Indigenous Peoples and Governance Structures

A Comparative Analysis of Land and Resource Management Rights

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Aboriginal Studies Press
Australian Institute of Aboriginal
and Torres Strait Islander Studies
Canberra, Australia

Cover Art: 'Hot Sunday' © Treahna Hamm

First published in 2002 by Aboriginal Studies Press for the Australian Institute of Aboriginal and Torres Strait Islander Studies, GPO Box 553, Canberra, ACT, 2601.

National Library of Australia Catloguing-in-publication data:
Nettheim, Garth.
Indigenous peoples and governance structures : a comparative analysis of land and resource management rights.

Bibliography.
ISBN 0 85575 379 X.
1. Indigenous peoples - Legal status, laws, etc. 2.Indigenous peoples - Land tenure. 3. Native title. 4. Land tenure. 5. Aborigines, Australian - Legal status, laws, etc. 6. Torres Strait Islanders - Legal status, laws, etc. 7. Environmental management - Australia - Citizen participation. I. Meyers, Gary D. II. Craig, Donna. III. Australian Institute of Aboriginal and Torres Strait Islander Studies. IV. Title.

333.20994

Copy edit by George Boeck, Aboriginal Studies Press
Design and layout by Rachel Ippoliti, Aboriginal Studies Press

1000/3/2002

Aboriginal
Studies
Press

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Introduction

This Chapter is largely, though not exclusively, concerned with structures devised for Aborigines and Torres Strait Islanders apart from structures devised for land-holding and land-management purposes. Land-holding and land-management structures under legislation for statutory land rights, and for native title, are surveyed in Chapters 11 and 13, respectively.

- The first matter considered is land-holding structures for land acquired under the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995* (Cth).
- A second topic is experience under the *Aboriginal Councils and Associations Act 1976* (Cth), and proposals for its amendment.
- A third topic considers recent developments in one state—New South Wales—concerning the internal and external accountability of Aboriginal Land Councils and Aboriginal Legal Services.
- A final topic looks at the design of Aboriginal and Torres Strait Islander bodies established for the purposes of exercising broad governmental powers, particularly in Queensland.

Historical overview

Australian experience with governance bodies for Indigenous peoples has produced several interesting innovations.

Since colonisation, governance has been seen as a matter for non-Indigenous governments. Little attempt was made to understand Aboriginal authority structures and processes; indeed, attempts were made to eradicate such structures and processes.

The end of assimilationist tendencies began in the 1960s in response, in particular, to strong political moves from Indigenous Australians. Of course, demands for recognition and respect ran through post-colonisation Australian history[1] and gained some momentum in terms of organised political activity in the 1930s.

But the 1960s saw the beginnings of change. The 1967 referendum was successful in amending the Commonwealth Constitution so as to establish the legislative power of the Commonwealth parliament to make laws with respect to Aboriginal people.

The 1960s also saw the beginnings of the modern land rights movement with the Gurindji walk off from the Wave Hill pastoral station, and the Yirrkala clans campaign against a Commonwealth government grant of bauxite mining leases on the

Gove Peninsula. Both of these dramas played out in the Northern Territory where the Commonwealth parliament had plenary authority. Both reflected what has been the primary concern of Indigenous Australians—the recognition of land rights.

At that time, the only land where Aboriginal peoples and Torres Strait Islanders had any residential rights as such were the reserves. Notionally, reserves were areas of Crown land reserved for the use of Aboriginal people or Torres Strait Islanders, but owned by the Crown and managed by government officials or religious missions. The right to be on such reserves was, in most cases, not really a right for the Indigenous peoples concerned. There were, typically, powers to compel people to be on the reserves and to refuse permission for them to depart. There were also powers to exclude people from the reserves or to transfer them from one reserve to another.

The pattern varied from jurisdiction to jurisdiction and from one period to another.[2] In some jurisdictions there were Aboriginal Protection Boards or the like with overall powers to govern Aboriginal people and the reserves.

The first legislative breakthrough occurred in South Australia when, under the Dunstan government, the *Aboriginal Lands Trust Act 1966* (SA) established the Trust to hold reserves on behalf of Aboriginal people across the state.[3] The pattern was followed, with variations, in some other states.

Woodward and after

The major innovation came from the Commonwealth parliament in relation to the Northern Territory with the reports of the Aboriginal Land Rights Commission[4] (Woodward Reports) and the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).[5] The Woodward Reports took very careful account of anthropological evidence and the views of Aboriginal peoples in the Northern Territory. The Act provided for the establishment of Land Trusts to hold title, and Land Councils to manage land and claims to land on behalf of those with traditional rights in respect of the land. This scheme is generally accepted as representing a high water mark in the design of culturally appropriate governance structures with respect to the land rights of Aboriginal Australians.[6]

The statutory land rights regimes for Indigenous Australians considered in Chapter 11 vary significantly across the several jurisdictions. For the purpose of land-holding and land-management, these statutes make considerable use of statutory corporations.

By contrast, native title at common law is covered by Commonwealth legislation, though with some provision for variations at state and territory level. The *Native Title Act 1993* (Cth) (the NTA) requires the establishment of 'prescribed bodies corporate', either to hold title or to act as agents for native title holders. The legislation also provides for a system of Representative Aboriginal/Torres Strait Islander Bodies. See Chapter 13.

By the mid-1970s there had been a proliferation of Aboriginal and Torres Strait Islander bodies formed for purposes other than holding title and managing land. Their purposes included the delivery of services to Indigenous Australians—legal, health, housing and the like. When such bodies began to receive public funding, it was necessary that they be established as entities under Australian law. The same applied to bodies formed for other purposes such as culture, sport and heritage protection.

Even before the 1970s, some Australian governments had established councils for Aboriginal and Torres Strait Islander communities with limited local government-type powers. Some councils, as in Queensland, also came to hold title to community land.

