Review of the Future Acts Regime

A response to Issues Paper 50 released by

the Australian Law Reform Commission

Overview

This submission by Peter See, Suzanne King, Tony Kelly and Peter Johnson seeks the inclusion in the forthcoming ALRC Discussion Paper of an issue not mentioned in the Issues Paper on this review, as Question 2 of the Issues Paper sought.

The issue centres on the role, authority and accountability of Registered Native Title Body Corporates (PBCs). As we outline below, PBCs play a critical role in the future acts regime. This role will become increasingly significant and, we argue, increasingly problematic under the current legislative framework, as governments continue to focus on the link between native title and economic development.

This submission and the issues we raise address the following elements of the ALRC's Terms of Reference for this review:

- the opportunity for the native title system to contribute significantly to social, cultural, environmental and economic outcomes for First Nations people, businesses, organisations and communities;
- the role of the future acts regime as a precursor to economic and other activities on native title land; and
- the importance of the future acts regime being appropriately designed for Australia's current and future social and economic development, in a way that respects the rights and interests of native title holders.

This submission springs from over twenty years of observation and experience in working with the Martu people of the Western Desert, who hold exclusive native title over a vast area. The four authors of this submission have worked closely with Martu people in the creation and development of Kalyuku Ninti – Puntuku Ngurra Limited (KJ) from 2005 to the present day.[1] All four are currently or were previously Advisory (non-voting) Directors on the Board of KJ, with three also having filled senior executive roles in the company over the past 16 years. The development of KJ and its suite of cultural, environmental and social programs to a point where it contributes over $3.5m annually in wages for Martu is one example of the kinds of benefits that can flow to Indigenous groups as a result of native title. Martu have yet to see any significant direct financial

[1] Appendix A to this submission provides background on Kanyirninpa Jukurrpa.

contribution in things such as community infrastructure or housing from their native title.

The submission focuses on practical effects of the future acts regime and on practical and growing risks that spring from those effects, which, unless addressed, will substantially compromise attainment of the objectives outlined in the ALRC's Terms of Reference.

We strongly urge that the issues we raise should be included in the Discussion Paper and seen as part of the foundations of the future act regime. We would be happy to speak to the review team about these issues and seek to make a more complete and detailed submission in a response to that Paper.

Prescribed Bodies Corporate

Prescribed Bodies Corporate (PBCs) play a crucial role in the Native Title system, including a major role in the future acts regime.

Trustee PBCs hold native title rights and interests on trust for the common law holders. They are the conduit by which external parties wishing to take action that will impact those rights and interests engage with the common law holders. They are entrusted with ensuring that correct consultative processes are followed for native title decisions. They play a significant role in the negotiation of future acts and ILUAs.

PBCs are tasked with 'managing' native title rights and interests. That at least means the organization of consultations about opportunities arising from or challenges to native title rights. It includes organizing and conducting legal actions to protect native title rights. However, as discussed below, the precise meaning and effect of their duty to 'manage' native title rights is unclear.

PBCs have at least initial responsibility for ensuring that native title rights are exercised in accordance with law and custom. They thus are tasked with playing a bridging role between traditional practice and Western law.

PBCs hold monies relating to native title rights and interests on trust for the common law holders.

This is a substantial and critical suite of responsibilities in the administration, protection and exploitation of native title rights, interests and funds. It is critical that this role is performed with clarity and integrity. PBCs should be the guardians of integrity in the administration, exercise, protection and exploitation of native title rights and interests.

Yet, as we argue below, they are effectively almost completely unaccountable. If, as previous Commonwealth Ministers and Joint Parliamentary Committees have suggested, they are to be 'the engine rooms of economic growth', there is an inherent

conflict of interest in that role, threatening the integrity of the primary function. Their role, authority and powers are ill-defined. The mechanisms chosen by the legislature to ensure that their actions are lawful and accountable are practically worthless. Yet their role, scope of responsibility and authority is burgeoning, largely fuelled by government action, both formal and informal.

The lack of clarity concerning their authority leads to government, corporate and philanthropic organisations according them far more ostensible authority than we believe is justified or prudent. In many practical respects, these organisations have usurped the authority of the common law holders.

