

Wearing two hats

The conflicting governance roles of native title corporations and community/shire councils in remote Aboriginal and Torres Strait Islander communities

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Abstract

Aboriginal and Torres Strait Islander community governance can be greatly impacted by the nature of the land tenure held or managed by the community. The fragmented system of national and state regimes which provide grants or titles of land to Aboriginal and/or Torres Strait Islander people has enabled a governance landscape where there are often overlapping rights to land. This creates a situation where relationships within an Indigenous community – and even within a traditional owner group – are competing for power and control. This is most notable with respect to how different community organisations compete for community funding, the durability of culturally appropriate governance structures and the taking of natural resources.

The ability of an Indigenous community to resolve potential conflicts, created by the recognition of native title and adapt to the post-determination landscape also impacts upon a community's ability to respond to external pressures such as land use planning, water management and government initiated tenure reform processes. Often these conflicts appear between Registered Native Title Bodies Corporate and community or local shire councils – who have historically played the role of land manager and program administrator. This paper looks at the role of cultural governance in supporting the recognition of Indigenous landholdings and the reasons that Indigenous landholdings, in their current form, have failed to be effective in adequately mobilising economic, social and cultural resources to achieve social, cultural, environmental and health benefits in remote Indigenous communities in Western Australia and Queensland.



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‘Wearing two hats’: the conflicting governance roles of native title corporations and community/shire councils in remote Aboriginal and Torres Strait Islander communities

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Introduction

When people come into Kowanyama they should come and see not only the council [Kowanyama Aboriginal Shire Council] but also the PBC [Abm Elgoring Ambung Aboriginal Corporation RNTBC], which is the board of the traditional owners. Other people who want to do business in Kowanyama should talk to the PBC and not only the Council itself. The true organisation is not in a way that one is trying to control the other. The thing is that elected councillors they have to work under the local government structures and the Act, and from where we [the PBC] are we are trying to work with governance from the land...

—Leslie Gilbert, Director, Abm Elgoring Ambung Aboriginal Corporation RNTBC¹

The Australian government’s recognition of Indigenous rights and interests in land is part of a broader process of strengthening contemporary Indigenous governance. Native title supports Indigenous governance through recognising the unique system of laws and customs possessed and demonstrated by Indigenous peoples and through protecting rights and interests in land that flow from this recognition.² However, by the time the *Native Title Act 1993* (Cth) (NTA) was enacted there was an existing landscape of legislation and social policy reform of community government, including state enacted land rights regimes, the hand-back of missions and reserve areas to Indigenous communities, and the establishment of a range of Indigenous community organisations aimed at fostering community governance and self-determination.³

Native title must also fit within the broader context of land, water, heritage, planning, corporate governance and community governance legislation. Most of these regimes were developed prior to the NTA and many have not since been updated, impacting on the assertion of native title rights and interests.⁴ The retrospective recognition of native title has caused great challenges for native title holders,⁵ who

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- 1 Abm Elgoring Ambung Aboriginal Corporation RNTBC administers land on behalf of the Kowanyama people in southern Cape York (L Gilbert, pers. comm., 12 December 2013).
 - 2 Justice French (now Chief Justice of the High Court) has argued that the principles of *Mabo* ‘embody the rules of what is said to constitute legal “recognition” of Indigenous relationships to land defined by traditional law and custom’ but ‘[t]hey do not operate directly upon those relationships or the traditional laws and customs from which they are derived’ (R French, ‘The role of the High Court in the recognition of native title’, *Western Australian Law Review*, vol. 30, no. 2, pp. 129–66, 2002).
 - 3 For a complete overview of land rights legislation in each state see the Native Title Research Unit’s *National PBC funding and training guide*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2015, viewed 2 February 2016, <<http://aiatsis.gov.au/publications/products/national-pbc-funding-and-training-guide>>. See also D Martin, ‘Rethinking Aboriginal community governance’, in P Smyth, T Reddel & A Jones, *Community and local governance in Australia*, UNSW Press, Sydney, 2005; D Smith, ‘Cultures of governance and the governance of culture: transforming and containing Indigenous institutions in West Arnhem Land’, in J Hunt, D Smith, S Garling & W Sanders (eds), *Contested governance: culture, power and institutions in Indigenous Australia*, ANU Press, Canberra, 2008, pp. 75–113.
 - 4 There are some notable exceptions. For example, the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth), in s. 46, recognises the role of native title groups and their land managing corporations, Registered Native Title Bodies Corporate (RNTBCs), in Australia’s carbon reduction initiatives.
 - 5 A native title holder is defined as an Aboriginal or Torres Strait Islander person who has had a native title determination on their traditional country. The term ‘traditional owner’ is employed by both Indigenous people and non-Indigenous people in a broad range of contexts, which gives rise to ambiguity and debate over its definition. One definition of traditional owner is someone who has customary rights to land. It encapsulates both Aboriginal and Torres Strait Islander peoples who have recognised legal rights (through native title and/or land