The Woodward Reports were not confined solely to land rights in the Northern Territory.

For one thing, the Commissioner saw a need for the restoration to Aboriginal people of land which could not be claimed under the claim process, which was confined mainly to unalienated Crown land. He proposed that funds be made available for the open market purchase of land for Aboriginal people and Torres Strait Islanders anywhere in Australia. A fund was first established for this purpose in 1974. The principal current program is administered by the Indigenous Land Corporation (the ILC).[7] Under the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995* (Cth) (the Land Fund Act), the ILC may vest land purchased only in corporations; it has needed to deal with those for whose benefit land is purchased with the aim of devising appropriate corporate entities for the purpose.[8]

In addition, Woodward foresaw that Aboriginal people would need to establish additional structures for such purposes as receiving and administering royalty-equivalent monies from mining and other developments on Aboriginal land. Again, he did not confine his recommendations to the Northern Territory but recommended the enactment of Commonwealth legislation of nation-wide scope. Indigenous Australians, of course, were (and remain) able to establish corporations and associations under generally applicable Commonwealth and state or territory legislation. But Woodward perceived a need for a more user-friendly system which could produce culturally appropriate corporate entities. The outcome was the *Aboriginal Councils and Associations Act 1976* (Cth) (the ACA Act). This was intended to provide for culturally appropriate corporations for a variety of purposes, and for culturally appropriate councils to exercise powers of community government.

This Chapter discusses these matters. It also refers to recent developments in one state—New South Wales—concerning Aboriginal Land Councils and Aboriginal Legal Services. And it considers recent experience in another state—Queensland—in the development of alternative governing structures for Indigenous communities.

> 24 The ILC argues that a reasonable time has not elapsed and that it is reasonable to await the establishment of an Aboriginal or Torres Strait Islander corporation which represents Aboriginal persons with traditional links to the land the subject of the lease more fully than any existing corporation, and further that such a corporation be one which did not engage in any trading or business activity that might render it liable to be wound up.
>
> ...
>
> 26 In one sense it may be said that the ILC has made a decision, although not specific to a grantee. It awaits the outcome of the native title proceedings and the identification of those persons and families having traditional links to the land the subject of the lease. If there is no Aboriginal or Torres Strait Islander corporation in existence of which they, or a number of them, are members, there would need to be one formed before a grant could be made. There is no time estimate given as to when an outcome is likely.
>
> ...
>
> 38... Given the preference afforded, by the policy documents, to those having a traditional connexion to the land, and to the use of the statutory powers of acquisition and grant as an adjunct to native title claims it could not, in my view, be said it was unreasonable in delaying its decision so those aims might best be realised. It seems to me that it was in the circumstances justified in doing so.

The application was dismissed.

The Aboriginal Councils And Associations Act 1976 (Cth)

The Bill for this Act (as with the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)) was introduced in 1975 under the Whitlam government but enacted in 1976 under the Fraser government. In introducing the Bill in 1975, the Minister for Aboriginal Affairs, Mr Les Johnson, referred to 'the need to provide a vehicle by which Aboriginal communities and organisations, whether they hold land or not, may more effectively achieve their aims and objectives within the general Australian community'. He went on to say:

> They need a flexibility in such matters as establishment of the geographical base and membership of a corporation, the election of the governing executive for a community, the making of rules appropriate for that community and the control of that community's funds and property.[26]

In introducing basically the same bill in 1976, the new Minister, Mr Ian Viner, referred to the point made in the first of the Woodward Reports 'that existing legal provisions in respect of incorporation were not adequate to meet the needs of the communities with which he had come into contact'. The Minister said:

> What is so important about this measure is that it will recognise cultural differences between the Aboriginal and non-Aboriginal societies and enable Aboriginal communities to develop legally recognisable bodies which reflect their own culture and do not require them to subjugate this culture to overriding Western European legal concepts.[27]

The evidence is that this vision has not been achieved. Amendments to the ACA Act and the way in which the ACA Act has been administered have led to calls for it to be amended in order to return to the original concept.

Writing in 1999, Mantziaris notes that approximately 3,000 corporations have been incorporated under the ACA Act:

> These corporations have become major actors in the social, economic and political life of Aboriginal Australia. But the incorporation statute is in crisis, as its own form of the legal category 'corporation' struggles to accommodate the social-political functions with which these corporations have been entrusted.[28]
>
> The functions fulfilled by ACA Act corporations range from land-holding, service-delivery (for example, the provision of health, medical, legal and housing services and the administration of employment and training programs), the promotion of arts, sport and culture, to the pursuit of business, political representation and native title litigation.[29]

Mantziaris notes that the ACA Act establishes a general regime for the incorporation and management of Councils (never used) and Aboriginal Associations and creates the Office of the Registrar of Aboriginal Corporations, vesting it with wide regulatory powers. Membership is restricted to Aboriginal persons or their spouses. He writes:

> Throughout the late 1970s and the 1980s, ACA Act corporations were subject to a very basic accountability regime. The public officer of the corporation was under an obligation to provide a current register of the name and address of every member; the Governing Committee had to ensure that proper accounts and records were kept and that adequate control was maintained over corporate assets. Audit reports and financial statements were to be submitted to the Registrar. This simple governance structure was meant to reflect the circumstances of indigenous economic and political organisation. By 1984, it was apparent that some corporations could not meet these minimal requirements and the Act was amended to grant the Registrar a discretionary power to exempt corporations from full compliance.[30]

However, 'from the early 1990s, there has been a steady legislative push to assimilate the novelty of the ACA Act corporation within the dominant legal category of the Corporations Law corporation'. Mantziaris continues:

> The result is that even though most ACA Act corporations would fall within the Corporations Law definition of a 'small proprietary company'...their reporting and audit requirements go well beyond those of small proprietary companies. The audit requirements are now more onerous than those imposed on incorporated associations under State and territory legislation and are additional to whatever financial accountability measures might be imposed by public funding bodies such as ATSIC.
>
> ...The effect of this process of analogical legal reasoning has been to impose on the indigenous corporation a set of consequences stemming from a legal category which has

> evolved on the basis of a very different corporate substratum—that of the nineteenth century commercial enterprise.
>
> The practical consequences of this fictive tendency are quite grave. The ACA Act corporation now embodies governance rules which are, generally speaking, undermined by their bias towards European cultural norms.[31]

Mantziaris goes on to illustrate this proposition by reference to the cultural assumptions which underscore the General Meeting and the fiduciary duties owed by members of the Governing Committee to the corporation.

