.

The section entitled *Proposed Dispute Resolution Strategies* is a discussion of the different strategies for dispute resolution, management and mediation suggested by the stakeholders who have engaged in the research. This section is broad-ranging and is presented for the purposes of providing the President, Registrar and other stakeholders with the broadest possible perspective.

The section entitled *Further Considerations* presents issues currently arising from within the native title space which are beyond the scope of this report, yet will impact upon dispute resolution within the arena of PBCs. These considerations are intended as suggested areas of further research.

Framing

Within the broader context of disputes and dispute resolution, stakeholders spoken to during the initial phase of this research have indicated a degree of uncertainty about what constitutes a 'PBC dispute'. The AGD noted that the term 'PBC dispute' is not yet adequately defined and is currently a catch-phrase which could mean a number of things. This is particularly the case concerning the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) and the current powers of ORIC.⁴

ORIC has suggested that there needs to be a process put in place to identify which kinds of dispute would be suitable for resolution. ORIC representatives report that many disputes referred to it are actually complaints (rather than disputes between two or more parties). An example of this is when ORIC is informed by a Traditional Owner that they have been excluded from a royalty payment because of a poorly defined estate group boundary within a larger native title determination area. In these instances, ORIC is bound to point out that it cannot intervene as it has no powers to do so. This is also the case where people have been excluded or delisted from PBC membership. Once they are no longer a member, ORIC has no power to assist them as they fall outside the jurisdiction of the CATSI Act.

ORIC further advised that, while they do have some dispute resolution powers, these are activated after a PBC is registered. Prior to this, they are limited to providing the corporations rule book and assistance with regard to its interpretation and implementation. ORIC noted that it had recently been helping Torres Strait Islander PBCs to amend dispute resolution rules but that it was not actively conducting mediations. ORIC further noted, however, that it does have an investigative function which could be triggered during a mediation if an appropriate matter were to arise.

The burden of compliance demanded by the CATSI Act is also topical in this context. There is a general acceptance that this burden is too great for many PBCs given the acknowledged dearth of capacity in the sector, particularly in the initial years of operation. QSNTS used the example of the requirement for PBCs to hold meetings under the CATSI Act. They noted that this is beyond the resources of many PBCs as they simply do not have the funds they need to

⁴ With regard to Native Title corporations, I have been much informed by Mantziaris C & Martin, D (2000) *Native Title Corporations: a legal and anthropological analysis*. The Federation Press: Sydney.

comply. This is further exacerbated by the capacity deficit (which also might be addressed with the provision of more and better targeted funding).

QSNTS reported that ORIC does not have the resources to enforce this requirement and this results in many PBCs simply ignoring it. More broadly, they felt that there needs to be a greater balance between the compliance burden of PBCs and the ability of ORIC to enforce it. As current requirements are unrealistic, many PBCs are giving up on efforts to be compliant.

The stability of PBCs is another theme by which discussion concerning dispute resolution is framed. NTRB/SPs have suggested that PBCs appear to become more stable over time and that those that do survive have done so by securing a sustainable source of funding and maturing as organisations.

The need for both better dispute resolution processes and an objective third party, acting as an honest broker to manage and resolve disputes that occur within PBCs⁵, was universally recognised by the stakeholders engaged in the research project to this point. Representatives from both the AGD and the PM&C supported expanded dispute resolution functions for the NNTT.

Representatives from PM&C reported that they were considering changes to the CATSI Act to give the Court exclusive jurisdiction in civil matters in relation to PBCs and the CATSI Act. In addition, changes are proposed to the CATSI Act which will require Registered Native Title Bodies Corporate (RNTBCs)/PBCs to include a dispute resolution process in their rule book in relation to disputes with native title holders who are not members of the PBC (PBCs are currently only required to have such a process in relation to disputes with members of the corporation). PBCs are encouraged to try to address conflicts internally before further action is taken. Such next stages could be that the conflict is referred to ORIC or the NNTT, depending on its nature. If the dispute cannot be resolved, the parties could apply to the Court for mediation. According to the PM&C, this approach has been suggested to encourage long-lasting agreements rather than court imposed solutions and in order to save money and reduce expenses in an environment in which cost saving is an imperative.

The NTRB/SPs and PBCs engaged with have also identified the lack of a formal process for dispute resolution at the PBC level as a serious and immediate problem. They have further identified that there must be some middle ground between being unaware of, or ignoring, a dispute with the potential to disrupt the administration of a PBC (no intervention) and sending a PBC into special administration (total intervention). Indeed, ORIC reported regularly receives complaints from PBC members and advises them initially on how best to operate the

⁵ Here I am referring to disputes that are not solely complaints made by one party about another and that are within the power of statutory authorities to act upon.

dispute resolution clauses in their rule book. ORIC advised it is reluctant to intervene as its only option for intervention is drastic and, at times, destructive.⁶

Another theme which has emerged from the research is the ongoing impact of the pre-determination phase for groups which are able to prove native title. Claim groups are encouraged to become inclusive in order to limit the number of Aboriginal and Torres Strait Islander respondents after a claim has been notified. In this way, internal boundary disputes are often overlooked or purposefully set aside until after a determination has been handed down by the Court. However, these disputes remain and often become deleterious to PBC administration in the post-determination environment, particularly where they involve the distribution of compensation or other monies stemming from Future Acts or Indigenous Land Use Agreements (ILUAs). In these instances, the claim groups for which PBCs are created can be seen to enter into an exclusive phase in which previously unresolved boundary disputes come to the fore once more.

Related to this is the gulf that can open between the traditional lines of authority within each claim group (and within estate groups and families therein) and the lines of corporate authority in contemporary PBC administration. This internal inconsistency between the requirements of a modern corporation and the structure of pre-colonial kinship systems is a constant factor in dispute management and resolution throughout the PBC sector.

Finally, the statutory reach of both ORIC and the NNTT are also factors in discussions concerning mediation and dispute resolution in the PBC sector. The NTRB/SPs who have engaged in the research have expressed a desire for the NNTT to have more 'direct reach' into the PBC space to be able to engage in mediation and dispute resolution on a statutory basis. As has been noted by the President) and Registrar , the NNTT attempts to assist in this regard wherever possible within its current powers.

Risk Environment

Elements of the risk environment⁷ within which mediation and dispute resolution lie have emerged from the initial discussions with government agencies, NTRB/SPs and PBCs. The first of these concerns the ability of other native title stakeholders to keep parties in dispute sufficiently engaged with each other to reach a point of resolution. This is particularly relevant in the native title sphere as parties involved in PBC disputes are often deeply connected with

⁶ Destructive with regard to the relationships that exist within PBCs and between PBCs and government bodies that are crucial to the period of special administration ending and the resumption of normal administration.

⁷ For a detailed discussion of risk in the modern world, see Beck, U. (1992) 'From Industrial Society to the Risk Society: Questions of Survival, Social Structure and Ecological Enlightenment' in *Theory Culture Society* vol. 9, no. 97, 1992, 97-123; Giddens, A. 'Risk and Responsibility' in *The Modern Law Review*, vol. 62, no. 1, 1999, 1-10.

each other through ties of kinship, culture and history, even where they assert different cultural and/or group identities.

Attempts at dispute resolution in these instances must be culturally informed and performed by experienced and culturally aware mediators as there is a great risk of conflicts becoming intractable and uncontrolled. It is because of this risk, that parties to a dispute who are closely related will often seek to disengage from each other where the benefits of resolution are perceived not to be greater than the consequences of continued engagement.

This points to one of the differences between Aboriginal and Torres Strait Islander and non-Aboriginal and Torres Strait Islander corporations, in that Aboriginal corporation members are much more likely to personally bear the consequences of a bad decision or an unsuccessful agreement. As was emphasised during discussions with the CLC, many conflicts are avoided due to the tendency within closely related Aboriginal groups to avoid the kinds of conflict which might consequentially activate ties of family loyalty along structures of kinship. Owing to the nature of polity and extended kinship networks within Aboriginal families, Aboriginal people risk the consequences of corporate decision-making in a way inconceivable to the average non-Aboriginal corporation member. This speaks to the poor fit between Aboriginal social structures and decision-making and the CATSI Act but, on a broader level, it highlights the complexities faced by all stakeholders in the native title process in attempting to bridge the gap between Aboriginal law and custom and commonwealth and state legislation.

This is a compelling aspect of contemporary Aboriginal relations which is highly visible in the native title era. However, it does not have to present a barrier to operational decision-making. If this feature of contemporary Aboriginal culture is taken into account, it may be utilised to affect dispute management while preserving a PBC's ability to make native title decisions.

For instance, mediation between family groups may be more amenable to the parties involved where respect is given to the structural and personal relationships between families in conflict, which lie beyond the realm of the dispute at hand. An example of how this might work is provided by Bauman and Pope (2009) in their discussion of a case study of a conflict in Cape York, Queensland. In this instance, elders were brought in to attend mediation activities in order to lend their authority to proceedings and act as a powerful reminder that the conflict being experienced by their family members should not be greater than the ties that have traditionally bound them together. As Bauman and Pope explain, the presence of these elders was designed "... to remind participants of their ties to each other, their value as

members of family and the community, and to give their blessings and authority to any outcome reached between the parties”.⁸

The second element of the risk environment concerns the way in which native title disputes within PBCs can become arenas where pre-existing disputes are played out within the communities of those engaging in the conflict. In these instances, it is not possible for mediation focussed on native title dispute resolution to be effective, as the disputes concerned lie beyond the purview of native title and, therefore, are beyond the scope of mediation. Consequently, there is a risk of third parties becoming hopelessly entangled in non-native title family disputes where external assistance is focussed on dispute resolution as opposed to dispute management.

Here, there is also a reputational risk for Aboriginal people engaging in disputes which hinges upon either possession or interpretation of traditional knowledge. In these instances, different interpretations of cultural tradition can result in divergent understandings of group membership, country boundaries and familial association to particular localities and sites. This kind of conflict is exacerbated by the fragmentation of knowledge within some communities over time. Research data gathered for this report suggests that the fragmentation of knowledge, even in places such as the Central Desert, is gathering momentum as access to country becomes more and more difficult.