have often struggled, within the existing social, political and legislative regimes, to be recognised as the cultural custodians, or traditional owners, of their country. Research has shown that the lived experiences of native title holders are shaped by a chronic lack of resources, a lack of understanding among key stakeholders of traditional ownership and native title, and a great many demands on the time of traditional owners from external parties. This leaves traditional owners with little to no capacity to pursue social, cultural, environmental and economic aspirations on country.⁶ Where native title has been determined over or surrounding an Aboriginal or Torres Strait Islander community, there are often overlapping Indigenous and non-Indigenous land tenure and governance structures.⁷ These overlaps have the potential to create conflicts between native title holders and the existing community organisations that hold administrative power over these areas of land.

Native title is recognised as a demonstration of Indigenous laws and customs from pre-sovereignty until the present. Given that this recognition only occurred in the last 20 years, however, native title ‘competes’ with the laws, policies and processes that were created prior to *Mabo* to advance Indigenous control over traditional lands and the numerous organisations and government bodies who administer them. In particular, native title holders have had to negotiate relationships with Indigenous community or shire councils,⁸ which are mostly governed by Aboriginal or Torres Strait Islander boards (which may often include members of the native title group) and which play significant roles in Indigenous communities without any direct accountability to native title holders. These interactions have a number of serious consequences, including the great need for tenure reform. As noted by Abm Elgoring Ambung Director, Leslie Gilbert, tenure overlaps have the potential to erode Indigenous authority, because they can force forms of Indigenous governance to unnecessarily compete.⁹

With growing national recognition of native title and the establishment of Registered Native Title Bodies Corporate (RNTBCs, or PBCs as they are more commonly known)¹⁰ to hold and manage native title, there have been increasing calls for existing land tenures to be divested to native title holders as the recognised traditional owners and decision-makers for their country. For many traditional owners who have a determination of native title over their country, their RNTBC becomes the representation of their cultural custodianship.¹¹ Tenure reform can also provide more opportunities for native title holders

rights) and Aboriginal and Torres Strait Islander peoples who do not have recognised legal rights. For further discussion on the complexity and use of the term traditional owner, please see D Edelman, ‘Broader native title settlements and the meaning of the term “traditional owners”’, paper presented at the AIATSIS National Native Title Conference, Melbourne, 4 June 2009, viewed 21 April 2011, <<http://www.aiatsis.gov.au/ntru/nativetitleconference/conf2009/papers/DavidEdelman.pdf>>.

- 6 T Bauman, L Strelein & J Weir (eds), *Living with native title*, AIATSIS Research Publications, Canberra, 2013, viewed 2 February 2015, <<http://www.aiatsis.gov.au/publications/products/living-native-title-experiences-registered-native-title-corporations>>.
- 7 Native title rights are vulnerable to extinguishment to the extent that they no longer retain their original character as a ‘bundle of rights akin to full ownership’ (*Western Australia v Ward* [2000] FCA 191 [109]). For further discussion see *Western Australia v Ward* [2000] FCA 191 [92]. The decision was confirmed by the High Court in *Western Australia v Ward* [2002] HCA 28 (8 August 2002) [76] and *Western Australia v Brown* [2014] HCA 8.
- 8 Indigenous community or shire councils are administered through varying forms of state based legislation. In Queensland they are also referred to as Aboriginal Shire Councils.
- 9 Leslie Gilbert, pers. comm., 12 December 2013.
- 10 The term ‘Prescribed Body Corporate’ (PBC) derives from Part 2, Division 6 of the NTA, which provides that an incorporated body must be established to hold and/or manage native title rights and interests. The Native Title (Prescribed Bodies Corporate) Regulations 1999 prescribe the forms or types of bodies that may be nominated when a determination recognising native title has been made. The term ‘Registered Native Title Body Corporate’ (RNTBC) derives from the NTA and describes the organisation that is determined by the court and entered on the National Native Title Register. Under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) an RNTBC will be required to have the words ‘registered native title body corporate’ or the abbreviation ‘RNTBC’ as part of its name.
- 11 Under the NTA (ss. 55–56) it is compulsory for traditional owners to establish an RNTBC.