In 1995 ATSIC commissioned a Review of the ACA Act by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS). The Review was led by Dr Jim Fingleton and involved a research team of consultants. The Review was completed in August 1996.[32] Volume 1 contains the final report and recommendations. Volume 2 contains six Special Issues Papers and a series of thirty-two Case Studies of the experience of Indigenous people with a variety of corporations in various parts of Australia.

The Review has not been published or even tabled in Parliament. No public decisions have been made as to whether any of the recommendations are to be adopted or on whether the amendments proposed to the ACA Act in 1995, which had been sidelined pending the Review, are to be resurrected. Indeed, in late 2000, expressions of interest were invited from appropriate bodies to undertake a fresh review of the Act.

In the meantime, the adequacy of the ACA Act has acquired some urgency in light of the NTA—regulations under the NTA require that Prescribed Bodies Corporate (established under the Act to hold title or to act as agents for native title holders) must be incorporated under the ACA Act. This issue was addressed in one of the Special Issues Papers for the Review, reproduced in Volume 2 of Fingleton's review.[33]

The topic of Prescribed Bodies Corporate under the NTA is the subject of a separate report prepared on behalf of the National Native Title Tribunal by Christos Mantziaris and David Martin entitled *Native title corporations: A legal and anthropological analysis of institutional design* (the NTC Report), the principal elements of which are summarised in Chapter 13.

This Chapter focuses on the ACA Act itself. It does not attempt to replicate the detailed work by Dr Fingleton and his team, and instead draws directly from the Review. Because the Review is unpublished, substantial extracts are set out in Discussion Paper 7.[34] What follows summarises the principal elements and sets out shorter excerpts.

Chapter 2—'Overview', reported 'widespread dissatisfaction with the ACA Act in its present form, and the way it is being administered' felt by all those with an interest in the Act's operation. The complaints covered many matters, but their underlying theme was that the Act's regime for the incorporation of Indigenous groups and communities had

become unsuitable, either for meeting the circumstances, needs and wishes of the community members or as a vehicle for the delivery of government-funded community services.

The main reason why people used the ACA Act was because they were seeking funds from ATSIC for some purpose—to acquire land, or to carry out some government-type service. Under ATSIC's procedures, bodies have to be incorporated in order to apply for funds, and the ACA Act was the legal apparatus usually made available for that purpose. The Review pointed out that about half of all the Indigenous organisations in Australia had used other laws to meet their incorporation needs; and more than half of the Indigenous organisations funded by ATSIC were not incorporated under the ACA Act.

> 2.10 It is a key conclusion of this review that, in trying to meet the need for greater accountability, the direction of reforms brought in by the 1992 amendments was misguided. By imposing strict requirements on the structure of corporations and their decision-making processes, very little flexibility remained in the Act. Bodies wishing to incorporate were now faced with a set of Model Rules, drafted to ensure compliance with the Act's requirements, which ran to twenty-four clauses (some of which had a dozen sub-clauses) and set out rules for all aspects of the body's operations in precise detail. In the first three years after the amendments, the Registrar sought and received a total of seventy-three legal opinions on aspects of the Act's operation—not good, for a law intended to be simple and easily understood. But the worst consequence was the loss of flexibility in the Act's regime. From a law intended to suit the enormously diverse needs of indigenous groups and communities across Australia, the approach was now 'one size fits all'. Only one model 'suit' was made available, and that was a legal strait-jacket, which gave no room for local cultural variation in corporate structures and decision-making processes. The consequence of that loss of flexibility will now be examined.
>
> 2.11 In the following illustration, each symbol represents a legal 'instrument', as follows:
>
> A: The ACA Act itself
>
> B: Rules made by corporations under the Act
>
> C: Service agreements entered into by corporations with funding agencies to provide community services
>
> D: Other legislation on particular subjects (eg, *Native Title Act*)
>
> Present situation:
>
> A ⟶ B C D
>
> ACA Act Rules Service agreement Other legislation
>
> The way the ACA Act works at present, the Act itself (A) sets out in very detailed terms how a body can be incorporated, and how it can then operate. The rules adopted by that body at its incorporation (B) are also very specific—in fact, they repeat much of what is in the Act itself. The result is that B is basically an extension of A. Meanwhile, bodies incorporated under the Act who wish to be funded to provide a community

service are required to enter into a service agreement of some kind (C). Under ATSIC's present system for program funding, no attempt is made to articulate the funding regime (C) with the incorporation regime (A and B).

2.12 From a legal point of view, these two factors:

1. the basic sameness of A and B, and
2. their separateness from C

have the effect of limiting the scope for adaptation of the legal instruments to different situations. A is almost the same as B, and they have no relationship to C. How the instruments can be interrelated, and the benefits that become available, will be looked at shortly. The fourth legal instrument above is 'other legislation' (D), and the example given is the *Native Title Act 1993* (Cth). A legal device commonly adopted is for one piece of legislation to pick up a 'regime' created by another law, and use it for its purposes. Just such a situation arose under the Native Title Act, when it was necessary to provide for 'prescribed bodies corporate'. These bodies are responsible for holding and managing native title under the Act and, rather than introduce a whole new regime for them, the existing regime of the ACA Act has been 'picked up'. In doing so, the Native Title Act (Prescribed Bodies Corporate) Regulations 1994 spell out certain matters which must be addressed in the rules of such bodies, in particular with respect to consultation. The result is that, to qualify as a prescribed body corporate for native title-holding purposes, a body must incorporate under the ACA Act, and cover those particular matters in its rules. There are obvious advantages in being able to combine Acts in this way.