In the Central Desert, for example, there appears to be generational differences emerging concerning the conceptualisation of the relationship of Traditional Owners with country. For the older generation, who grew up on stations within the boundaries of their country, their relationship with country appears still to revolve around the obligations they have to country and the secret/sacred things that reside in it. It revolves around the things that link their people back to the beginning of time on country. For younger generations who have not had the same level of access to country or time on country with their elders, country can be seen, in some instances, as a resource which they may utilise to better navigate the contemporary world and enter profitably into the modern marketplace. This is not to say this is illegitimate or that they are somehow less connected to country in any way. It is more a reflection of the realities of contemporary Aboriginal Australia in which the PBCs must operate and evolve.

This generational complexity adds to the risk environment of PBC decision-making. Here the risk is that conflict, if not addressed adequately and timely, may develop not only between different parts of the same larger family group, but between different generations of the same family. While this is certainly not something unique to Australian Aboriginal families,

⁸ Bauman, T. & Pope, J. (eds) (2009) *Solid Work You Mob Are Doing: Case Studies in Indigenous Dispute Resolution by the Federal Court of Australia's Indigenous Dispute Resolution & Conflict Management in Australia*. Commonwealth of Australia: National Alternative Dispute Resolution Advisory Council, p: 102.

the pressures and complexity of responsibility and obligation within the context of native title are unparalleled in any other sector of the Australian community. This also involves risk for other stakeholders such as NTRB/SPs and government agencies because PBCs cannot properly function under circumstances where the decision-making environment becomes too complex and difficult. Where no relief is accessible, this type of conflict can easily engender conditions requiring special administration without any obvious hope of remedy.

The third element of the risk environment lies outside the dispute, but still within the claim group from which the PBC has arisen. Here, there is risk for members who are not involved in the dispute that the resolution, or continuation, of the conflict will result in either the loss of opportunity to benefit from an agreement (due to a stalled decision-making process) or another outcome which is negative from their perspective. This could be loss of membership, inclusion of an antagonistic family, loss of enjoyment of rights, dilution of Future Act and ILUA compensation, increased competition for jobs, etc.

While the authorisation process requires PBCs to make efforts to consult with and seek the consent of native title holders, in practice, attempts at consultation can be cursory. Research data suggests that, in these instances, the bare minimum is sought and there is no real sanction, other than special administration, in circumstances where consultation is inadequate or where the decision does not reflect the results of consultation.

The fourth element of the risk environment rests with the third parties who have an interest in the functionality of the PBC as a sustainable organisation. This includes any party seeking to make an ILUA with the PBC or seeking to negotiate Future Act compensation. These groups risk incurring the ill-will of a PBC if they attempt to make an agreement with a board which then changes dramatically in its composition due to internal power struggles. They may also risk coming into direct conflict with a majority of the original claim group, should the board of directors make agreements without proper and inclusive consultation with the other PBC members.

For example, NNTT mediators report instances where a PBC and Grantee have experienced these type of difficulties. Here, parties may have been negotiating for some time and may have come to the cusp of agreement, only for there to be some change in the PBC (or more often, a change in representation of the PBC). Where the new representative does not support the previously negotiated draft agreement, they are likely to suggest a different agreement. Alternatively, where PBCs are working well, and are well or consistently represented, mediations can be straightforward, and executing the agreement is often done at PBC Director level.⁹

⁹ This alleviates the need for lengthy and expensive 'signing trips' for a whole applicant group, for example.

The fifth element of the risk environment concerns ORIC's relationship with native title groups and the tensions created by ORIC's legal and regulatory responsibilities to PBCs. This risk was illustrated in the proceedings concerning the Gunditj Mirring Traditional Owners Aboriginal Corporation (Gunditj Mirring). In this instance, on 13 July, 2017, ORIC placed the corporation under special administration until 15 December, 2017, citing "irregularities in director appointments and corporation meetings, largely arising from disputes amongst the corporation's directors and members".¹⁰

However, on 25 August, 2017, the decision was successfully challenged in the Court by two former directors, on the grounds that the process by which the corporation was placed under special administration was defective. At the request of "a number of the corporation's members and one of its three directors"¹¹, Gunditj Mirring was again placed under special administration until 15 January, 2018.¹²

Here, if briefly, ORIC was found to have exceeded its authority and to have wrongly imposed special administration on Gunditj Mirring. Future challenges to the authority of ORIC such as this may well entail a significant loss of face and significant reputational cost. Even as it stands, had this been a higher profile PBC, the reputational consequences may have been more severe. Challenges of this nature only add to the urgency surrounding the efforts of native Title stakeholders to deal effectively with PBC disputes. This, it would seem, further strengthens the case for the passage of the proposed amendments to the NTA.

The sixth factor concerns the Full Court's decision in *McGlade v Native Title Registrar* [2017] FCAFC 10 (McGlade) and its ramifications for native title decision-making. The NTA was amended in response to the McGlade decision and now allows for the execution of ILUAs by a majority of applicants as a default position. However, the group is able to override the default position by specific instructions about how the applicant is to exercise its authority to represent the interests of native title holders (for example, by majority, only a certain number, only specific members, etc.). Similar arrangements are proposed in the native title reform package regarding the way the applicant represents the group's interests in relation to native title claims and s 31 agreements. While not affecting how the applicant is authorised by the claim group, this may well de-emphasise 'traditional decision making' (or lines of authority) and create new layers of complexity as more traditional lines of authority become destabilised, at least in the short term. If not managed and supported properly by NTRB/SPs,

¹⁰ Hugg, L. (13/06/2017) 'Registrar to reform of Victorian Native Title Corporation', ORIC Media Release.

¹¹ Hugg, L. (14/09/2017) 'Registrar recommits to reform of Victorian Native Title Corporation', ORIC Media Release.

¹² Styles, C. (16/01/2018) 'Victorian Native Title Corporation handed back to members', ORIC Media Release.

some PBCs may become conflicted and unable to meet the burden of compliance and decision-making obligations. The problem then may fall to the Court to resolve.¹³

Kinship ties, multiple affiliations and decision-making (traditional or otherwise).

The ties which are found in Australian Aboriginal kinship networks exert a great deal of influence upon the decision-making processes of PBCs. Across the continent, the structural nature of relationships within these kinship systems has allowed them to survive contact with colonial Britain and continue to function into the present day. Even where colonisation has had its greatest impact, kinship systems have proven remarkably tenacious, evolving into different structures which ensure they continue to perform many of the same functions as they once did in the pre-colonial era.¹⁴

Importantly, the variation in socio-cultural norms and structures in pre-colonial Australia was never sufficient to create societies so vastly different as to not exhibit many common features. Howitt and Fison offer a useful discussion of the two seminal structural features of Australian Aboriginal social organisation:

We may view the tribe as a whole made up of certain exogamous intermarrying classes, or we may study it as a whole made up of certain local divisions, each of which may contain members of all classes aforesaid. The former may be called its social aspect, the latter we may speak of as its local and physical aspect.¹⁵

Here, Howitt and Fison broadly outline the way that overarching social institutions, such as moieties, skin sections, totemic associations and initiation cohorts, create the context and logic within which local organisation occurs. In the same passage they go on to describe how these higher level social features are, in turn, translated by local groups to conform to local conditions, resources and opportunities. In this way, they are not philosophically abstracted forms (such as is Plato's theory of forms). Rather, they are the product of the interplay between social logic and local contingencies which produce a variety of kinship networks which can be understood as variations on a theme.¹⁶

¹³It would be good to be able to estimate the cost of these proceedings for the Court, the NTRB/SPs and the PBCs involved and to seek to understand the kind of investment in time and expertise it currently takes to resolve these compliance issues.

¹⁴ O'Kane, M.P. (2017) 'How kinship structures have been adapted to allow continued descent of rights and interests in North-western Victoria' in *Australian Aboriginal Studies*, Australian Institute of Aboriginal and Torres Strait Islander Studies: Canberra.

¹⁵ Howitt, A. W. and L. Fison. 1883. 'From Mother-Right to Father-Right', *The Journal of the Anthropological Institute of Great Britain and Ireland*, Vol. 12, p: 33.

¹⁶ Howitt, A. W. and L. Fison. 1883. 'From Mother-Right to Father-Right', *The Journal of the Anthropological Institute of Great Britain and Ireland*, Vol. 12, p: 33.

Within this more traditional framework, decision-making rests firstly upon the structural authority of the decision-makers, relative to both the country involved and to each other. To a certain extent, the more traditional this structural authority is, the clearer the identity of those who have the right to make decisions in any instance becomes. For example, where there is an accepted understanding of which people are associated with which portions of country and of how they are associated with these areas (and with each other), there is less room for confusion and uncertainty. Commonly, this is where knowledge is, again, not fragmented but coherent and applicable.

In kinship networks that have undergone more extensive adaptation in response to historical and contemporary exigencies, there may be multiple and divergent understandings of these relationships, even where they share the same authoritative logic. For instance, disputation often arises within PBCs where a portion of a native title determination area is considered by more than one family as 'their' country in which they enjoy primary (and sometimes sole) rights to use and the rights to use and dispose of resources. In many of these instances, the families involved employ the same cultural authoritative logic to make their claims – i.e. (1) they are descended from an apical ancestor who has been shown to have an historical association with that portion of the determination area, (2) they are the custodians of knowledge specifically about the secret/sacred aspects of that portion of the determination area or (3) they are a part of a broader kinship group who hold either or both of the aforementioned associations with that portion of the determination area.

Where disputes such as these occur, they tend to be resistant to resolution or mediation because they arise from competing claims which employ the same cultural logic. Therefore, they involve competing statements of truth that are held equally firmly on both (or all) sides.¹⁷ This is particularly the case given how Aboriginal groups universally understand their responsibilities and obligations to country.

Anthropologist W. E. H. Stanner provides a window into this relationship when he makes the point that local groups, or 'estate groups', traditionally have a core area over which they assert primary and exclusive rights to land and resources. They also make use of a broader area, which he terms their 'range', in which they seek the full gamut of resources necessary for their survival throughout the seasonal course of each year. Importantly, Stanner stresses the distinction between estate as "the traditionally recognised locus ('country', 'home', 'ground', 'dreaming place') of some kind of patrilineal descent-group forming the core or

¹⁷ A useful book on the topic of longstanding, value based conflict is Mayer, B. A. (2009) *Staying with Conflict: A Strategic Approach to Ongoing Disputes* by Bernard A. Mayer. John Wiley & Sons: San Francisco.

nucleus of the territorial group”, and the range as “the tract or orbit over which the group, including its nucleus and adherents, ordinarily hunted and foraged to maintain life”.¹⁸

Of the relationship between the two (and speaking in the past tense¹⁹), Stanner further states that the “range normally included the estate: people did not usually belong here and live there but, in some circumstances, the two could practically be dissociated”.²⁰ For Stanner, the combination of these two things can be described as “an ecological life-space” called a “domain”.²¹ Stanner also opines that, while in “good habitats range and estate might be virtually co-extensive, a clear distinction between them being scarcely possible”²², this is not the case in more extreme environments such as those affected by drought or where water was seasonally scarce in the normal course of each year.

