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# *NATIVE TITLE CORPORATIONS: A LEGAL AND ANTHROPOLOGICAL ANALYSIS*

**By Christos Mantziaris and David Martin**

**The Federation Press, Sydney 2000**
**xxxiv, 366 pp**
**ISBN 1 86287 3720**

The *Native Title Act 1993* (Cth) ('*NTA*') provides a mechanism for the determination of 'native title'. There is no procedure for 'group' applications, much less any recognition of the group as a political entity. Instead the application for native title must be made by an individual or individuals who are authorised by all the persons who hold the common or group rights (s 61 *NTA*). On such an application the Federal Court may determine that native title exists and, if it does, the nature and extent of it (ss 94A, 225 *NTA*). Before making such a determination, the court must determine whether the native title will be held by a prescribed body corporate ('PBC') on trust for the common law holders (s 56 *NTA*) or, if not, it must determine which PBC will perform the relevant functions under the *NTA* and *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) ('the Regulations') (s 57 *NTA*). In either case the PBC is registered on the National Native Title Register and becomes a registered native title body corporate (s 193 *NTA*). The practical result is that if the common law native title holders wish to seek a determination under the *NTA,* they must establish a PBC which will act either as trustee or as agent for them in relation to their native title interests.

This book deals generally with the creation of PBCs. It forms an integral aspect of a broader project studying governance structures for Aboriginal communities which has been funded by the Australian Research Council. Although the book can stand alone, some of the papers that have been produced within the broader project provide a useful background to the book. For example, Professor Nettheim's paper (Discussion Paper 7) on *Governance Bodies and Australian Legislative Provision for Corporations and Councils* describes the history of the use of corporate structures for Aboriginal land.[1] Presumably for reasons of space, this is not dealt with at any depth in the book, and its absence means that some of the discussion of the reasons for the use of PBCs in the *NTA* lacks a context. Some of the other papers that form part of the broader project (including Professor Nettheim's paper) are published in the 'Reconciliation and Social Justice Library' at the *Austlii* site on

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1 See also Christos Mantziaris 'The Dual Theory of the Corporation and the Aboriginal Corporation' (1999) 27 *Federal Law Review* 283.

the internet and are readily accessible.

The book is an expanded version of a shorter publication called *Guide to the Design of Native Title Corporations* written by the authors and published by the National Native Title Tribunal.[2] Many will find the *Guide* sufficient for their purposes.

The main strength and emphasis of the book is in describing the statutory and practical issues that need to be considered in establishing a PBC. The PBC must comply with the regulations. Those requirements include (reg 4):

1. The body is incorporated after 30 December 1994 under the *Aboriginal Councils and Associations Act 1976* (Cth) for the express purpose of being the subject of a PBC determination; and

2. All the members of the corporation are persons who have native title rights and interests.

The functions of the PBC are to act as trustee or agent (as the case may be) for the native title holders (regs 6, 7). If it does any act which will affect the native title rights it must consult with and obtain the consent (in accordance with Aboriginal tradition) of the common law holders (reg 8). In some circumstances it is also required to consult with the relevant representative body (reg 8(3)(a)).

The assumption behind the use of a PBC is that the membership of the corporation and the holders of native title are the same. As the authors point out, this is not as obvious as the Parliament and the government may have assumed. First, the interests may not be individual interests, but group interests. These may not be adequately reflected in individual membership. Second, traditional or customary laws and processes may not be reflected in the corporate model. The potential for conflict between the corporation and the interests it is intended to protect may be obvious.

This is exacerbated by the role of the PBC as trustee or agent of the native title holders, rather than as the holder of the native title (as occurs under the *Pitjantjatjara Land Rights Act 1991* (SA), for example). The book discusses the difference between the agency and trust relationship at some length and points out that under the trust arrangement the native title holders do not hold the native title rights, but have statutory rights against the PBC. On the other hand, under an agency arrangement the native title holders have their rights at common law as well as statutory rights against the corporation. In either case problems are created for the PBC. Put simply, it cannot be assumed that the native title holders will all have

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2 Christos Mantziaris and David Martin, *Guide to the Design of Native Title Tribunals* (1999).

the same interest or indeed the same rights as the corporation. The PBC may well be placed in an impossible situation. Given its status as a trustee or agent it is unclear how the inclusive nature of its membership will necessarily protect it from breaches of its various duties. The analysis of these issues by the authors is lengthy and difficult, but ultimately compelling.

The authors identify eight minimum legal 'facilities' that must be provided by a corporate structure for the corporation to achieve its objective as a PBC: legal capacity, legal authority, identification of members, identifying the nature and extent of native title rights and interests, decision-making procedures, dispute resolution procedures, accountability to members and to external parties and allocation of liability for native title related acts.

The authors identify a number of legal and anthropological difficulties standing in the way of a PBC providing these facilities. For example, the authors point to the different approaches of Aboriginal decision making and 'corporate' decision making in relation to an annual general meeting. Within at least some Aboriginal cultures the meeting should only take place where a consensus has already been reached, rather than as a means of reaching a position. As the authors put it:

> Meetings, then, may be more suited as a tool for ratifying a broad consensus, which has been arrived at through a process of detailed, sequential discussions and negotiations with the relevant members of the native title group, than as the sole means for reaching a decision. An understanding of the role of meetings in indigenous political processes suggests that reliance upon the general meeting of members to secure the members' control of a native title corporation may be misplaced.[3]