to pursue economic development.¹² However, this places RNTBCs in competition with the bodies that have historically held (either formally or by proxy) decision-making power over remote Indigenous communities — Indigenous community or shire councils. While some Indigenous community or shire councils do not hold formal rights to be decision-makers for the areas of land they govern, in the absence of any other institutions they become proxy decision-makers and gain authority from state and federal governments through administering government funding and holding leases to government land. Indigenous councils have emerged from a colonial history, shared by Indigenous peoples throughout Australia, of government oppression, forced removals and mission or reserve structures. The subsequent tenure systems created by the state to administer lands historically used for missions and reserves (with an aim to divest these lands to Aboriginal and Torres Strait Islander people) were developed in ignorance of Aboriginal and Torres Strait Islander cultural diversity, decision-making protocols and connection to country. Rather, each Indigenous community or shire council has to be understood in the context of the unique regional history in which each council is deeply embedded.¹³

The failure of policymakers and legislators to recognise Indigenous decision-making structures has generated deep conflicts between RNTBCs and Indigenous community or shire councils over who are the appropriate land holders. In the case of Mer (Murray Island) in the Torres Strait, the conflict between traditional owners and the shire council was a central factor in Eddie Mabo's landmark case.¹⁴ In particular, concerns over the erosion of customary land administration were a central motivator for the claim, whereby Eddie Mabo sought to map out cultural boundaries and assert them as valid forms of landholding to be recognised under property law. The need to rationalise native title with introduced or existing tenures continues to be a key element of conflicts over development in remote Queensland and Western Australia. The 'unresolved' position of native title rights and interests affects not only state based land use planning but also the allocation of community resources, creating daily conflicts over power and decision-making.¹⁵

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- 12 Tenure reform programs have been predicated on the ability to seek economic opportunities on recognised Indigenous held lands. The Queensland government has sought to implement a reform process that enables greater flexibility to pursue economic development on Indigenous lands. This will be discussed further in section 3.2. The Western Australian government has initiated a range of attempts to transfer land back to Aboriginal people, but to date these initiatives have not been highly successful, and have been subject to sizeable criticism in 2007 a review of the Western Australian Department of Indigenous Affairs, see: D Casey, *Report of the review of the Department of Indigenous Affairs*, prepared for the Department of Premier and Cabinet, Perth, 2007, Chapter 8, viewed 28 January 2015, <<http://www.dampierrockart.net/Aboriginal%20Department%20Review%20Report.pdf>>.
- 13 E Wensing & J Taylor, *Secure tenure options for home ownership and economic development on land subject to native title*, AIATSIS Research Discussion Paper no. 31, AIATSIS Research Publications, Canberra, 2012.
- 14 Edward Koiki Mabo, application for research grant submitted to the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), 30 November 1984. In the grant application Mabo notes that 'in the Torres Strait land has been owned and occupied quite differently from the land ownership by Aboriginal people on the main land...its most important that his type of recording be done at this stage before the new Queensland Government's Services Legislation takes full effect and it would be disastrous if none of this type of information is passed on to our future generations.' However, despite the High Court decision it was not until December 2012 that the Mer, Dauar and Waier Reserve was transferred back to the Mer Ged Kem Le (Torres Strait Islander) Corporation Registered Native Title Body Corporate. See also: B Keon-Cohen, *A Mabo memoir: islan kustom to native title*, Zemvic Press, 2013; N Sharp, *No ordinary judgment: Mabo, the Murray Islanders' land case*, Aboriginal Studies Press, Canberra, 1996.
- 15 For specific case studies see: P Memmott & P Blackwood, *Holding title and managing land in Cape York: two case studies*, AIATSIS Research Discussion Paper no. 21, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2008. These issues are universal and are experienced to varying degrees in parts of Africa, Canada and the South Pacific, where tenure reform has been considered a means of enabling economic development. See, for example: J Baxter & M Trebilcock, "'Formalizing" land tenure in first nations: evaluating the case for reserve tenure reform', *Indigenous Law Journal*, vol. 7, no. 2, 2009, p. 45; S Farran, "'Making land work" in the Pacific? Evaluating land reform in Vanuatu', *Lawasia Journal* 2009, pp. 44–61; S Hepburn, 'Feudal tenure and native title: revising an enduring fiction', *Sydney Law Review*, vol. 27, no. 1, 2005, pp. 49–86. For case study examples see L Godden & M Tehan (eds), *Comparative perspectives on communal lands and individual ownership: sustainable futures*, Routledge, New York, 2010.