As he explains, an estate “for the practical purposes of life might amount only to places on a track, or a set of tracks, between exiguous waters in a wasteland”, while a range “might extend by common understanding into the territories of neighbours prepared to share food and water with the distressed”.²³ Thus, while nothing “could extinguish the fact and claim of estate”²⁴, Stanner clearly allows for the cohabitation of significant tracts of land in extreme or demanding environments.

Here, Stanner is stating that some portions of country are traditionally shared between neighbours, at least on the level of resource use in years of scarcity. Indeed, Roland Berndt’s discussion of Birdsell (1976) also points to the porous nature of ‘tribal’ boundaries and underlines the conceptual dangers of imposing strict language group boundaries on regional language group identities:

I do not suppose there is anything intrinsically wrong in speaking of ‘dialectal tribes’, except that ‘tribe’ does suggest a hardening effect in relation to that unit’s boundaries. I realise of course that the concept of boundary is crucial to Birdsell’s argument. While I

¹⁸ Stanner W.E.H. (1965) *Aboriginal Territorial Organisation: estate, range, domain and regime Oceania Vol 36* (1), p: 2.

¹⁹ I note here that, in many parts of Australia, the concept of range and estate remain useful anthropological descriptions of Aboriginal and Torres Strait Islander land use.

²⁰ Stanner W.E.H. (1965) *Aboriginal Territorial Organisation: estate, range, domain and regime Oceania Vol 36* (1), p: 2.

²¹ Stanner W.E.H. (1965) *Aboriginal Territorial Organisation: estate, range, domain and regime Oceania Vol 36* (1), p: 2.

²² Stanner W.E.H. (1965) *Aboriginal Territorial Organisation: estate, range, domain and regime Oceania Vol 36* (1), p: 2.

²³ Stanner W.E.H. (1965) *Aboriginal Territorial Organisation: estate, range, domain and regime Oceania Vol 36* (1), p: 2.

²⁴ Stanner W.E.H. (1965) *Aboriginal Territorial Organisation: estate, range, domain and regime Oceania Vol 36* (1), p: 2.

recognise the presence of language buffers or barriers, I cannot see these as being in fact hard boundaries.²⁵

In practical terms, this suggests that many boundaries between Aboriginal groups were not always hard boundaries such as those commonly desired within the practice of native title law (which seeks to understand the rights and interests of native title holders).

When considered in light of the fragmentation of traditional knowledge experienced by many native title groups and their PBCs across the country, this puts disputes about the primacy of groups within PBCs to exercise exclusive (or at least primary) native title rights and interests over discrete portions of the determination area into sharp relief. This is especially the case where apical ancestors are associated with the same portion of a determination area, yet their descendant families are in conflict with each other over that country. Any potential dispute management process employed within this domain must account for the fact that there may not be a space for resolution where two or more families understand their native title rights and interests to be exclusive rights and interests over the same area, and through the same logic.

The role of authority in family groups

The authority exercised within the family groups of native title holding bodies, such as PBCs, lies largely submerged within the corporate context. Research conducted for this report suggests strongly that authority of this kind, while a potent force in PBC disputes, is beyond the reach of the PBC arena. As such, it is important to understand how this authority operates when considering how disputes within the PBC arena involving this kind of authority might be managed. Importantly, the research data suggests that management, rather than resolution, might be the more realistic goal where the authority behind disputes resides beyond the reach of corporation law.

Broadly speaking, authority in this respect is traditionally bound to the structural relationships in Australian Aboriginal cultural institutions. These institutions are informed by a logic which begins with a binary opposition. Here, Ian Keen's discussion of the American ethnologist H. W. Scheffler²⁶ is useful to consider. As Keen explains, Scheffler concludes that, ultimately, there is one set of rules which is generic to all kinship systems across Aboriginal Australia. For

²⁵ Berndt, R. 1976. 'Territoriality and the problems of demarcating sociocultural space', in, Peterson, N (Ed) *Tribes and Boundaries in Australia: Social Anthropology Series No.10*. Australian Institute of Aboriginal Studies, Canberra, p: 134.

²⁶ Scheffler, H.W. 1978. *Australian kin classification*. Cambridge: Cambridge University Press.

Scheffler, kinship amongst Australian Aboriginal groups contains characteristics dictated “by the principles of conceptual opposition”.²⁷

The most obvious example of this can be seen in the moieties (such as Bunjil/Waa for the Kulin people of central Victoria or Kilparra/Mukwarra along the central Murray riverine) which are common throughout Australian Aboriginal societies. Moieties, in this sense, are a mechanism which creates the difference upon which traditional systems of marriage and alliance rest upon. In the pre-colonial era, and where they are still influential today, moieties served as a barrier against marriage between close kin and promoted the practice of exogamy which dictates/d that everyone’s mother was from a different group (and everyone’s sister or daughter married into a different group). This, in turn, is/was the basis for alliances between individuals and groups through which trade, knowledge and information could flow freely.

Even where moieties are no longer influential, the oppositional logic spoken of by Scheffler and Keen remains a fundamental aspect of Aboriginal culture. For example, when marrying or partnering, many Aboriginal people still seek (or are given) advice from their families concerning the suitability of their partners with regard to possible genealogical links and kin relations. People across the continent still understand their own relational identities in terms of ‘our mob’ or ‘that mob’ or ‘their mob’ and this is linked to an understanding of ‘our country’, ‘that country’ or ‘their country’.

One of the most important adaptations of Aboriginal social structures in response to the advent of colonial Australia has been the emergence of families of polity. In many parts of the continent, the impact of rapid depopulation and loss of access to land meant that traditional structures such as moieties, skin classifications, marriage alliances and initiation cohorts simply could no longer function in their original form. However, what has emerged in response to this are extended family units which understand themselves as separate entities defined by their relationships to other families of polity and to their country (or in some instances their region).

As understood by anthropologist Peter Sutton, families of polity consist invariably of one or more surname groups, or alternatively, cognatic descent groups.²⁸ As Sutton notes, families of polity serve both as “major forces of cohesion and mutual support in post-classical Aboriginal society” as well as “an arena in which political conflict tends to be concentrated”.²⁹

²⁷ Keen, I. 1988. ‘Twenty-five Years of Aboriginal Kinship Studies’, *Social Anthropology and Australian Aboriginal Studies: A Contemporary Overview*, p. 81.

²⁸ Sutton, P. (2003) *Native Title in Australia: An Ethnographic Perspective*. Cambridge: Cambridge University Press, p. 212.

²⁹ Sutton, P. (2003) *Native Title in Australia: An Ethnographic Perspective*. Cambridge: Cambridge University Press, p. 208.

Families of polity are also jural publics, as described by Burke³⁰, in which are vested obligations and responsibilities, much like the estate groups from which they have evolved. However, it should be noted here that these surname groups differ from the estate groups from which they have been adapted, in that recruitment occurs at birth through a direct relationship to an ancestor known to the family instead of being bestowed on a group through their relationship to a creator or ancestral being.

Importantly, as noted above, within families of polity, there are knowledgeable and respected individuals who are influential in the decision-making of the group. These people hold much authority and can, at times, apply sanctions on family members who act outside the accepted norms for their families and communities. To put this into perspective, these sanctions do not have to involve anything other than the disapproval of other family members to be an effective deterrent against similar future actions.

Within the context of research into the causes and possible management/resolution of PBC disputes, it is important to understand that most PBC disputes are also an expression of conflict between (or within) families of polity which wield authority based upon the same oppositional logic. Furthermore, the research data in this instance suggests that many conflicts occur along the fault lines of family relationships where membership of more than one family of polity is possible.

This occurs because, as Mantziaris and Martin note, Aboriginal corporations operate “in the intermediate domain between indigenous and non-indigenous systems of meaning and practice”.³¹ Furthermore, they undergo a kind of dual incorporation in which “they achieve legal status through the formal incorporation under the processes of the Australian legal system, and they achieve socio-political status through incorporation into indigenous society”.³² Thus, the foundations of authority in Aboriginal social structures such as families of polity, and the conflicts in which they are involved, are transposed onto and within “the legal structure created by the act of incorporation”.³³

The cogent point here is that the lines of authority that exist within families of polity are not contained by the PBC and are, in this respect, beyond the influence of the CATSI Act. As such, disputes involving this kind of competing, yet comparable, authority are unlikely to be amenable to resolution solely within the arena of the PBC. They may, however, be able to be

³⁰ Burke, P. (2010) Overlapping Jural Publics in Bauman (ed) *Dilemmas in Native Title Anthropology*. Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, p. 64.

³¹ Mantziaris, C. & Martin, D (2000) *Native Title Corporations: a legal and anthropological analysis*. The Federation Press: Sydney, p: 274.

³² Mantziaris, C. & Martin, D (2000) *Native Title Corporations: a legal and anthropological analysis*. The Federation Press: Sydney, p: 274.

³³ Mantziaris, C. & Martin, D (2000) *Native Title Corporations: a legal and anthropological analysis*. The Federation Press: Sydney, p: 274.

managed through a process which creates a forum within which such disputes might be allowed to unfold while not causing decision-making on the PBC level to cease while it does so.