2.13 Or, at least, there *should* be advantages. The problem in this case is that, when it came to 'picking up' the ACA Act for the purposes of native title-holding, many aspects of it were found to be unsuitable. A paper in Volume 2 of this report contains a long list of the difficulties in using the Act for this purpose, basically because so many of its provisions would conflict with custom. Native title, while recognised by the common law, is a customary title. The ACA Act was designed to enable indigenous groups to operate in accordance with custom. If the Act is so unsuitable for the purposes of groups holding native title in their own traditional lands under custom—the ultimate indigenous group activity—then the ACA Act has strayed very far indeed from its original purpose.

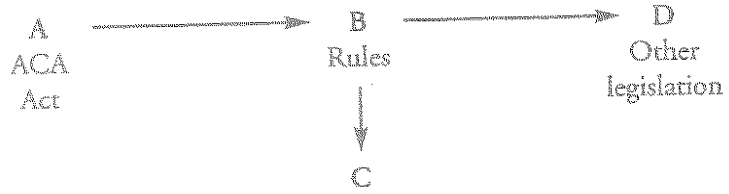
The Review described the ACA Act as having 'become a classic piece of over-regulation'. The main performance indicator for the Office of the Registrar of Aboriginal Corporations is 'full compliance by Aboriginal Corporations with the reporting requirements of the Act'. The Office consistently falls short of this target.

2.15 And all this regulation comes at a high cost. ...Despite all this expense and administrative effort, the accountability of corporations set up under the ACA Act, in ATSIC's view, is no better than that of the indigenous bodies it funds which have incorporated under the general law. The present Registrar's view is that more accountability requirements should be added to the Act, and more resources be made available to enforce those requirements. All the evidence suggests this would only be putting good money after bad.

The Review saw that the clear alternative was for accountability to be perceived, not in terms of whether the ACA Act's requirements had been met, but whether the particular outcome—usually, the delivery of a community service – had been performed. It recommended that the ACA Act be rewritten, returning it to its original purposes of a simple law, flexible enough to allow Indigenous bodies around Australia to incorporate in ways which are appropriate to them; and that ATSIC's funding system be reviewed, so that the weight of accountability is picked up where performance of outcomes is the main concern.

> 2.17 ...If the Act is reduced to a simple form, then it is available to be built on as required. Where a body only requires basic recognition, then it need not be saddled with additional requirements. But where, as in many cases, a body is being incorporated in order to be funded for the provision of community services, then a more elaborate legal regime can be constructed, using the various legal instruments available. But this time, it is possible to combine the 'cultural appropriateness' of the incorporation with the 'accountability' for performance in delivery of the funded service.
>
> 2.18 To return to the illustration, using the same four symbols as above, ie:
>
> A: The ACA Act
>
> B: A corporation's rules
>
> C: The service agreement
>
> D: Other legislation

Recommended situation:



> Having scaled the Act back, the four legal instruments can be used and articulated with each other as the occasion demands. In the case of a group seeking to incorporate simply to gain legal recognition of their indigenous corporate nature only a basic set of rules would be required, covering such matters as the group's name, its membership criteria, how the group acts, any custom applying to it, and so on. Only two instruments, the Act (A) and the rules (B), are involved.
>
> 2.19 Where, however, a group is incorporating in order to provide community services using public funds, then it has a wider responsibility. It has to be accountable not only to its membership, but to the wider community for whom the services are intended, and ultimately to the taxpayers for expenditure of public funds. Accountability in this context is multi-dimensional, and conflict is possible between the different obligations and expectations. To deal with this complex situation, the incorporation regime and the funding regime need to be co-ordinated. The Act (A)

having set out the basic requirements for incorporation, the group's rules (B) then need to be developed so that they meet two types of accountability:

(i) internal accountability: to the group's membership; and

(ii) external accountability: to the wider constituency intended to benefit from theservice, and to the funding agency.

Internal accountability is best addressed by letting the group incorporate in a culturally appropriate way. That is, basing the group's rules on its own concepts of membership, leadership and decision-making. External accountability is mainly the concern of the service agreement (C), but it may specify that the group must include certain matters in its rules (B), if it wants to be funded to provide that particular service.

2.20 Matters which might be specified in this way could be aimed at ensuring representativeness of the constituency—that is, that the group's governing body is not just drawn from its own membership, but includes representatives of the wider constituency for whom the service is intended. And the service agreement may require the rules to spell out the way the constituency will be consulted, in planning for and providing the service. In this way, the complementary requirements of internal and external accountability can be addressed in a way likely to enhance a group's performance. Rather than forcing all groups to accept the structures and decision-making processes laid down in fine detail in the present Act and Model Rules, groups can adopt structures and processes which are meaningful to them, but their wider responsibilities in using public funds to provide government-type services to their communities can also be met. Indigenous groups and communities across Australia are typically small and local, and a flexible incorporation law is the only way to cater for their enormous variety. This flexibility does not, however, have to come at the expense of effective accountability, if the approach advocated above is adopted.

2.21 Another benefit of scaling the incorporation law back to the basic requirements for legal recognition is that it becomes available for being 'picked up' by other special-purpose legislation (D). Taking the native title example again, the problems of using the present Act as the vehicle for incorporation of 'prescribed bodies corporate' for holding and managing native titles can be overcome by the approach advocated above. The native title legislation can specify the matter which bodies must address in their rules (B), in order to qualify for the powers and functions of prescribed bodies corporate. But each body is able to adopt its own structure and applicable customs, without the Act (A) dictating how these vital matters are handled.