The transfer of lease and reserve holdings to traditional owners, or reforms to facilitate these processes, are becoming a policy priority throughout remote areas of Australia. The Queensland state government is undertaking an extensive review of tenure reform which includes the development of alienable freehold title in Aboriginal and Torres Strait Islander communities as a strategy to pursue economic development and home ownership.¹⁶ The Western Australian state government has also conducted a review of the processes involved in divesting Aboriginal Lands Trust (ALT) lands to Aboriginal people, but to date has been unable to divest the majority of this land.¹⁷ There are many questions that need to be answered by Indigenous communities, traditional owners and administrators as to how customary landholdings and the laws and customs that support them can be translated into tenure regimes without eroding or assimilating the cultural principles upon which the recognition of native title is based.¹⁸ Second to this conceptual issue is the question of how such regimes would work in practice and the processes that would ensure Indigenous decision-making, priorities and interests are protected. This paper looks at how competing policies, processes and funding practices impact on cultural governance. It argues that without an effective way of resolving competing regimes the current failure to effectively use Indigenous landholdings to bring economic, cultural and health benefits to Indigenous communities will continue. It draws on examples from Cape York Peninsula, Torres Strait, the Western Desert and the Kimberley.¹⁹

Negotiating cultural governance

For Aboriginal and Torres Strait Islander peoples, culture and custom are deeply ingrained in land, sea and sky, which are central to culture, self and identity. These relationships are often articulated and encapsulated through the term 'country'.²⁰ From Indigenous perspectives, native title recognition is based on the demonstration of songs and ceremony that illustrate authority and ownership of Indigenous land and waters, the custodianship of which has important implications for individual and community wellbeing.²¹ With the advent of the land rights movement in the 1970s, the cultural

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- 16 The Queensland Government has undertaken three interrelated tenure reform initiatives designed to improve economic development opportunities, especially in Cape York. These include a leasing and freehold conversion arrangement to promote home ownership and economic security, support regional planning and enable business diversification on existing tenures (see State Development, Infrastructure and Indigenous Committee (SDIIC), *Inquiry into the future and continued relevance of government land tenure across Queensland* and *Inquiry into the Regional Planning Interests Bill 2013*, report no. 25, Brisbane, 2013; Department of Natural Resources and Mines (DNRM), *Discussion paper on providing freehold title in Aboriginal and Torres Strait Islander communities*, State of Queensland, 2012; Agriculture, Resources and Environment Committee, *Aboriginal and Torres Strait Islander Land Holding Bill 2012*, Queensland Government, 2012, viewed 24 June 2014, <<http://www.parliament.qld.gov.au/documents/committees/arec/2012/atstillandholding/rpt010.pdf>>.
 - 17 There are a number of practical barriers to this, which are discussed further on pages 18–20 of this paper. See also D Casey, *Report of the review of the Department of Indigenous Affairs*, prepared for the Department of Premier and Cabinet, Perth, 2007, Chapter 8, viewed 28 January 2015, <<http://www.dampierrockart.net/Aboriginal%20Department%20Review%20Report.pdf>>.
 - 18 For further discussion of these issues see: E Wensing, & J Taylor, *Secure tenure options for home ownership and economic development on land subject to native title*, AIATSIS Research Discussion Paper, no. 31, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2012.
 - 19 These were key issues identified by the AIATSIS PBCs and Climate Change project, which was carried out over 18 months with two case studies: Bidyadanga in the Kimberley and Kowanyama in Cape York (see T Tran, LM Strelein, JK Weir, C Stacey & A Dwyer, *Native title and climate change: changes to country and culture, changes to climate: strengthening institutions for Indigenous resilience and adaptation*, National Climate Change Adaptation Research Facility, Gold Coast, 2013, viewed 2 February 2016, <<https://www.nccarf.edu.au/publications/native-title-and-climate-change>>).
 - 20 See D Rose, *Nourishing terrains: Australian Aboriginal views of landscape and wilderness*, Australian Heritage Commission, Canberra, 1996; JK Weir, C Stacey & K Youngentob, *The benefits associated with caring for country*, literature review prepared by the Australian Institute of Aboriginal and Torres Strait Islander Studies for the Department of Sustainability, Environment, Water, Population and Communities, 2011.
 - 21 For discussion see G Koch, *We have the song, so we have the land: song and ceremony as proof of ownership in Aboriginal and Torres Strait Islander land claims*, AIATSIS Research Discussion Paper no. 33, Australian Institute of