In like manner the authors identify other problems. In order to address these problems and to achieve the various facilities, the authors propose eight principles of corporate design. These are: certainty, capacity to attract allegiance of the group, sensitivity to systems of traditional law and culture, sensitivity to motivational complexity, revisability, robustness, simplicity and transaction cost efficiency. As might be expected from the authors' earlier analysis of the duties of a PBC as trustee or agent, there is good reason for some scepticism of the possibility of designing any corporate structure that meets each of the eight principles. Nevertheless, the authors propose four 'template' PBCs: either an agent or a trustee corporation, each with representative or participatory membership. In each case they analyse the capacity of the 'template' corporation to achieve the required eight principles. Each template has various strengths and weaknesses which are analysed. Not surprisingly the conclusion seems to be that the corporation will only

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3 Christos Mantziaris and David Martin, *Native Title Corporations: A Legal And Anthropological Analysis* (2000) 313.

work well if the members are a relatively small and cohesive group. After all, this would seem to reflect traditional Aboriginal communities.[4]

This analysis of the corporate structures and their strengths and weaknesses is, in one sense, reasonably obvious. It would seem obvious, for example, that the capacity to attract the allegiance of the group is a critical success factor where the corporation is intended to be the vehicle to reflect basic group spiritual values. On the other hand, the analysis may also be seen as somewhat arbitrary. There is no discussion, for example, of the importance of attracting competent officers to manage the corporation, yet it is obvious that the skill of the board and its managers (whether it be Aboriginal elders or someone else) is a critical success factor. Given the vigour of much internal Aboriginal politics (an issue which is assumed, but not discussed in the book) it would be of some interest if the authors had been prepared to suggest any mechanisms to attract, protect and retain competent administrators.

Although the main emphasis and the primary strength of the book is in its analysis of the statutory and practical issues relating to the establishment of a PBC, the book also analyses the legal and political context in which these corporations are intended to operate. I did not find this aspect of the book as useful. The authors point out that there is a 'recognition space' where Aboriginal customary rights and other legal rights intersect. They spend some time attempting to analyse what this 'recognition space' involves. They draw attention, for example, to the different approaches by the various Federal Court judges in *Ward v Western Australia*[5] to the identification of what native title rights remain in light of co-existing title. The authors offer the solution that 'core' rights should be distinguished from 'non-core' rights.[6] The solution is suggested as one to be incorporated into Australian common law. However, they seem to accept that this approach cannot be justified simply on an anthropological or factual basis. Nor do they show how this analysis is consistent with either *Mabo v Queensland [No 2]*[7] or with the *NTA*. The suggestions made by the authors, like much of the legal debate in this area, seem to be based more on the identification of some means to achieve some predetermined outcome, than on any analysis from first principles.

Arguably, the authors' analysis of the legal and political context also fails to identify the more fundamental objections that can be made to the requirement in the *NTA* that native title holders use PBCs. The problem is merely an aspect of the general failure of the *NTA* to address the relationship between that Act and the common law.

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4 Ibid 40.

5 (1998) 159 ALR 483; on appeal, (1998) 170 ALR 159.

6 See Mantziaris and Martin, above n 2, 63–4, 310.

7 (1992) 175 CLR 1 ('*Mabo*').

It is true that *Mabo* limited the recognition of Aboriginal law and custom to rights in real property.[8] Nevertheless, in *Mabo* it was accepted that the common law recognises native title rights as being held by a community which is defined in accordance with Aboriginal law and tradition.[9] This was a fundamentally important acknowledgement. At the bicentennial Australian Legal Convention in Canberra in 1988, Professor James Crawford delivered a paper on 'The Aboriginal Legal Heritage'. The theme of that paper was the failure of Australian politics and law to recognise Aboriginal public law. This included the failure to recognise those laws and customs by which Aborigines define for themselves their polities and communities. Professor Crawford argued that it was wrong to attempt to distinguish between those traditional political structures and the rights held by the political structure. *Mabo* did recognise Aboriginal public law at least to the extent that that public law defined the political entity that held native title. Presumably that political entity could take legal proceedings to enforce the rights that were identified.[10]

The *NTA,* on the other hand, seems to treat the political entity as being no more than the conglomeration of its members.[11] And, of course, the purpose and role of the PBC is to act in substitution for the political entity and, at least where the PBC acts as trustee, to limit its rights. This has not occurred in other countries, at least not to the same extent. At this more fundamental level it may be that the failure of the *NTA* to deal with the relationship between the rights and structures created by that Act and the common law has the inevitable consequence that PBCs will have fundamental problems. The *NTA* did not leave the common law alone; nor did it replace the common law with a new structure for Aboriginal land holding. Instead it 'meddled'. PBCs are an example of that approach. The authors are correct in identifying the problems inherent in the role and function of PBCs. However, it may be that the problem is not limited to the role and function of PBCs. It may be that it is inherent in the whole scheme of the *NTA*.

These comments relate only to that part of the book dealing with the legal and political context to the operation of PBCs. As already pointed out this is not the main emphasis of the book. There is no other book or paper where the legal and practical issues of the creation or operation of prescribed bodies corporate have been considered in as much detail or with as much insight as they are in *Native Title*

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8 See B M Selway, 'The Role of Policy in the Development of Native Title' (2000) 28 *Federal Law Review* 403, 439–43.

9 See *Mabo* (1992) 175 CLR 1, 60–2, 70. See also *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470, 727.

10 *Mabo* (1992) 175 CLR 1, 59–60, 62.

11 See, eg, s 66B of the *NTA* and the definition of 'group of common law holders' in reg 2(2) of the Native Title Regulations.

*Corporations*. Anyone seeking to establish a PBC or to operate within one, and who requires more detail than is in the *Guide,* clearly needs to obtain a copy of the book. *Native Title Corporations* is a useful addition to the learning in this area.