2.22 These reforms to the ACA Act will mean that much more attention will have to be given to the incorporation of groups being set up to be funded for provision of community services, and the service agreement will also have to be carefully negotiated to work in tandem with the group's rules. To be fully effective, it would mean a major reform of ATSIC's funding regime, and correspondingly of the services it provides to indigenous groups and communities. A more pro-active style of service would be involved, tapping into skills necessary for effectively advising indigenous groups on their incorporation options. The Office of the Registrar of Aboriginal Corporations would be reduced, in keeping with the reduction in the Act's prescriptive requirements and in the

Registrar's current extensive powers to intervene in a group's affairs. Far more attention in future should be given to information, education and advice – but the Act should be rewritten first.

In Chapter 3 the Review comments:

> 3.10 A large number of corporations have been established to obtain funds to provide services. Estimates based on figures provided by the Registrar for Aboriginal Corporations indicate that approximately 67% of corporations formed under the ACA Act are for the purpose of service provision (see table in Chapter 4). There are two major reasons for the proliferation of indigenous corporations for the purpose of service delivery. First, mainstream service-providers have failed indigenous communities in two fundamental ways. In a large number of instances they have failed to provide indigenous communities with any service at all, and where services have been provided, they have often been so culturally inappropriate as to hinder rather than to give effect to service delivery to indigenous communities.
>
> ...
>
> 3.13 The second main reason for proliferation of indigenous corporations is that the recognition of a right to self-determination presumes recognition of cultural distinctness. Indigenous communities tend to be very localised and desire local solutions to the problems which they encounter. Time and time again, programs—even well-intentioned programs—which are imported into communities fail. Corporations have served an extremely important role as structures through which enormous achievements have been made by Aboriginal and Torres Strait Islander communities.
>
> 3.14 Corporations are therefore playing a very different role in indigenous communities to the role which they play in the mainstream community. They have a much greater bearing on indigenous people's lives than they do in the general community. This is particularly so in small communities where people's only access to basic amenities such as housing, sewerage and water might be through a service corporation. The central role which corporations play in many indigenous communities is directly related to the fact that they are indigenous communities. The relationship between corporations, community development and funding is integral within indigenous communities...

In Chapter 5—'Cultural Appropriateness', the Review draws a series of Findings from the Case Studies. The Findings themselves (without the amplifying comments) are summarised as follows:

- There is widespread dissatisfaction with the Act in its present form, and its admin istration.
- Most Indigenous bodies seek incorporation under mainstream laws, rather than the ACA Act.
- The Act's 'popularity', based on the level of incorporations under its provisions, is an illusion. By far the most common reason for groups incorporating under the ACA Act was to gain access to ATSIC funding; that was the real motivating factor, rather than some attraction to the Act itself.

- A very large proportion of the bodies incorporated under the ACA Act are based at the local community level, and their main purpose for incorporating is to provide a community service—and be funded for that purpose.
- There is practically no opportunity for groups to adopt rules on the matters of most significance to them based on custom.
- The apparent freedom for groups to adopt rules based on custom is in fact seriously qualified, in particular with respect to:
  (a) group membership; and
  (b) decision-making by the group.
- Opinions vary over whether non-Indigenous persons should be eligible for membership, some people feeling that non-Indigenous membership should not be possible while others favour an approach which leaves it open to each group to decide for itself, under its rules.
- The imposition of limits on membership numbers is artificial, it presents difficulties for small communities and leads to incorporations which are not culturally appropriate.
- There is a major demand for the incorporation of 'umbrella' organisations, which is not possible under the present Act as it is interpreted.
- It is not culturally appropriate to base membership in all cases on formalities like applications and membership lists.
- General meetings of the corporation's membership are generally not good forums for making informed decisions and setting policies.
- Governing Committees do not generally reflect the decision-making structure within communities.
- The Registrar's wide discretionary powers under the Act, instead of allowing necessary flexibility as was intended, have actually worked against culturally appropriate incorporations.
- The strong impression gained from the case studies and submissions made under the review is that the Registrar is most reluctant to agree to any deviation from the Model Rules.
- There is an ever-increasing gap between people's attempts to incorporate in a culturally appropriate way and the Registrar's pre-occupation with matters of statutory compliance.

The Review, in Chapter 6, tracks the increasing complexity of the ACA Act over the years on matters of accountability. It offers the following findings drawn from the Case Studies:

- Accountability as a concept is not well-defined, and the process of accountability is poorly understood.
- Accountability, in the context of Indigenous organisations, is a multi-dimensional concept, which will involve one or more of the following elements–

(i) responsibilities, of a political, social and economic nature, to a local group membership;

(ii) responsibilities to a wider constituency, often to provide a particular public service or range of public services fairly and efficiently; and

(iii) the responsibility to account to the general public for the expenditure of public funds, in accordance with the conditions on which they were provided to the organisation.

Not every Indigenous organisation is faced with the full range of accountability requirements, but for those that are, conflict is always possible between the goals and expectations of members, of the wider constituency, and of the funding agency.