knowledge that Indigenous people hold about their land began to be recognised in the non-Indigenous sphere, and Indigenous land management increasingly came to be known as ‘caring for country’.²² In recent years a growing field of research has shown the connections between Indigenous people being able to care for their country and improved social, education and employment outcomes.²³ Indigenous forms of governance have been progressively dismantled since colonial contact through policies of forced removal and dispossession, leading to the fragmentation of Indigenous families and communities. Native title has given recognition to Indigenous governance and provided a space for asserting and reforming contemporary Indigenous governance systems, and therefore culturally informed decision-making.

Given the centrality of country to Aboriginal and Torres Strait Islander peoples’ culture and identity, it becomes clear how many traditional owners consider themselves to be ‘custodians’ of their country, with a deep sense of responsibility for caring and protecting it. As noted by Joseph Edgar, a Karajarri traditional owner from the Kimberley in Western Australia:

We have everything to lose if we don’t react and try to look after our country. That’s a responsibility that our elders left for us: to do the best we can to look after that country and to make proper decisions about it.²⁴

While access to land is critical to Indigenous wellbeing, the political and legal recognition of the rights Indigenous people have as the traditional owners of their land is critical to the success of Indigenous organisations. Political recognition of traditional law and custom, and therefore culturally grounded decision-making, is seen as a crucial factor in achieving Indigenous economic development.²⁵ RNTBCs have a range of functions that are embedded in law and regulation²⁶ but they also have to meet the expectations of their communities to achieve the social, cultural, environmental and economic outcomes that initially motivated the group to seek a native title determination.

Aboriginal and Torres Strait Islander Studies, Canberra, 2013, viewed 2 February 2016, <<http://www.aiatsis.gov.au/publications/products/we-have-song-so-we-have-land-song-and-ceremony-proof-ownership-aboriginal-and-torres-strait-islander-land-claims>>.

- 22 JK Weir, C Stacey & K Youngentob, *The benefits associated with caring for country*, literature review prepared by the Australian Institute of Aboriginal and Torres Strait Islander Studies for the Department of Sustainability, Environment, Water, Population and Communities, 2011, p. 1
- 23 There is increasing documentation that, for Indigenous people, caring for country is intricately linked to maintaining cultural life, identity, autonomy and health. See, for example, CP Burgess, FH Johnston, DM Bowman and PJ Whitehead, ‘Healthy country: healthy people? Exploring the health benefits of Indigenous natural resource management’, *Australian and New Zealand Journal of Public Health*, vol. 29, no. 2, p. 117–22; B Sithole & S Garnett, *Sustainable northern landscapes and the nexus with Indigenous health: healthy country, healthy people*, Land and Water Australia, Canberra, 2007; J Hunt, JC Altman & K May, *Social benefits of Aboriginal engagement in natural resource management*, CAEPR Working Paper no. 60/2009, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra.
- 24 J Edgar, Director, Karajarri Traditional Lands Association RNTBC, pers. comm, 26 November 2012.
- 25 In the 1972 inquiry that led to the *Aboriginal Land Rights (Northern Territory) Act 1976*, Justice Woodward suggested that there is also a need to enable Aboriginal groups to incorporate in a way that both reflects Aboriginal culture and has legal standing (P Sullivan, *Review of the Aboriginal Councils and Associations Act 1976*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1995). This has been reiterated in a detailed study of North American Indian organisations. The Harvard Project on American Indian Economic Development concluded that the three factors critical to the success of Indigenous community organisations were: (a) ‘Practical self-rule’, by which they meant the genuine power and ability to control decisions relating to their own governance and development; (b) ‘Capable governing institutions’, which can effectively exercise self-determination, manage conflict, deal with corruption, quarantine business decisions from political ones, and generally manage their day-to-day affairs effectively; and (c) ‘Cultural match’, by which they mean that the organisations must be culturally legitimate. See further J Hunt & D Smith, *Building Indigenous community governance in Australia: preliminary research findings*, CAEPR Working Paper 31/2006, Centre for Aboriginal Economic Policy Research, Canberra.
- 26 *Native Title Act 1993* (Cth), *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth); Native Title Prescribed Bodies Corporate Regulations 1999.