Native Title (Prescribed Body Corporate) Regulations

The functions and duties of PBCs are set out in the 31 pages of the Native Title (Prescribed Body Corporate) Regulations 1999. The functions of a trustee PBC, with which we are concerned, are set out in Regulation 6. That regulation is short, unclear and relies on the importation of mainstream legal concepts to attempt to impose safeguards on the exercise of their authority.

There are several potential safeguards on the exercise of PBC authority.

The first is the wording of Regulation 6. It can be assumed that at the time these regulations were first promulgated, the major focus of enacting native title legislation concerned claims and determinations, rather than the 'post-native title world', which we now largely inhabit.

Regulation 6 is meagre, ambiguous and makes use of two bodies of law – corporations law and trust law – to deal with much of the detail of how PBCs should act.

The regulation states that a trustee PBC is to 'manage' native title rights and interests. What does that import? Does it mean that PBCs have the power to exercise native title rights (such as authorizing access to and activities on a determination area) independently of the wishes of the common law holders? Does it connote a merely administrative or procedural right to exercise, such as when agreements have been authorized by common law holders and the PBC executes the agreement? Does it include the institution of protocols, at variance with traditional law and custom? Does it mean the responsibility to act as an administrative conduit between external parties and native title holders – a 'letter-box' as some early commentators suggested was a PBC's nature.

Over the last 15 years, KJ has had to deal with all of the more far-reaching interpretations listed above. As an independent entity whose membership is exclusively Martu native title common law holders, it has had to deal with extravagant assertions of PBC authority and power.

With inadequate safeguards, as argued below, the current, unclear statement of the role of 'managing' native title rights invites an expansive interpretation of the authority thus granted and then what we would argue to be over-reach. As we outline below, the first change we would seek is significant clarification of the role, authority and power of a trustee PBC in those Regulations.

Regulation by Corporations Law

PBCs are constituted under the Corporations (Aboriginal and Torres Strait Islander) Act. That Act provides certain tailored requirements and obligations for Indigenous corporations. It is administered by the Office of the Regulator of Indigenous Corporations (ORIC).

In our experience, ORIC sees its role as limited solely to regulating the requirements imposed by the CATSI Act and the common law in relation to corporate governance. It explicitly denies any significant role in regulating the actions of a PBC in relation to native title law, native title processes or native title funds. Guidance provided on the ORIC website identifies processes set out for native title decisions under the PBC Regulations and a company's Rulebook, but suggests no role for ORIC in regulating such processes. So, it regulates the 'conventional' corporate practices of PBCs, but not practices related to their principal and distinctive focus and nature.

Where an action of a PBC breaches some aspect of Corporations Law in a way that harms common law holders, such as oppression of a majority by a minority in relation to native title matters, then the common law holders are at liberty to pursue remedies available for such a breach under the legislation or the common law. This is effectively illusory for Martu and, we would expect, for many native title groups. For the group that we work with, very traditional Western Desert people, advising that they could pursue an injunction in the Federal or Supreme Court is not realistic and more likely impossible, without substantial support.

These members of the PBC are not able to seek the assistance of the appropriate Native Title Representative Body, which will inevitably regularly do work for the PBC and so claim a conflict of interest.

Other people who may have an interest in challenging an unauthorized action by the PBC will be unlikely to have standing.

Government agencies of all persuasions, in our experience, have been reluctant to become involved in an argument between common law holders and the PBC, seeing it as something that the people themselves must resolve. As we outline below, this is unrealistic.

Regulation by trust law

It may be that the Parliament believed that it was imposing appropriately serious safeguards on the actions of PBCs when it stipulated in Regulation 6 that they were to hold native title rights and interests and native title funds on trust for the common law holders. We would argue that this is an ineffectual safeguard, without further structural support for common law holders.

First, we have received conflicting advice, both that Regulation 6 fully imports trust law, including common law trustee duties, and that it doesn't, but rather sets up a unique creature, a statutory trust the terms and effect of which, and the protections afforded thereby, are matters of complete uncertainty. There appears to be no established law on the question.

Trust law undoubtedly makes the PBC the legal holder of the native title rights and interests. The distinction between legal and beneficial ownership is one that, unsurprisingly, is lost on many remote common law holders. Their formulation of the role of the PBC can be summarized as 'The PBC is the Boss' or, in exasperation, 'The PBC shouldn't be the Boss.'