- The current approach to measuring whether indigenous corporations are accountable places far too much reliance on:
  (i) the filing of audited financial reports; and
  (ii) compliance with the ACA Act.
- Audited financial reports are not reliable indicators of accountability.
- Compliance with the requirements of the ACA Act is not a reliable indicator of accountability.
- Neither the ACA Act, nor the Registrar in enforcing the Act, is concerned with many of the main factors upon which an organisation's real accountability depends.
- The ACA Act's regime brings together wide legal powers and significant administrative resources, but they are concentrated on enforcing compliance with the Act—which as the previous findings show, is not the same thing as accountability.
- True accountability, in the sense of ensuring that a body achieves the objectives it is being funded for, is the responsibility of the funding agency. Present arrangements suggest that the Registrar has a central part to play in ensuring that funding objectives are achieved, but this is mistaken and leads to a major confusion of roles.
- Because accountability is misunderstood, and enforcement of compliance with the Act is confused with achievement of funding objectives, current attempts to improve outcomes in service delivery not only have failed to produce the intended improvements but also have produced unintended problems and difficulties, including–
  - inconsistent regulation of indigenous corporations;
  - over-regulation of most corporations under the ACA Act;
  - unnecessary interference with the rights and powers of indigenous self-management and self-determination;
  - chronic illegality (as a strict matter of law) in the operations of corporations, with consequent breach of funding agreements;
  - lack of attention to the real causes of poor outcomes in service delivery;
  - a consequent proliferation of bodies incorporating to seek funding for services; and
  - ever-increasing difficulties for ATSIC and other agencies in attempting to provide funds for community services in a rational way.

In Chapter 8 the Review considers Reforms, including legislative reforms:

8.3 The basic options are:

(a) leave things as they are;

(b) repeal the Act;

(c) make minor adjustments to the Act, to strengthen it and address particular problems; or

(d) carry out a major rewrite of the Act, to get to the root of the problems.

The Review discusses each of these options in sequence, and opts for (d) which it analyses:

> 8.11 ...this option involves changing the basic thrust of the Act, back to the directions proposed for it in 1976. This approach is based on the view that there is a continuing role for a Commonwealth Act providing legal recognition to indigenous groups in a culturally appropriate way. Such bodies will be accountable to their membership in accordance with the rules they adopt, including any custom which they nominate as applying to them. To the extent that accountability beyond their membership is required, those additional requirements can be spelt out in different ways–
>
> * in service agreements, in the case of bodies funded to provide community services;
>
> * in the rules adopted by the body concerned (either at incorporation, or under a change of rules at the time of entering into the service agreement); or
>
> * possibly, in a special part of the Act itself.
>
> 8.12 In addition, where a body has functions vested in it under legislation, those special functions, the powers that go with them and how they are exercised will be spelt out in the other legislation. A case in point is a group incorporated for the purposes of being a 'prescribed body corporate' under the Native Title Act 1993. Under the ACA Act in its present form, the powers and functions of such native title-holding bodies are largely incompatible with the prescriptions, limitations and administrative discretions contained in the ACA Act (see Vol 2, Sullivan). Under option (d), the Act would be reformed so that the native title-holding body could readily gain recognition as a 'natural' group with an 'automatic' membership, holding native title under and in accordance with custom and the Native Title Act.
>
> 8.13 This is the option the review team clearly favours, and within it there are further choices, which relate to how 'radical' the Act's reform should be. They are–
>
> (i) to reduce the Act to its bare minimum requirements;
>
> (ii) to make the Act a Federal version of the State and Territory Associations Incorporations Acts; or

(iii) to provide in the Act for different categories of incorporations, enabling accountability requirements to be matched to a body's actual activities.

The Review discussed these sub-options and concluded:

> 8.20 Opinions varied between team members as to which option was to be preferred, but the **weight of opinion came down in favour of recommending option (ii)—a Federal version of an Associations Incorporation Act.**

The Review discussed other legislative recommendations on such matters as controls on incorporation, re-incorporations, membership lists, dispute resolution, Councils, drafting and tax exemption. It also recommended a number of financial and administrative reforms.

Because the Review has not been tabled or published, there has been little opportunity for any public discussion of its criticisms or recommendations. One such opportunity did, however, take the form of a debate in the pages of the *Indigenous Law Bulletin*. Mantziaris was particularly critical of what he termed the absence of a corporate law perspective in the Review, and expressed concern that the Review, in trying to restore a suitable degree of cultural appropriateness, had moved too far away from essential elements of the corporation. (Whether the corporation is the most suitable vehicle for particular purposes is a separate question.) He also indicated his own preference, among the options considered by the Review team, for the 'different categories' model. Dr Fingleton provided a spirited response.[35]

It seems not unfair to say that the ACA Act has, on occasion, become a battleground. One recent and dramatic example appears from the judgment of the Federal Court in *Leslie, in the matter of the Aboriginal Councils and Associations Act 1975 v Hennessy*[36] which Drummond J described as arising from a 'tripartite dispute between the Registrar, ATSIC and those previously controlling NAILSS [National Aboriginal and Islanders Legal Services Secretariat Aboriginal Corporation] and QAILSS [Queensland Aboriginal and Islanders Legal Services Secretariat Aboriginal Corporation]' (para 19). Those previously controlling the corporations included Mr R Robinson, then also ATSIC Deputy Chairman; he was also an officer of the Goolburri Aboriginal Corporation Land Council which had been in dispute with the Registrar in *Kazar v Duus*.[37]

The reported deficiencies of the ACA Act would be less significant if Indigenous Australians and their advisers had access to the various critiques, provided that they also had the option of seeking incorporation under other legislation at Commonwealth or state/territory level. However, as noted, in some situations they will have no option but to incorporate under the ACA Act. This is currently the position for Indigenous people needing to establish a Prescribed Body Corporate in respect of a Federal Court determination of native title. The NTC Report sets out to provide guidance on how to steer a careful path between the requirements of the ACA Act, on the one hand, and, on the

other hand, the cultural and economic needs of native title holders and others with traditional rights and interests in the territory concerned.

As noted, the ACA Act was conceived to serve the needs of a large number and variety of Indigenous bodies. The Review demonstrates that, as it has evolved, it demonstrably fails to do so. It is discouraging that amendment of the ACA Act has been treated as a matter of such little urgency.

Internal and external accountability in NSW

New South Wales is one state in which recent inquiries throw some light on ways to improve accountability (internal and external) in Indigenous organisations.