Amendment F Proposal Categories

As one of the main foci of this report, it is appropriate here to present the suggested amendments to the NTA that will impact most significantly upon the powers of the NNTT. These can be found within Attachment F of the Options Paper. The 11 suggested amendments in Attachment F which have been, for the purposes of this discussion, placed in the following categories:

- Compliance and oversight
- Membership (inclusion/exclusion)
- Transparency/Accountability
- Dispute Resolution (Mediation & Arbitration)

Table 1 Amendment F Proposal Categories

	Proposal/Recommendation	Source(s)	Further detail	Category
F1	It is recommended that the [ORIC] Registrar’s compliance powers be expressly expanded to include matters of procedural compliance with the <i>PBC Regulations</i> , in particular to ensure that PBCs are fulfilling their obligations to common law holders to the same extent as members.	COAG Report, Table 2, Item 8 and Technical review report recommendation 44	<p>Current practice There is currently no body that has oversight of PBC compliance with obligations under the <i>PBC Regulations</i>, and the capacity to support these obligations.</p> <p>Benefits of proposal Giving ORIC the ability to consider compliance with the PBC Regulations will provide a low-cost remedy for disaffected members of the native title group in some circumstances. As regulator, ORIC would be best placed to have this role.</p>	Compliance and oversight
F2	It is recommended that the <i>CATS/ Act</i> be amended to provide a power for the [ORIC] Registrar to refuse to amend a PBC’s rule book in circumstances where the amendment would result in the PBC no longer meeting the requirements of regulation 4(2) of the <i>PBC Regulations</i> .	COAG Report, Table 2, Item 10 and Technical review report recommendation 54 and State and Territories proposal	<p>Current practice Membership criteria are set out in the rulebook. Membership does not have to be open to all common law holders, but has to be consistent with the native title determination. Currently the <i>CATS/ Act</i> does not provide for</p>	Compliance and oversight

			<p>a mechanism to ensure consistency.</p> <p>Benefits of proposal This amendment ensures that PBCs are not able to establish membership criteria to disenfranchise a section of the native title group.</p>	
F3	<p>Introduce a requirement that the dispute resolution provision in the PBC rulebook specifically addresses arrangements for resolving disputes about membership (clarifying that such disputes can arise between members and directors, between native title holders, and between native title holders and the PBCs and its members and directors).</p>	<p>COAG Report, Table 2, Item 10 and State and Territories proposal</p>	<p>Current practice A CATSI corporation's rules must provide for the resolution of disputes internal to the operation of the corporation only. Technically, disputes about membership (between non-members and the PBC) are therefore not covered.</p> <p>Benefits of proposal This amendment will ensure a pathway for resolution of disputes of persons denied membership to a PBC. The resolution process will be based on a process chosen by the native title holders.</p>	<p>Membership (inclusion/exclusion)</p>
F4	<p>Remove the directors' discretion to refuse membership to a person who meets the PBCs membership criteria other than in exceptional circumstances.</p>	<p>COAG Report, Table 2, Item 10 and State and Territories proposal</p>	<p>Current practice PBCs are the corporations established to represent the common law holders. Under the <i>CATSI Act</i>, PBC directors have discretion to refuse to accept a membership application by a common law holder, even if the eligibility requirements are met, thus having the power to arbitrarily exclude persons from PBCs. This gives rise to a large number of disputes. ORIC has no power to direct PBCs to accept eligible members.</p> <p>Benefits of proposal The benefit of the proposal would ensure that memberships are not refused arbitrarily when eligibility</p>	<p>Membership (inclusion/exclusion)</p>

			criteria are met and all persons who are entitled to membership and wish to become members of the PBC are accepted as members.	
F5	Limit the grounds for cancellation of PBC membership to ineligibility or misbehaviour. Require the process for cancellation of membership to include a general meeting.	COAG Report, Table 2, Item 10 and State and Territories proposal	<p>Current practice The <i>CATSI Act</i> provides for the cancellation of PBC membership on the grounds of ineligibility or failure to pay fees. This is a replaceable rule which means it is open for a PBC to adopt its own rule, potentially arbitrarily cancelling the membership of eligible persons.</p> <p>Benefits of proposal This amendment ensures that PBCs are not able to change their rules to disenfranchise a section of the native title group; or allow them to cancel memberships on grounds other than ineligibility and misbehaviour.</p>	Membership (inclusion/exclusion)
F6	It is recommended that the <i>CATSI Act</i> be amended to empower the [ORIC] Registrar to amend a CATSI corporation's Register of Members where, following appropriate consultation with the Corporation, the Registrar considers it reasonably necessary to ensure that rule books are complied with in relation to the revocation of membership of individuals.	COAG Report, Table 2, Item 10 and Technical review report recommendation 53	This proposal complements the above and ensures that a PBC's Register of Members accurately reflects who ought to be a member of a corporation in cases where memberships are revoked not following the corporation's rule book.	Membership (inclusion/exclusion)
F7	It is recommended that the <i>CATSI Act</i> be amended to require PBCs to set up and maintain: 1. a 'Register of Native Title Decisions'; and 2. a 'Register of Trust Money Directions'.	COAG Report, Table 2, Item 8 and Technical review report recommendations 55 - 59	<p>Current practice The functions of PBCs under the PBC Regulations include:</p> <ul style="list-style-type: none"> • to use native title monies as directed by the native title holders; and • to obtain consent of native title holders on decisions to do with native title. 	Transparency & Accountability

	<p>It is recommended that the <i>CATSI Act</i> be amended to require the Register of Native Title Decisions to include copies of documents created to provide evidence of consultation and consent in accordance with the PBC Regulations.</p> <p>It is recommended that each of the Register of Native Title Decisions and the Register of Trust Money Directions be available for inspection by:</p> <ol style="list-style-type: none"> 1. members; 2. common law holders. <p>It is recommended that PBCs be required to provide an extract of the Register of Native Title Decisions or the Register of Trust Money Directions to any person having a 'substantial interest' (within the meaning of that phrase as used in the PBC Regulations) in the relevant decision.</p> <p>It is recommended that the [ORIC] Registrar should have the same powers in relation to the Register of Native Title Decisions and the Register of Trust Money Directions as in relation to the Register of Members (and the Register of Former Members).</p>		<p>PBCs are currently not required to document how they have obtained the direction or consent of the native title holders.</p> <p><i>Benefits of proposal</i> The proposals would increase transparency and accountability of PBCs. Native title holders and non-native title holders dealing with PBCs will benefit from the increased transparency of decision-making.</p>	
F8	<p>It is recommended that the <i>CATSI Act</i> be amended to require PBCs to keep separate financial records and reports in relation to 'native title benefits' (as defined by the <i>Income Tax Assessment Act 1979 (Cth)</i>) received by the PBC.</p>	<p>COAG Report, Table 2, Item 9 and Technical review report recommendation 62</p>	<p><i>Current practice</i> There are no express requirements for PBCs to separately account for native title monies received, other than in accordance with applicable accounting standards.</p> <p>These funds are different from other moneys [sic] the PBC holds as they are beneficially</p>	<p>Transparency & Accountability</p>

			owned by the native title group (i.e. not merely by the PBC).	
F9	Introduce a requirement that the common law holders be consulted on the investment and application of native title monies so that the obligation to seek direction from the common law holders is met (whether or not the monies are held by the PBC).	COAG Report, Table 2, Item 9	<p>Current practice Where native title monies are held outside the PBC, there is no statutory requirement to seek direction from the common law holders or to report to them about the investment and application of the monies.</p> <p>This amendment increases native title groups' control over native title monies.</p> <p>The amendment ensures native title holders can have input in decisions about the use of native title monies.</p> <p>Benefits of proposal Extending the existing transparency and accountability provisions to non-PBC bodies will improve accountability for the use of those monies to the native title group.</p> <p>In relation to the establishment of charitable trusts, the direction to be sought from common law holders would be in relation to the establishment of the trust and its application arrangements.</p>	Transparency & Accountability
F 10	Amend the definition in [PBC Regulation] reg 3[2] of group of common law holder to clarify that it refers to the determined native title holding group(s) for which the PBC acts as agent or trustee.	Commonwealth proposal	<p>Current practice PBCs that hold native title for more than one group are currently required under reg 8(5) to consult only with the group of common law holders affected by the native title decision. Reg 3[2] defines group of common law holders as common law holders who belong to a tribe, clan or</p>	Transparency & Accountability

			<p>family or a descent, language or other group recognised as such under traditional laws and customs. In practice many PBCs represent groups whose members have equal interests in the determination area. As such, this requirement creates tension. That sub-groups of common law holders make native title decisions that affect their rights and interests can be ensured by the decision-making process under reg 8(3) and (4).</p> <p>Benefits of proposal The amendment would ensure that PBCs consult with the common law holders but would not mandate consultation with an affected sub-group, unless the traditional decision-making process of the group, which is to be used pursuant to reg 8(3) if one exists, requires such consultation.</p>	
F 11	<p>NNTT: Create a broader role in post-determination disputes by:</p> <ul style="list-style-type: none"> • allowing PBCs or individual native title holders to approach the Tribunal for dispute resolution assistance directly • providing a new arbitration power to the Tribunal e.g. to deal with questions of fact regarding membership. <p>Federal Court: Expanded role by making the Federal Court’s jurisdiction exclusive in relation to CATSI Act matters that affect PBCs.</p>	COAG Report, Table 2, Item 10	<p>Current practice Currently the NTA requires the consent and funding by the NTRB/SP for the NNTT to assist with the resolution of a dispute. The Tribunal has arbitration powers in relation to certain Future Act related applications. Currently, the Federal Court’s jurisdiction in relation to CATSI Act matters is not exclusive of the jurisdiction of the Supreme Courts of the states and territories.</p> <p>Benefits of proposal The reform would make the Tribunal’s mediation service more accessible and build on its existing expertise [in] arbitration. Making the</p>	Dispute Resolution (Mediation & Arbitration)

			Federal Court’s jurisdiction exclusive will ensure consistency and coherency in jurisprudence and case management.	
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Disputes

For the purposes of this discussion, the disputes raised during the research into mediation and dispute resolution concerning PBCs have been recorded and placed in the same categories used above with regard to the proposed amendments to the NTA. This categorisation will provide a sound contextual basis on which to understand the potential interplay between the proposed amendments and the types of disputes occurring presently within PBCs across the country. I note here that, due to the limited engagement in the project research survey, the range of disputes is not comprehensive.

Compliance and Oversight

As discussed throughout this report, the burden of compliance on PBCs is a challenging one, made more difficult by the lack of capacity in administrative skills among many native title holding groups (or common law holders). A further complication is the lack of synergy between the lines of authority created by the modern corporate structure and the traditional lines of authority usual to extended kinship groups, and families of polity, throughout Aboriginal Australia.