We have experienced various formulations by a PBC of their role and authority, including:

- 'We are the landholder' (or, from Government agencies, 'The PBC is the landholder') – meaning that they have ultimate authority
- 'There aren't traditional owners any more, there's just the PBC' [redacted]

The importation of trust law into Regulation 6 lacks clarity; its effect is unclear and unenforced. The means of beneficiaries enforcing their interests against the trustee are effectively inaccessible: 'You could commence an action in the Supreme Court in its equity jurisdiction to stipulate how the trustee powers should be exercised….'.

The fiduciary duties which we would presume are imposed on a PBC by the importation of trust law are, in our experience, selectively observed.

Risks

Without the means to understand and enforce the duties placed on a PBC, common law holders are vulnerable to a host of risks.

The major risk is simply the creation of a small cohort of corporate officeholders and senior staff that appropriates all of the resources, decisions and opportunities that should rightly be held or taken up by the body of common law holders.

Non-Indigenous staff and forceful figures in the traditional owner group who are fluent in Western structures, processes and tactics can readily impose their will on a traditional owner group, largely through bluff and bewilderment.

The vesting of these rights and any safeguards surrounding them in Western structures, such as corporations and trusts, without any special, additional safeguards appropriate to the context, disenfranchises and disempowers the mass of common law holders. It can lead to the undermining of cultural authority, structures and governance practices, in effect undermining the proper and empowered exercise of native title rights.

The lack of appropriate safeguards can lead to the misuse of native title funds.

The appropriation of decision-making processes by a small cohort, including the potential to engineer agreements that extinguish native title rights, is readily possible when those processes are couched in the language of corporations, legal requirements and legalese. Senior traditional owners can fight the substance of proposals, insofar as their cultural impact is understood, but they can't fight the process. The PBC should be the protector of integrity in such complex situations, rather than a proponent of one cause and the instigator of bewildering process.

Appropriation of decision-making process leads to political problems within the common law holder group: division, conflict, selective allocation of 'native title resources' such as compensation and vehicles. Any idea that litigation is an appropriate means of resolving disputes is quickly scotched: maintenance of social harmony within the traditional owner 'family' has far higher currency for most than winning the argument and the rights.

These risks are exacerbated when PBCs are championed as the vanguard of economic development or of political representation. There is an inherent conflict of interest where the organization vested with the guardianship of integrity in cultural process is also the proponent of an initiative that will impact native title rights. The Discussion Paper must, at least, recognise this profound conflict of interest which has, in our experience, been continually missed in the rush to foster economic development.

We have seen native title processes effectively hijacked, so that a mining initiative championed by the PBC was agreed and an IlUA executed, despite alarm and strong opposition from the common law holders. [redacted]

There is also a risk to other organisations working in the determination area. KJ has run a very successful ranger program for over 15 years. [redacted]

These risks are not theoretical: we have seen all of them played out over the last 15 years. If we have an opportunity to make a more complete submission, we will elaborate on the means by which native title processes are subverted and turned to a minority's advantage.

Relevance to the ALRC's Terms of Reference

This submission and the issues we raise are directly relevant to the ALRC's Terms of Reference. They address the following elements of the Terms of Reference:

- the opportunity for the native title system to contribute significantly to social, cultural, environmental and economic outcomes for First Nations people, businesses, organisations and communities;
- the role of the future acts regime as a precursor to economic and other activities on native title land; and
- the importance of the future acts regime being appropriately designed for Australia's current and future social and economic development, in a way that respects the rights and interests of native title holders.

In our view, the integrity of the future acts regime and the likelihood of attaining these objectives are dependent upon providing greater clarity on the role, authority and powers of a PBC in the Regulations and on creating additional safeguards to ensure and protect the integrity of native title processes and decision-making.

Potential Solutions

We believe that these issues are critical to the maturing of the native title system and future act regime. As such, these issues and the solutions proposed below should be

considered as proposals to be included in the Discussion Paper. We will then present a more comprehensive analysis and proposed solutions in response to that Paper.

However, some of these issues have been raised and solutions have been proposed in the past. This is not an entirely new issue.

In 2011, Martin, Bauman and Neale highlighted the problems flowing from the unsupported imposition of Western structures and laws on traditional owner groups.[2] After highlighting the risks inherent in this cross-cultural dynamic, and reviewing literature on those risks and tensions, they proposed the appointment of knowledgeable, independent experts as 'process managers' for native title matters. They would be interposed between the traditional owner group and the PBC, not to act as mediators but to ensure that processes adequately take account of cultural forms, dynamics, relationships, interests in country and other cultural factors.