Aboriginal Land Councils

The *Aboriginal Land Rights Act 1983* (NSW)[38] adopted a three-tiered system of Aboriginal Land Councils—119 Local Aboriginal Land Councils (LALCs), 13 Regional Aboriginal Land Councils (RALCs) and the state-wide New South Wales Aboriginal Land Council (NSWALC). All are bodies corporate. The membership of LALCs is based primarily on residence within the area and only secondarily on having an association with the area. This has the potential to create some tension between the statutory land rights regime and native title rights and interests.

As noted above in Chapter 11,[39] the Act imposes on the Land Councils significant provisions for accountability. These were recently re-examined in the context of an inquiry by the NSW Independent Commission Against Corruption (ICAC).[40]

In its Executive Summary, the ICAC said:

> Corruption prevention is an important role for the ICAC, and this is particularly relevant to Aboriginal land councils. The ICAC's enquiry showed that many of the issues identified relate to lack of training and capacity in the difficult task of running multi-functional organisations which control quite substantial sums of money.[41]

The Report went on to summarise four groups of outcomes which the ICAC considered necessary to prevent and counter corrupt conduct in Aboriginal land councils:

Increased accountability through:

- appropriate community decision-making processes

Improved decision-making through:

- meaningful political participation
- transparent decision-making by LALCs
- proper corporate governance by the NSWALC
- effective responses to misconduct and disputes

Notes

1 H Reynolds, *This whispering in our hearts*, Allen and Unwin, 1998.

2 For an account of one jurisdiction at one time, see G Nettheim, *Victims of the law: Black Queenslanders today*, Allen and Unwin, 1981.

3 See Chapter 11.

4 *First report*, AGPS, 1973 and *Second report*, AGPS, 1974.

5 See Chapter 11.

6 At the time of writing, the Commonwealth government is considering its response to the Reeves Report which recommends substantial changes to the legislation. For comment, see I Viner, 'Whither land rights in the Northern Territory? Whither Aboriginal self-determination? A review of the Reeves Report' (1999) 4(1) *Australian Indigenous Law Reporter* 1; JC Altman, F Morphy and T Rowse (eds), *Land rights at risk? Evaluations of the Reeves Report*, CAEPR Research Monograph No 14, ANU, 1999. The Reeves recommendations failed to win whole-hearted support from an important parliamentary committee: House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Unlocking the future: The Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, Commonwealth Parliament, August 1999.

7 For extracts from the ILC's *Annual report 1997-98*, see (1999) 4(2) *Australian Indigenous Law Reporter* 109, pp 109-21.

8 The requirement for land to be vested in a corporation has also caused problems. In Queensland, some forms of pastoral leases may be vested only in natural persons.

9 Aboriginal Land Rights Commission, *Second report*, AGPS, 1974, paras 240-72.

10 The Commission's attempt to purchase pastoral lease land in Queensland, opposed by the state government, led to a landmark High Court decision upholding the validity of the *Racial Discrimination Act 1975* (Cth): *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

11 For a Federal Court decision concerning ATSIC funding of land purchases during the transitional two year period, see *New South Wales Aboriginal Land Council v ATSIC* (1995) 131 ALR 559. See also H McRae, G Nettheim and L Beacroft, *Indigenous legal issues. Commentary and materials*, 2nd edn LBC Information Services, 1997, pp 298-99.

12 The 1997/98 ATSIC Annual report disclosed a balance of over $8 million at 30 June 1998. The 1998/99 Annual report disclosed a balance of nearly $10 million. ATSIC also has a substantial Housing Fund.

13 Indigenous Land Corporation, *Annual report 1997-98*, ILC, 1998, p 22. Extracts are reproduced in (1999) 4 *Australian Indigenous Law Reporter* 109, pp 109-24.

14 The ILC has prepared model rules for incorporating under such legislation.

15 Pages 46-47. The matter is also addressed in the 1998-99 *Annual report* with reference to two particular purchases.

16 A similar policy approach is stated in the ILC's *Annual report 1998-99*, pp 24-25, 36-37. See also *Annual report 1999-2000*, pp 50-51.

17 *Annual report 1997-98*, p 47.

18 *Annual report 1998-99*, pp 34, 70-72.

19 *Annual report 1999-2000*, p 24.

20 *Annual report 1998-99*, pp 33, 55-56, 75.

21 *Annual report 1999-2000*, p 30.

22 *Annual report 1998-99*, p 19; *Annual report 1999-2000*, p 12.

23 *Annual report 1998-99*, pp 33-34.

24 *Annual report 1999-2000*, p 38.

25 [2000] FCA 1501 (25 October 2000) per Kiefel J. See also *Annual report 1999-2000*, pp 65-66.

26 Parliamentary Debates, House of Representatives, 30 September 1975, pp 1410-11.

27 Parliamentary Debates, House of Representatives, 3 June 1976, pp 2946-47.

28 C Mantziaris, 'The dual view theory of the corporation and the Aboriginal corporation' (1999) 27 *Fed L Rev* 283, pp 284-85.

29 Id, p 317.

30 Id, p 307.

31 Id, pp 308-09.

32 Australian Institute of Aboriginal and Torres Strait Islander Studies, *Final report. Review of the Aboriginal Councils and Associations Act 1976*, August 1996 (the Review).

33 P Sullivan, 'The needs of prescribed bodies corporate under the Native Title Act 1993 and Regulations' in AIATSIS, above note 32. See also P Sullivan, *A sacred land, a sovereign people, an Aboriginal corporation: Prescribed bodies corporate and the Native Title Act*, NARU (ANU) Report No 3, 1997. For an account of difficulties encountered by the judiciary with the regulations, see C Mantziaris, 'Problems with prescribed bodies corporate: *Mualgal People v Queensland*' (1999) 4(22) *Indigenous Law Bulletin* 21, pp 21-22.