Commonly, upon the formation of a PBC, groups adopt the compliant rule book provided by ORIC with few changes. This uniformity is an unintended consequence of ORIC’s provision of an example of a compliant rule book for groups to use as a guide. As explained by ORIC representatives during the course of this research, it was not intended by ORIC that this become the standard rule book across the PBC sector, yet this now is the case. Nevertheless, the condensed rule book, as can be found on the ORIC website³⁴, sets out the rules necessary for a compliant corporation under the *CATSI Act* complete with rules for membership, the nomination and appointment of directors, quorum decision-making, etc.

Traditionally, relationships and authority are structural in Aboriginal societies, in as much as behaviour and interaction between categories of relationships are broadly prescribed. Authority is positional and rests with different classifications of social actors in relation to an individual during the course of a lifetime. As a person matures and is exposed to different

³⁴ <http://www.oric.gov.au/start-corporation/rule-book>

kinds of secret/sacred knowledge, they gain more authority and are influential in many different contexts. This authority is, however, different in nature to that exercised by a member, director or secretary of a corporation as it is not subject to transparency, usually not dependent upon consensual decision-making and has a powerful non-secular element.

In less traditional circumstances, extended kinship groups remain vital to the continuity of culture and identity for Aboriginal people. As discussed earlier, where the prescribed structural nature of relationships has been transformed to some extent by the nature, rapidity and degree of colonisation, extended family groups in many instances retain an understanding of authority that is jural in nature and is different to corporate authority. With regard to corporate compliance and decision-making, the challenge for PBCs and NTRB/SPs is to identify effective ways to respect traditional authority whilst developing and maintaining the necessary corporate authority.

The NTRB/SPs which have engaged in this research project have suggested that traditional decision-making models may atrophy and wither as corporate decision-making becomes the norm in PBC groups. Notably, there was a view expressed by representatives of CYLC and FNLRs that the dependence upon traditional decision-making is holding PBCs back from being compliant and from making decisions about country that will result in a benefit for them.

Conversely, the PBCs that have engaged in the research have been soundly behind a middle way in which both types of authority are utilised in decision-making processes. An example of this was provided by the Quandamooka PBC in which a Council of Elders has the power of arbitration over disputes occurring within the PBC where they have become intractable and disruptive. This has had the effect of allowing corporate decision-making to continue unimpeded throughout their seven year history. Notably, this is the result of pre-determination consultation within the native title claim group and has been in place during the entire life of the PBC.³⁵

Input from PM&C suggests that it is useful also to distinguish between *native title decisions* and *decisions concerning internal dispute resolution*. With regard to native title decisions, i.e. decisions that affect native title such as entering into a mining agreement or an ILUA, PBCs must, under Regulation 8 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999*³⁶ (PBC Regulations) consult with and garner the consent of the native title holders before a

³⁵ Another way to frame this discussion would be in terms of movement towards or away from the process of juridification, in which custom becomes law and is altered in the process. For further reading see Blichner, L. C. & Molander, A. (2005) 'What is juridification?', *Working Paper no. 14*. Arena, Centre for European Studies, University of Oslo; Stuart Kirsch, S. (2012) 'The Juridification of Indigenous Politics' in Eckert, J., Donahoe, B., Struempfe, C. & Biner, Z. O. (eds.), *Law Against the State, Ethnographic Forays into Law's Transformations*. Cambridge University Press: Cambridge 2012, pp: 23-43.

³⁶ Statutory Rules 1999, No. 151 as amended made under the Native Title Act 1993.
<https://www.legislation.gov.au/Details/F2012C00151>

decision can be made by the PBC. This may be done using either an existing traditional decision-making process identified in the claim connection material or by using another decision-making process adopted by the native title holding group. With regard to decision-making concerning internal dispute resolution, PBCs may employ any means that members wish to use, including a council of elders, external mediation, etc.

Importantly, many disputes experienced within PBCs involve both internal and native title decision-making *because*, as previously discussed, they involve both traditional and corporate forms of authority. Moreover, whether or not a 'traditional decision-making process' is identified, it seems apparent from the research data that the majority of disputes and decision-making challenges encountered within PBCs involve conflict and action within the families of polity which constitute their native title holder group and PBC membership.

Membership (inclusion/exclusion)

Membership in native title groups is a key area of conflict which remains relevant in the PBC space. All parties who have engaged with this research project have indicated that disputes arising from membership issues are perhaps the most intransigent and most difficult to resolve. Importantly, many of these disputes predate the determination of native title and the formation of the PBC in which they play out.

As previously noted, there is a strong consensus from the parties who have engaged in the research that native title groups tend to be more inclusive in their pre-determination phase. This is in order to minimise the risk of generating respondents from neighbouring groups concerning external boundaries and ancestors recorded in marginal areas (with regard to the core claim area). During this phase, arguments and conflicts concerning internal boundaries of estate or family groups are also downplayed in order to stress the unity of the group. Often informal agreements are made in this period of inclusivity between estate groups and families concerning country that has become of indeterminate ownership over time. In the post-determination phase, groups have a tendency to become more exclusive, causing agreements such as these to be subsequently disputed, particularly when the principal parties have since passed away.³⁷

In support of this notion, the NQLC identified the discontinuity between the concept of rights and interests for the whole group over an entire determination area and the existence of estates where sub-groups have primary rights and interests over particular portions of the claim area which 'belong' to them. It was noted that this tension creates a kind of factionalism

³⁷ This is touched upon in Bauman, T. (2005) 'Whose Benefits, Whose Rights?' in Greene, C. (ed) *Land, Rights, Laws: Issues of Native Title*. Native Title Research Unit, vol 3, no 2, pp: 7-8.

(referred to elsewhere as 'localism') which stymies decision-making and brings different estates into conflict with each other.³⁸

However, it should also be noted that there is no lack of evidence pointing to the existence of competition and conflict between estate groups in the pre-colonial and colonial period and in the pre-native title era and the native title era proper. Indeed, this is as likely to be as much an expression of the fault lines of traditional cultural authority as it is the product of tension caused by the NTA in groups who are in the exclusive post-determination mode.³⁹

During the course of this research, PM&C have identified disputes arising from instances in which the disbursal of money to a Native Title determination group has been objected to on the grounds that the activity through which the money was generated was in an area associated with one estate group or family within the larger group rather than the group as a whole. This has generally resulted in attempts to fracture native title determination groups into smaller estate groups in order to benefit further from the wealth generated by the activity in question. This has been echoed by the NQLC, which is also finding that many disputes are arising around who can talk for which country and in which circumstances.

All of the NTRB/SPs who have engaged with the research effort to date reported that the introduction of possible monetary benefit from cultural heritage management and future act agreements provided further motivation for dispute. They have cited instances where people have been taken off membership lists without their knowledge and have only found out when they have attempted to attend meetings. They noted further that, once this has happened, ORIC has no authority to intervene on behalf of non-members. Its powers are only concerned with PBC members under the CATSI Act. This seems an effective strategy for exclusion as, for the time being, there is nothing to counter it.⁴⁰

Another related cause of disputes concerning group and PBC membership is the act of validation present in the handing down of a determination of the existence of native title. Those considered by the Court to be native title holders at the time of the determination are validated in their assertion of rights and interests over the determination area while those who are not considered as native title holders for an area rarely accede this point to the Court and, in most cases, continue to assert ownership in other contexts. This can be destabilising

³⁸ See discussion of localism on p. 32.

³⁹ For a more detailed discussion of how this may be understood within mediation practice see Baumann, T. (2006) 'Waiting for Mary: Process and Practice Issues in Negotiating Native Title Indigenous Decision-making and Dispute Management Management Frameworks' in Angela Philp. (ed.) *Land, Rights, Laws: Issues of Native Title. Native Title Research*, vol. 3, no 6, 1-13.

⁴⁰ PM&C advises that the suggested new dispute resolution provision for an internal process regarding disputes with non-member Native Title Holders and the PBC is meant to address this in part. Also, Native Title Holders in future will be able to seek the NNTT's mediation assistance.

for PBC members who then experience continuing conflict with groups or families with competing claims within the broader Aboriginal community.

This is particularly the case where claims over portions of country have undergone several configurations which have included ancestors subsequently excluded in the final configuration. This can be exacerbated where native title group and PBC members descended from an ancestor recognised in the claim are also descended from one of the ancestors excluded in the final outcome. These members have kinship groups which extend across both included and excluded families and often continue membership disputes by seeking inclusion for their excluded family members.

ORIC has provided a further example of a dispute concerning pre-determination membership issues where an Aboriginal corporation had been created with 12 members and had begun to deal with future acts on behalf of the applicants and the claim group. In this instance, the directors were preventing eligible candidates from joining, as the majority of the current membership did not want to admit new members until after the determination had been made. Underlying this dispute was a deeper dispute between siblings, some of whom were corporation directors, refusing their siblings membership. In this instance, ORIC was not able to provide assistance as it does not have the appropriate statutory power in a pre-determination context.

Personal disputes between directors have also been identified as a central cause of disputes within the PBC arena. Again, these disputes, in many instances, precede the determination of native title and are difficult to resolve. The NQLC noted that membership was often rejected on purely personal grounds and that this was aggravated by PBC Boards deciding to exclude or reject applicants without consulting the regular members as to the merits of their actions. Where these disputes inhibit normal PBC administration, they can also cause PBCs to cease to be able to process new membership applications, thus creating new disputes.

Transparency/Accountability

Disputes arising from a real or perceived lack of transparency within PBCs are common across the sector. When issues of administrative capacity and conflicts arising from disputes concerning membership are taken into account, the need for accountability beyond the minimum requirements of the CATSI Act condensed rule book becomes apparent.

From the PBC perspective, many disputes within PBCs concern people seeking to access funds held in charitable trusts for the benefit of native title holders. In relation to this, QSNTS noted that PBC directors are also trustees of trust monies but that, in many instances, they are not fulfilling their responsibilities and obligations as such. This happens, in their opinion, because

cultural authority often supersedes the PBC's rule book. This could be avoided by making rule books more culturally appropriate.

Research participants commonly agreed that there are many disputes characterised as complaints about authorisation meetings. These disputes are usually communicated in terms of the wrong people being involved in consultation and consent decisions under reg 8 of the PBC Regulations 1999⁴¹, the wrong place being subject to authorisation decisions, the right people being excluded from the decision-making process and the wrong people being included in the decision-making process.

In addition, as discussed above, issues concerning the disbursement of monetary benefits stemming from ILUAs, future acts and cultural heritage management all feed into concerns about transparency and accountability. The NTRB/SPs who have engaged in this research project to date have identified many disputes concerning internal boundaries which have resulted in attempts to divide native title holder groups into smaller groups with more specific familial association to areas within an existing native title determination.