Dr Angus Frith has written about the need for a hybrid form of PBC organization, neither fully Western nor fully traditional, that could be cognizant of both Western legal requirements and cultural structures, forms and practices.[3]

Some solutions are readily understood and available. The Native Title (Prescribed Body Corporate) Regulations are deficient, failing to clearly elaborate the nature, authority and powers of PBCs. Clearer legislation and policy is unarguably required and should be a starting point. At very least, we would propose that legislative change is required.

The provision of mechanisms by which common law holders could be supported in interrogating the lawfulness and potential solutions for PBC actions is essential, if the ostensible safeguards of corporations law and trust law are to have any effect. As indicated above, the local Native Title Representative Body is likely to be conflicted, but it is possible that the National Native Title Tribunal could play a role in supporting common law holders. Alternatively, ORIC's jurisdiction, focus and resourcing could be expanded to explicitly include the administration by PBCs of native title matters. This could also include the power to give opinions on the legality of PBC actions.

For external organisations, including those owned and managed by common law holders, some form of standing to challenge the actions of a PBC, or a forum in which that could be done, would provide a means of requiring higher standards of accountability. The Indigenous world frequently includes multiple specialist organisations, each with their distinct focus, servicing the same group of traditional owners. This is a special context with distinctive issues and great benefit from close cooperation; it is not simply a conventional 'corporate' environment.

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[2] *Challenges for Australian native title anthropology: practice beyond the proof of connection*, David Martin, Toni Bauman & Jodi Neale, AIATSIS Research Discussion Paper Number 29 ((May 2011)

[3] *Getting it Right for the Future: Aboriginal Law, Australian Law and Native Title Corporations*, unpublished thesis for Doctor of Philosophy, Melbourne Law School, Melbourne University, December 2013

At present, it has become clear to us that there is no government agency that wishes to get involved in native title 'arguments'. ORIC's largely 'hands-off' position in relation to third parties is illustrated by the following extract from their website:

> If the matter subject to dispute is not one that another government entity can assist with, the third party is likely to require independent legal advice and /or the help of mediators. You can contact us if you are unclear on who may be able to assist with your dispute and we may be able to provide advice about who you should talk to.

Finally, and with a broader view of the ALRC's terms of reference, the risks inherent in current proposals to expand the cultural, political and economic responsibilities of PBCs need to be carefully thought through. There is undoubtedly convenience in seeing a PBC as the single body representing a traditional owner group on all matters and building up such an organization. However, without adequate safeguards, such a course will enable and invite the misuse of power and position.

If you wish to discuss this submission further, please contact Peter See on [redacted]

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Appendix to Submission

Kanyirninpa Jukurrpa (KJ) is a Martu organisation based out of Newman in the East Pilbara in Western Australia. It is incorporated as a company limited by guarantee and its membership is solely Martu native title holders.

The board of directors is comprised of 12 Martu directors – two from each remote community, Newman and the diaspora. The Martu directors can appoint up to three non-voting advisory directors who do not have to be Martu.

Martu have exclusive possession native title rights over approximately 20 million hectares of desert country including surrounding Karlamilyi National Park (approximately another 1.2 million hectares). Martu native title rights have been determined in two major determinations and are held in trust by different prescribed bodies corporate (PBCs) – Jamukurnu Yapalikurnu Aboriginal Corporation (JYAC) in the north (often referred to as the Martu native title determination) and Mungarlu Ngurrarankatja Rirraunkaja Aboriginal Corporation (MNR) in the south (often referred to as the Birriliburu native title determination).

KJ's members would all be eligible for membership of JYAC and some eligible for membership of MNR.

KJ started in about 2005 within JYAC (then known as WDLAC) and incorporated separately back in 2009 with the PBC's support. This was documented in a Memorandum of Understanding as well as a tri-partite agreement between WDLAC, KJ and the Commonwealth for the transfer of the management of the ranger and other Commonwealth funded programs to KJ.

KJ has grown from its origins around family history and cultural knowledge programs to include an extensive ranger program across four remote communities and a suite of social programs that are highly regarded. KJ employs over 500 Martu and pays over $3.5 million in wages each year. KJ has staff based in the four communities as well as in Newman.

KJ is funded by NIAA, the WA Government as well as BHP and others.