34 Discussion Papers are available on www.austlii.edu.au/au/special/rsjproject/rsjlibrary/arcorp/index.html.

35 C Mantziaris, 'Beyond the *Aboriginal Councils and Associations Act*? Part 1' (1997) 4(5) *Indigenous Law Bulletin* 10, pp 10-14; 'Beyond the *Aboriginal Councils and Associations Act*? Part 2' (1997) 4(6) *Indigenous Law Bulletin* 7, pp 7-13; J Fingleton 'Back of beyond: the review of the *Aboriginal Councils and Associations Act 1976* in perspective' (1997) 4(6) *Indigenous Law Bulletin* 14, pp 14-15; C Mantziaris 'Reply to Jim Fingleton' (1997) 4(6) *Indigenous Law Bulletin* 16.

36 [2000] FCA 1532 (27 October 2000) per Drummond J.

37 (1998) 88 FCR 218.

38 See Chapter 11, pp 41-48.

39 Id, pp 45-47.

40 Independent Commission Against Corruption, *Report on Investigation into Aboriginal Land Councils in New South Wales: Corruption prevention and research volume*, Independent Commission Against Corruption, 1998. (Specific findings are covered in a later report, *Report on Investigation into Aboriginal Land Councils: Investigation report*, Independent Commission Against Corruption, 1999.) Further reports were promised, including a 'report card' on what NSWALC, DAA and the Registrar of the Aboriginal Land Rights Act have done in responding to ICAC's recommendations.

41 Id, p 4.

42 Id, pp 6-7.

43 Id, p 7.

44 Ibid.

45 Id, p 8.

46 Id, p 9.

47 Id, p 14.

48 New South Wales Aboriginal Land Council, *Annual report 1996-97*, New South Wales Aboriginal Land Council, 1998, p 38.

49 *Report on investigation into Aboriginal Land Councils in New South Wales: Implementation progress report*, October 1999.

50 Id, p 17. In May 2000 the NSW Auditor-General reported that NSWALC had mismanaged its finances: 'Land Council "failed on finances"', *Sydney Morning Herald*, 18 May 2000, p 8.

51 *Review of the Aboriginal Land Rights Act 1983 (NSW)*, Background Paper, Summary of Discussion Topics and Discussion Topics, NSW Department of Aboriginal Affairs, May 2000.

52 *1998-99 Annual report*, ATSIC, p 89.

53 T Christian and L Beacroft, 'Changes to Aboriginal legal services' (1998) 4(13) *Indigenous Law Bulletin* 4, pp 4-5.

54 Id, p 5.

55 The Allen Consulting Group, *Tendering of Aboriginal and Torres Strait Islander legal services in New South Wales: Initial assessment and future options*, Final Report to the Office of Evaluation and Audit, December 1999.

56 Id, 'Part A: Summary and overview', pp 2-3.

57 Id, pp 6-7.

58 Chairman Sam Jeffries, *1999-2000 Murdi Paaki Annual Report*, ATSIC, p 6.

59 Ibid.

60 Refer to *Report on greater autonomy*, National Policy Office, ATSIC, 2000 for more details of regional autonomy discussions, models and directions.

61 Review, above note 32, para 7.9, citing C Gibb, *The situation of Aborigines on pastoral properties in the Northern Territory*, Report of the Committee of Review, Parliamentary Paper No 62, Commonwealth Government Printing Office, 1973, p 49.

62 Parliamentary Debates, House of Representatives, 3 June 1976, p 2947.

63 D Dalrymple, 'The forgotten option: Part III of the *Aboriginal Councils and Associations Act 1976*' (1988) 2(32) *Aboriginal Law Bulletin* 11, pp 11-13.

64 In Western Australia, an unofficial handbook to the state and Commonwealth legislation was produced under the auspices of two parliamentarians: *The Aboriginal organisations' survival kit*, 1995.

65 Page 117.

66 Page 108. See paras 7.63-7.69.

67 One of the Issues Papers in Volume 2 of the Review is S Brennan, 'Queensland models for Indigenous self-governance'.

68 By Will Sanders in response to Discussion Papers 4 and 7, at a Workshop for the Project, held on 31 March 2000.

69 Citing T Rowse, *Remote possibilities: The Aboriginal domain and the administrative imagination*, NARU, ANU, 1992, p 89.

70 M Limerick, *Discussion paper on alternative governing structures*, October 1994; also M Limerick, *Resource document on alternative governing structures*, Law, Justice and Culture Unit, Office of Aboriginal and Torres Strait Islander Affairs, September 1994.

71 Id, pp 2-3.

72 Id, p 8.

73 J Wolfe, *'That community government mob': Local government in small Northern Territory communities*, North Australia Research Unit, ANU, 1989.

74 Limerick, *Discussion paper on alternative governing structures*, above note 70, pp 8-9.

75 Id, p 11.

76 Id, p 15.

77 Personal communication with Michael Limerick, 22 September 1999.

78 For accounts of Queensland's community justice groups, see P Chantrill, 'Community justice in Indigenous communities in Queensland: Prospects for keeping young people out of detention' (1998) 3 *Australian Indigenous Law Reporter* 163; *Interim assessment of community justice groups: Local justice initiatives program*, Department of Aboriginal and Torres Strait Islander Policy and Development, May 1999.

79 *Mayatja Manta Nyangaku Kutju: Local government for Aboriginal communities*, prepared for Anangu Pitjantjatjara by the Pitjantjatjara Council Inc, 1994.

80 Id, p 10.

81 Id, p 11.

82 Id, p 21.

83 N Pearson, *Our right to take responsibility*, Noel Pearson and Associates Pty Ltd, 2000.

84 Id, pp 67-69.

85 Id, pp 72-73.

86 Id, p 81.