According to the Quandamooka PBC, this has been exacerbated by the eagerness of ILUA making parties, such as mining companies, to make agreements with legally entitled parties, even where this entitlement may be subject to subsequent questioning. This seems to be particularly pertinent in overlap areas and areas where a claim has not been determined yet future act rights are being exercised on the strength of a registered claim (even where this claim is probably unrealistic).

It was further noted that, in these cases, when native title research is conducted in detail, it is often found that eligible people have been excluded from claims from which they may well have received a benefit. A further point was made that there is no real ownership retrospectively of these problems by either NTRBs or Land Councils as most employees involved (if not all in many cases) in facilitating these agreements are no longer employed in that capacity when these issues arise.

Disputes appear to be more common where corporation leadership has not effectively communicated the intended aims of the PBC and the rationale behind expenditure. It is clear from the research that there is a lack of effective communications strategies across the PBC sector. Indeed, it seems that communications are thought of mostly in terms of consultation with regard to reg 8 and are not prioritised as a matter of course. This, in turn, appears to be a further consequence of the lack of funding experienced by most PBCs and NTRB/SPs across the country and by the subsequent lack of capacity to assign the appropriate resources to this task.

⁴¹ Statutory Rules 1999, No. 151 as amended made under the Native Title Act 1993.
<https://www.legislation.gov.au/Details/F2012C00151>

The research data suggests that effective communications strategies could contribute to the de-escalation of disputes within PBCs by maintaining active contact with their membership and by pro-actively assisting members to keep their membership contact details current. In this way conflicts which arise from members being de-listed due to incorrect or outdated contact information may be reduced significantly. The inclusion/provision of detailed information (within ethical boundaries) concerning both native title decisions and other internal decision-making on electronic platforms, such as PBC websites and membership mail-outs, might also serve to provide a more complete understanding of what, and why, important decisions have been made and by whom they have been made. At the very least, this might have the effect of focusing related disputes upon the facts of the matter as they have been provided by the PBC to the membership.

Dispute Resolution (mediation & arbitration)

The research data has identified a number of types of disputes which are amenable to mediation and arbitration under the proposed amendments to the NTA. From the PBC perspective, concern has been raised about the way in which agreements concerning benefits stemming from native title rights and interests are written. The concern arises from the lack of responsibility taken by non-native title holder parties to ILUAs and future acts in the equitable distribution of monetary benefits. Whether or not this is properly the concern of those parties (or is the concern of the PBCs making native title decisions), this was identified as an area in which timely mediation or arbitration may be beneficial.

Another potential area for mediation and arbitration is in disputes which are fuelled by a lack of understanding of the nature of native title and confusion surrounding the relationship between native title and cultural heritage management. It was reported that this is particularly the case in New South Wales where the *National Parks and Wildlife Act 1974 (NSW)* and *Aboriginal Land Rights Act 1983* caused confusion among PBCs with regard to the legitimate ability to conduct cultural heritage management under the law. It was suggested that any mediation concerning these issues might begin with education about which legislation has primacy and in which context.

Mediators involved in PBC disputes might also take into account the effects of generational change in group membership with regard to the structure of PBC Boards. The NQLC pointed out that, while PBC Boards are usually representative when they are set up, they do not always remain so. The realpolitik of PBCs and claim groups means that Board members may vie with each other to unseat competing families and gain effective control of a PBC as it develops.

Representatives from both QSNTS and FNLRS commented that many disputes emerged from the way in which PBCs are set up, or from unforeseen circumstances as the PBCs evolve. They noted that PBCs are usually set up shortly before a determination is made (at which point the PBC is nominated as the Registered Native Title Body Corporate (RNTBC)) and there are many circumstances, such as mineral exploration and changes in group composition, that cannot be anticipated at the onset. In the initial years after a PBC is created, groups are also emerging from a very intensive phase of claim related activities and are often suffering from the fatigue that comes from years of negotiation throughout the claims process. As such, they are not well equipped to deal with possible future conflicts at this stage. Thus, flawed or inadequate PBC structures not tailored to the needs of the native title holders and their traditional decision-making structures, can be put in place which can create or inflame disputes within PBCs at a later date.

The NQLC provided an example of a dispute involving an ILUA over a sand mine, the proceeds of which were distributed to the whole native title determination group by the PBC.⁴² The families upon whose land the sand mine was located argued that the proceeds be distributed amongst their estate group only.⁴³

Conflict of this kind has been referred to by Mantziaris and Martin as ‘localism’, which is “... characterised by such features as a strong emphasis on individual and local group interests, and by the primacy of values and interests grounded in the particular and local, rather than in a broader and more encompassing social and political order”.⁴⁴ For Mantziaris and Martin, localism is associated with the organising principles of Aboriginal kinship-based systems which are, “...fundamental to customary systems of tenure”.⁴⁵ Importantly, there is a dissonance between these customary systems of tenure and the structure of many native title claims which have been determined to exist by the Court.

As mentioned previously, native title groups are often encouraged to be quite inclusive in their pre-determination phase, in order to ensure that the group contains all of those people who hold or may hold native title rights and interests within the claim area. On this broader level, all people considered as Traditional Owners are considered to hold native title rights and interests in common and upon the same basis with regard to the stated composition of the group. However, as noted by Sutton, rights and interests to and on country are not held equally by all Traditional Owners.

⁴² The NQLC made the case that, under the amendments, the NNTT would be in a good position to mediate this dispute.

⁴³ See Bauman, T. (2005) ‘Whose Benefits, Whose Rights?’ in Greene, C. (ed) *Land, Rights, Laws: Issues of Native Title*. *Native Title Research Unit*, vol 3, no 2, pp: 7-8, for further discussion of this type of dispute.

⁴⁴ Mantziaris, C. & Martin, D (2000) *Native Title Corporations: a legal and anthropological analysis*. The Federation Press: Sydney, p: 282.

⁴⁵ Mantziaris, C. & Martin, D (2000) *Native Title Corporations: a legal and anthropological analysis*. The Federation Press: Sydney, p: 282.

Indeed, notions of equally held individual rights do not align well with the way in which Aboriginal people traditionally hold rights, interests and obligations to country. As Sutton points out, these rights are held unevenly, with those who hold a primary association with country being core rights holders and those who hold contingent rights depending upon a relationship with a primary rights holder to have those rights. In other words, contingent rights holders do not hold the authority to act on or make decisions about country in their own right.⁴⁶

Accordingly, disputes such as the one that occurred concerning the sand mine mentioned by the NQLC are manifestations of localism asserting, or re-asserting, itself in the more exclusive post-determination context where decisions about land and resource use have binding consequences. In this context, where ILUAs concerning portions of native title determinations are made, the group of people who hold particular obligations to the country affected by an ILUA, and the group of people who will benefit from such an agreement, are often not interchangeable.

Existing Dispute Resolution Strategies

The research to date has identified a number of strategies deployed by both PBCs and NTRB/SPs to either avoid, manage and/or resolve disputes that occur within PBCs. The first of these is the Elder's Council put in place by the Quandamooka PBC. As mentioned previously, the function of the Elder's Council is to be the final arbitration body for disputes. In other words, because the Elder's Council can resolve disputes, the PBC has had no need for court intervention.

The Quandamooka PBC noted that the Elders Council was conceived of in the pre-determination period as part of a process which had helped them define a process that would lead to clear and representative decision-making. Furthermore, because the Elders Council has been constructed around the families of the claim group, it has sufficient cultural authority to be effective as a deterrent to needless or baseless disputes. The fact that it has not been called upon to arbitrate a decision in its seven year history bears evidence of its efficacy.

This example feeds into the previous discussion concerning the possible separation of corporate compliance and cultural authority in PBCs. With regard to this, FNLRs advised that

⁴⁶ Sutton, P. (2003) *Native Title in Australia: An Ethnographic Perspective*, Cambridge University Press, Cambridge, p: 4.

concepts of eldership are compatible with the CATSI Act and that acknowledging elders is acceptable as long as they do not perform the function of directors (as elders). Indeed, the PBCs and NTRB/SPs engaged with in this research have indicated a strong preference for the creation of structures which entertain both types of authority in concert with each other. However, it was noted that eldership was very hard to define and differed from group to group. It was noted further that decisions sometimes need to be made quickly and that elders usually take time to ponder and discuss decisions and issues.

An example of this kind of structure is provided in an interview given to AIATSIS by Ned David, Chief Executive Officer of the Magani Lagaugal (Torres Strait Islanders) Corporation.⁴⁷ In the interview, Mr David states that the Torres Strait Islander peoples have an alternative dispute resolution process. Rather than a Council of Elders, they have a Dispute Resolution Committee which is, in many ways, like a council. According to Mr David, the Magani Lagaugal dispute resolution process is based upon the principles of the traditional Kod. This Kod:

... is made up of people that have knowledge, have status and, more importantly, have the authority. They make all the decisions.⁴⁸

Although this traditional decision-making body “hasn’t functioned since the 1920s – 1910 or maybe even before”, the Magani Lagaugal PBC have used “those principles that make up a Kod”. Notably, Mr David provides an insight into how these more traditional principles may be adapted to operate in contemporary corporate structures:

... some of the long held beliefs, part of the tradition like, you know, the male dominated Kod – We would have to say ‘We’re going to change that’. How we set up the process ... we looked at those things that used to worked, you know, in the past ... we were fortunate to have people who understood the law of today, so that what we did didn’t breach any of the rules that ORICs got in the rule book. Didn’t break any of the laws of the Commonwealth and the State ... and we had people like Lisa Strelein and Cassie Lang, who are qualified in this space, to assist, to look at what we’d done.⁴⁹

In the interview, Mr David goes on to describe how a dispute resolution committee was formed from members of the native title holding families of the Torres Strait.

... and there are people there – members of that group – who are quite young ... you would call them your elder, but they have all those things ... knowledge, status, [and] authority. They can deal with stuff.⁵⁰

He also provides a brief description about how this committee has prepared itself to deal with the issues and disputes that come before it:

There’s a lot of work that was done with the group about what to consider. Like making sure that the process is done ... the elders are given every information. Like, ok, we

⁴⁷ <https://www.nativetitle.org.au/learn/pbcs-making-it-work/dispute-management>

⁴⁸ <https://www.nativetitle.org.au/learn/pbcs-making-it-work/dispute-management>

⁴⁹ <https://www.nativetitle.org.au/learn/pbcs-making-it-work/dispute-management>

⁵⁰ <https://www.nativetitle.org.au/learn/pbcs-making-it-work/dispute-management>

understand you're not Kod but you're going to do some of the things that Kod used to do
... this is what you need to make sure you do by the rule book.

Mr David goes on, in the interview, to note the importance to the Dispute Resolution Committee of understanding exactly who is having the dispute and what the dispute is about. He also highlights the importance of conducting a fair and transparent process at all times.

FNLRS representatives discussed a strategy deployed in the creation of an improved rule book for the Gunditj Mirring PBC in western Victoria. Initially, the group had used the condensed rule book from the ORIC website but, after a period of special administration, had decided to review and amend it.. FNLRS reported that the special administrator had been advocating a more simplified rule book which would be easier to operate, yet the PBC members in this instance demanded and created a much more complex and prescriptive rule book than they had previously had. Consequently, the amended version anticipated areas of dispute and stipulated a prescribed process for dealing with disputes when they arose in the context within which they arose.

FNLRS representatives further reported that, in the case of the Eastern Maar PBC, the decision making processes that were at play within the group during its pre-determination phase became the basis for the way in which the Eastern Maar Aboriginal Corporation is currently structured. FNLRS advised that PBC structures need to mirror the communities they represent in so far as lines of authority and decision-making are concerned. In this way, they are durable, sustainable and able to build capacity.

The NQLC raised the general lack of capacity within PBCs to manage compliance duties and reported that they are now working with PBCs to support them with administration capacity building. The NQLC are devoting significant resources to building policies and processes that can be promoted at the PBC level and to identifying ways in which PBCs can form their own governance systems – each fit for purpose and in the context of the cultural group. In this, the NQLC is building its own capacity to respond to disputes quickly to avoid the situation becoming worse through inactivity. Similarly, AIATSIS have been developing a 'PBC Toolkit' but this is currently in draft form and has not yet been released publicly.⁵¹

FNLRS provided a further example of how a process might be put in place at the PBC level in order to avoid disputes concerning new membership applications. Using the Barengi Gadjin Land Council Aboriginal Corporation (BGLC) as an example, FNLRS noted that new membership applications were processed by specific family groups associated with the ancestor identified in the application. This does not, however, provide clarity regarding any process in place to deal with the provision of a new, previously unidentified ancestor (or

⁵¹ PM&C advises that it provides PBC Basic support funding which is currently received by about 50 % of all PBCs. Its purpose is to provide PBCs with funding to meet their statutory requirements (holding AGMs, director meetings...). It is uncapped but on average PBCs receive (via their NTRB) about \$60k.

family group). However, the principle of assigning responsibility for processing membership applications to the families most closely associated with the ancestor named on the applications has so far worked for the corporation.

This approach is also being explored by CYLC, who are conducting a process they are calling 'apical mapping'. This appears to be a process of plotting the association of particular ancestors to country using their presence in the ethno-historic record. Importantly, they are considering extending 'apical mapping' so as to link PBCs with apical ancestors. The salient point here is that membership would be closed to anyone who was not descended from an apical ancestor named in the native title determination, regardless of what their contemporary language group association is.

This may be a risky strategy as it ignores people descended from legitimately associated families who could not link themselves to an historically recorded ancestor in the region at the time the relevant research was conducted. This policy may simplify membership issues but may ultimately dispossess many people whose ancestors were not recorded at the point of colonisation but have been, through generations, recognised as being able to speak for certain portions of country.

During this research project, an example of a successful strategy deployed by the State of Queensland was provided concerning an area of land in northern Queensland. In this instance, the Court Registrar took advantage of the assistance of an NNTT mediator and a member of the NNTT Geospatial Services Team, together with ORIC, to do some early development of the PBC rules. In this instance there were several different groups from the same cultural bloc associated with the area who were in conflict with each other over its ownership.

Representatives of these groups were brought together and those who could speak for country were identified. With the assistance of the NNTT Geospatial Team, they began mapping out where people saw their traditional country and, with the assistance of ORIC, built a rule book for the PBC which would arise out of a successful determination.

Feedback from ORIC identified this as a very successful process and one in which ORIC would be happy to be involved in again with regard to future, similar, disputes. ORIC also noted that work in the pre-determination space was of vital importance for building up PBCs that could function largely free of conflict. ORIC noted further the importance of developing relationships in the predetermination phase between ORIC, the Court, NNTT and Traditional Owner groups.

ORIC pointed out that it was their view that the NNTT was in the best place to deliver mediation in these instances as PBCs sometimes did not want to work with NTRB/SPs because

of a perception of bias on the part of the NTRB/SPs in favour of one faction or another. ORIC reported that it was also trying to create better strategies to educate both PBCs and NTRBs about its role.⁵² Importantly, this process shows that, given appropriate time and resources, the NNTT, ORIC and Traditional Owners can work together to successfully manage and/or resolve these kinds of disputes.

Proposed Dispute Resolution Strategies

During the initial phase of the research, several proposed strategies were suggested regarding the resolution of disputes within PBCs. These proposed strategies are presented below, some of which suggest further reform to the NTA beyond the amendments that have already been proposed. I note here that, where legal matters are concerned, I am merely recording proposed strategies and am aware that I can offer no opinion or advice.

One of the main proposed strategies with respect to PBC dispute resolution concerned the present role of ORIC and future role of the NNTT in light of the proposed amendments. From the PBC perspective, there is great concern about the under-resourcing of ORIC and the current difficulties it faces in imposing sanctions upon non-compliant PBCs. There is a feeling within the PBCs who have engaged with the research so far that this perceived⁵³ lack of action on the part of ORIC has encouraged non-compliant behaviour and allowed PBC directors, in some instances, to act without the best interests of PBC members at heart.

NQLC representatives pointed out ORIC's current role as both trainer and regulator in the PBC compliance space and suggested it might, as a result, be conflicted. It was suggested that ORIC's perceived reluctance to use its regulatory powers has contributed to the lack of motivation PBCs have shown to build capacity in order to be compliant. There was frustration within the NQLC concerning the lack of consequences for non-compliance within PBCs and a pessimism that this will not change unless the proposed amendments become law. It was recommended that these two functions/powers of regulation and training be separated so that they reside in different bodies and be applied more freely and without complication.

One proposed strategy suggested by the Quandamooka PBC is to enable members to be excluded if they do not act in the best interests of the group. This, it is hoped, will reduce the need for further intervention by ORIC. It was further suggested that, if this is linked to the need to take decisions to a general meeting, it might reduce instances of bad management and conflicts of interest.

⁵² I note here that the Registrar made it clear that the NTRB (NQLC) played a major role in the resolution of the disputes to hand in the matter, having made the request for NNTT assistance in the first place.

⁵³ Regardless of justification, this perception was clearly present in the research data.

With regard to ORIC and the NNTT, there emerged two related schools of thought. The first seeks to bolster and enhance the current functions of ORIC by allowing for a broader range of mediation and dispute resolution functions that it could bring to bear before disputes are brought before the Court. There was very little suggestion as to how this might be done, or what this might look like, other than that it would involve creating a new form of prior intervention within the powers of the CATSI Act.

The second seeks to expand the mediation and dispute resolution functions of the NNTT and allow it greater powers in the post-determination context of PBCs. This appears to be more in line with the proposed amendments to the NTA. In this way, the NNTT would have a basis to employ these powers as part of its functions. PM&C suggested that a broad power was appropriate but noted that the NNTT would need to manage its resources carefully and prioritise which disputes it provides assistance for.

With regard to how matters might be referred to the NNTT, the AGD suggested that there would need to be a Memorandum of Understanding between ORIC, PM&C, AGD and the NNTT which should then be followed up with a legislative link. ORIC outlined a possible process in which, after receiving a complaint, they would have the option of assisting groups to handle the disputes internally or to seek advice from the appropriate NTRB/SP. If it was determined subsequently that the complaint would involve assistance from the NNTT, ORIC would then refer the matter to the NNTT for mediation. However, where there are limitations concerning the reach of the CATSI Act, there may be cases that go straight through to the NNTT for mediation.

Education was also raised as a key area in which the NNTT could engage with the PBC sector concerning dispute resolution. The weight of research data suggests that better education among PBCs regarding the native title process and the NTA may develop capacity within PBCs concerning the proper role of PBC administration with regard to membership, ILUAs and future act agreements. There is some evidence that PBCs are beginning to prioritise educating young people about native title in order to prevent such disputes but, clearly, the NNTT could play a greater educative role in the post-determination context, should the proposed amendments be passed into law.

It was also suggested that currently the NNTT could organise pre-determination workshops in order to present people with an in-depth overview of what happens in PBCs and what happens to claim groups after they are successful. PM&C advises that it is seeking currently to address this and has commissioned the National Native Title Council (NNTC) to provide determination brochures for each determination to educate native title holders about their rights and interests.

QSNTS representatives suggested that the NNTT should have more functions regarding small claims with an emphasis on PBC disputes, as these disputes impose an unnecessary impost on the Court, and the Court's processes and formalities are beyond the experience of many Traditional Owners. In this respect, the NNTT could provide a much more comfortable setting for Aboriginal and Torres Strait Islander people engaged in PBC disputes with a minimum of formality and expense.

It was suggested by QSNTS that the NNTT could provide a hierarchy of interventions designed, at each stage, to have an opportunity for resolution. At the final stage, if mediation were deemed to be ineffective (where disputes are intractable), the NNTT might be provisioned with the ability to bring down a binding decision.

This echoes, in many respects, the process of dispute resolution suggested by FNLRS. Aimed at avoiding lengthy timelines which exacerbate and deepen disputes, the process proposed by FNLRS consists of a staged approach in which options for resolution are developed, or examined, before the dispute is escalated to the next stage. The five stages of the process are as follows:

1. Internal – Disputants attempt to resolve the dispute using the PBC's internal processes. In drafting the dispute resolution provisions of the Rule Book consideration could be given to the involvement of Elders, community leaders and/or knowledge holders.
2. NTRBs – In the event the dispute persists disputants could be required to engage the NTRB from their area to assist with the resolution of the dispute. Increasingly NTRBs have staff with mediation and dispute management expertise, which combined with their legal and research expertise places them in a good position to assist PBCs manage their disputes.
3. NNTT – In the event the dispute still persists it could be escalated to the NNTT. This would provide further opportunity for appropriately trained and experienced staff to assist with the resolution of the dispute. Given the potential for NTRBs to not be seen as impartial this third stage may be of significant value.
4. ORIC – In the event the dispute could not be resolved at any of the previous three stages the dispute could be referred to ORIC. In addition to its existing powers the Registrar could be granted the power to arbitrate disputes, that is, to make binding determinations in relation to the dispute.
5. Court – Judicial relief should always remain open to any party to a dispute. Disputants would not be able to move from stage 2 to 3 and then onto 4 without evidence (by way of a certificate for example) that the dispute could not be resolved at the previous stage.⁵⁴

Significantly, this process also offers a clear pathway for dispute management as it proceeds through the different stages. As discussed above, whilst achieving dispute resolution is always the preferred option, in many instances this is not a realistic goal – particularly in disputes which have their foundation in pre-Native Title relationships between groups of PBC

⁵⁴ NTSV (FNLRS) Dispute Resolution Working Paper, pp: 3-4.

members. The above process has the potential to be able to assist those engaged in the dispute in identifying if the PBC is actually the appropriate forum for resolution. If it is not, there is an opportunity to pursue the matter in a different forum or context which will not impact further (or impact less) upon the decision-making ability of the PBC.

Alternatively, if the PBC is deemed the appropriate forum by the participants, Stage 3 presents PBCs experiencing these problems with an opportunity to seek assistance from the NNTT in the form of mediation and the capacity to seek resources to manage the dispute to either a resolution or to an agreed cessation. In this space, the NNTT can call upon its resources and expertise to provide information and mediation to the disputants and to further clarify the issues at play.

Here, the NNTT could play a valuable role for ORIC, should the dispute prove both appropriate within the PBC context yet resistant to mediation. The NNTT could prepare, for ORIC, a collation of the background information it holds pertinent to the native title determination from which the PBC has emerged, and a set of notes regarding their involvement in the dispute so far. This would, however, have to be approved by the groups involved before being passed on.

In this way, the NNTT would be able to provide the dispute management/resolution process with the benefit of its archive of native title information in tandem with the skills of its experienced mediators. This would, of course, be accompanied by assistance from the NNTT Geospatial Services Team regarding the presentation of existing geospatial data and, if necessary, the gathering and presenting of new geospatial data emerging from the mediation process.⁵⁵

Furthermore, there was agreement among all of those who engaged in the research that the NNTT should be given the power to arbitrate disputes along with the power to mediate them. There was a strong feeling that the NNTT should be able to compel parties to attend mediation in order to avoid the long delays that are caused when one or more parties to a dispute seek to disengage from the dispute completely so as to avoid resolution. NNTT mediators suggest that, while compelling parties to attend mediation may not be a realistic option, the shadow of an arbitrated decision being imposed, if they do not attend mediation, can often focus parties' attention on working together to achieve agreed outcomes.

There is some speculation within the sector concerning NNTT mediation outcomes and complementary mechanisms that might be employed in order to make these outcomes binding. This stems from an acknowledgement that the enforceability of post-determination agreements is a real problem in the PBC space. QSNTS representatives noted that there is no

⁵⁵ Here, I am speaking of geo-spatial data collected during such activities as the walking boundaries and the on-country inspections of places associated with people engaged in the dispute.

'big stick' to be wielded against PBCs, and the people within them, where there is a lack of compliance, fairness or processual integrity. There was a further recognition of PBC disputes being unnecessarily complicated when corporation directors seek independent legal advice from lawyers whose chief interests lie in retaining first option on any ILUA or future act agreement work generated by the PBC.

This support for the NNTT appears to be due, to some degree, to the understanding of the NNTT as an arm of the Court and, thus, an independent body held in high esteem throughout the sector. In support of this, it has been suggested the NTA be further amended to cover PBCs (and, thus, the post-determination context) so that the NNTT can legitimately work in the PBC space. The point was made that there is no other organisation with the ability to provide geospatial and research resources and the social capital to do so.

The need for a larger cadre of culturally aware professional mediators was identified as critically important to dispute resolution in the PBC sector. This need was also identified as being relevant for the NTRB/SPs across the country as they currently do not have the resources to become involved in PBC disputes until they are at a point which threatens to destabilise them as corporate entities. It was pointed out by the NQLC that this is usually at a point which is beyond simple mediation and at which the dispute has begun to harden into an insoluble form. Thus, along with the need for greater capacity with respect to the ability of NTRB/SPs to be more engaged with PBCs, there is also a need to develop dispute resolution processes which can be tailored to each PBC situation and can be operated within a PBC before disputes become intractable.

With regard to mediations, it was noted that the NNTT may need to call upon the anthropological material, including expert reports and lay informant affidavits. In instances where this material has been deemed by the Court to be unreliable, there may be a need for new research to be considered.⁵⁶

Another proposed strategy to avoid or resolve disputes within PBCs was to place greater emphasis on decision-making in the pre-determination phase. More specifically, there needs to be more extensive education available concerning what kinds of decisions will need to be made and by whom (and with whom depending upon the context). The appropriateness of ORIC as the body responsible for compliance within the PBC sector was also questioned in light of its perceived distance from the everyday decision-making and administration which occurs within PBCs.⁵⁷

⁵⁶ For a considered discussion of the role of research in Native Title disputes see McAvoy, T. & Cooms, V. (2008) *Even as the crow flies it is still a long way: Implementation of the Queensland South Native Title Services legal services strategic plan*. AIATSIS: Canberra.

⁵⁷ For a comprehensive exposition of authorisation and decision-making regarding native title decisions see Duff, N. (2017) *Authorisation and Decision-Making in Native Title*. AIATSIS Research Publications: Canberra.

Compulsory membership for all eligible people within PBCs was raised by both QSNTS and FNLRS⁵⁸ as a viable solution to many problems concerning PBC membership. QSNTS representatives spoke of instances in which membership was withdrawn, sometimes without the foreknowledge of the member, and added that they had been arguing for a system in which every person who was eligible to be a PBC member was automatically given membership. They further recommended that eligibility should be made immune to revision without a majority vote at a general meeting.

Finally, an increase in funding for PBCs, in order to build capacity and to properly administer their corporations, was the most commonly proposed strategy for the avoidance and resolution of PBC disputes. It was broadly agreed that the most common cause of disputes within PBCs is a lack of funding in the initial phases and a further lack of sustainable funding during the life of the corporation. Proposed strategies such as the provision for Elders Councils, capacity building and greater mediation functions for both the NNTT and ORIC will need considerable and sustained funding if they are to be realised.⁵⁹ As yet, there appears to be no certainty among research participants as to from where this funding might emerge.⁶⁰

Further Considerations

The issues raised in this report, while complex currently, will become more so in the coming years as regulatory and political change impacts upon the native title space. Although it is far beyond the scope of this report to address these issues properly, some of the aspects of the changing native title environment should be raised for future consideration.

Clearly, the first of these is the full raft of suggested amendments to the NTA. While the legal aspects of these are beyond the expertise of the author, those which impact upon dispute resolution and the prospective role of the NNTT have been addressed above.

The second prospective regulatory change concerns the suggested amendments to the CATSI Act. Again, while a discussion of these changes is beyond the scope of this report, it is clear that most of these changes will impact upon the way that dispute resolution and management is approached within PBCs. On a broad level, these changes impact upon:

- the classification system for corporations;
- the composition and structure of corporation rule books;
- the use of corporation names under the CATSI Act;

⁵⁸ NTSV (FNLRS) Dispute Resolution Working Paper, p: 4.

⁵⁹ PM&C advises that funding is available under two specific streams - PBC Basic Support funding and NAWP PBC Capacity building funding.

⁶⁰ A compelling cost analysis-based argument for adequate funding of mediation in Aboriginal corporations is put forward in Williams, M. S. (2016) 'Justice Reinvestment: The cost benefits of Trusting and Supporting Indigenous People to Mediate their Troubles' in *Indigenous Law Bulletin* vol. 8, issue 22, pp: 21-27.

- the ability to create subsidies and allow joint venture organisations to be set up under the CATSI Act;
- changes in the required frequency of meetings;
- the tabling of annual reports;
- the use of member contact details and information;
- transparency concerning executive salaries;
- the ability to make third party transactions and the discretionary powers of ORIC to allow other transactions;
- the grounds for putting corporations into special administration;
- the process of appointing special administrators;
- the criteria for voluntary deregistration; and,
- the powers of investigation and compliance regarding lower-level compliance issues.⁶¹

The third change concerns the impact of the Timber Creek compensation decision.⁶² While currently this is being appealed in the High Court, compensation stemming from similar claims across the country will impact greatly upon the size and nature of disputes within (and without) PBCs in the coming years.

While it is hard to foresee the nature of this impact, from the above report one can glean the possibility of disputes becoming more entrenched and less soluble as the possibility of financial compensation becomes clearer. Indeed, this may leave groups and individuals in disputation within PBCs with less ability to compromise as the consequences of compromise become starker. On the other hand, we may see Traditional Owner groups coming together to discuss ways of achieving outcomes acceptable to them. Either way, it is impossible for a major change in the legal landscape not to have a considerable impact upon disputes and dispute management/resolution in the PBC arena.

Finally, the political ramifications of the advent of Treaty negotiations in Victoria will have an impact upon how Aboriginal and Torres Strait Islander people see the merits of the NTA across the country. Although Victoria is currently the only state to pursue this course so far, there is much support for it nationally and it has strong support from advocates of the Uluru Statement From the Heart. Again, it is hard to gauge what this impact may be, owing to the rapidity of the process towards a Treaty with Aboriginal people in Victoria to date.

Certainly Victoria, with its *Traditional Owner Settlement Act 2010* and, now, with Treaty negotiations, offers a truly dynamic arena within which to study the trajectory of PBCs and PBC disputes over the next few years as they cope with the amount of change that has been

⁶¹ *CATSI Act reforms: less red tape, more accountability*. Office of the Registrar of Indigenous Corporations: Australian Government 2018.

⁶² *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 (Timber Creek).

introduced into the legal system. Within this context, it is likely that Victorian PBCs will also feel the impact of the other considerations discussed above all the more keenly and will, as a result, become a proving ground for native title and corporate practices that emerge from the coming era.

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