Outside of regions which have statutory land rights regimes,²⁷ the formation of RNTBCs is the first instance in which culturally grounded organisations have taken a formal decision-making role for country.²⁸ In contrast, Indigenous community or shire councils represent Indigenous people, some of whom have been forcibly relocated to areas that are not their traditional lands, living in existing Indigenous communities. Conflicts occur when Indigenous community or shire councils make decisions, such as decisions about land use planning or resource management, that impact on or usurp the cultural authority of native title holders who ‘speak for country’.

The administration of many remote communities through Indigenous community or shire councils, and the allocation of resources to them, is often considered in parallel to the recognition of holistic and integrated land management. Native title needs to be engaged with and adequately recognised in order to ensure that sustainable outcomes can be achieved.²⁹ Unfortunately the complexity of native title – matched with the inadequate funding and support for RNTBCs to manage their affairs or provide a space for third parties to engage in the system – results in a situation where native title is not engaged with but seen as a barrier to achieving social and economic development goals. The most common reaction to the perceived barriers of native title as a source of economic development is to legislate to curtail or diminish native title rights and interests through tenure rationalisation. As noted by Godden and Tehan, the ‘central denominator for gauging the viability of land and resource reforms in many contemporary contexts is the extent to which the incumbent political and economic system addresses equity and distributive justice issues implicit in historic patterns of land resource holding.’³⁰ Equity and distributive justice should be the underlying focus of reforms to address competing tenure regimes that impact on traditional owner rights and interests; however, the way in which this outcome should be achieved has been the topic of intensive political, social and intellectual debate.³¹

Legacy and emergent issues in land tenure reform

Western Australia — the Kimberley and Western Desert

Aboriginal community councils in Western Australia emerged in the 1970s, following the recognition of Aboriginal peoples’ demands for self-determination, which had been prefaced by growing Indigenous activism throughout Australia in the 1960s. The adoption of self-determination by governments as a policy approach to Indigenous affairs (specifically with the election of the Whitlam government in 1972) was the beginning of a significant shift in the relations between Aboriginal people and the state.³²

27 This is particularly true in the Northern Territory where traditional owners have opted for determinations under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) rather than the NTA where possible; and in New South Wales where the majority of native title determinations are sought by Land Councils to establish that native title does not exist in order to pursue land rights claims under the *Aboriginal Land Rights Act 1983* (NSW).

28 RNTBCs have enforceable functions under the *Native Title Act 1993* (Cth) and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act). These functions highlight corporate governance and compliance responsibilities and procedure to be followed where decision impact on recognised native title rights and interests. However these functions are a small part of the role that RNTBCs play from a social and cultural perspective. See for example: Martin, D, Bauman, T & Neale, J 2011, ‘Challenges for Australian Native Title Anthropology: Practice Beyond the Proof of Connection’, *AIATSIS Research Discussion Paper*, no. 29.

29 L Godden & M Tehan, ‘Introduction: a sustainable future for communal lands’, in L Godden & M Tehan (eds), *Comparative perspectives on communal lands and individual ownership : sustainable futures*, Routledge, New York, 2010.

30 L Godden & M Tehan, ‘Introduction: a sustainable future for communal lands’, in L Godden & M Tehan (eds), *Comparative perspectives on communal lands and individual ownership : sustainable futures*, Routledge, New York, 2010, p.10.

31 The rationalisation of Indigenous lands has been subject to federal and state government reform processes. For further discussion see for example: M Dodson and D McCarthy, *Communal lands and the amendment to the Aboriginal Land Rights Act (NT)* AIATSIS Research Discussion Paper, no. 19, AIATSIS, Canberra, 2006; W Mundine, ‘Aboriginal Governance and Economic Development’, address presented at the National Native Title Conference, convened by the Australian Institute of Aboriginal and Torres Strait Islander Studies, Coffs Harbor, 2 June 2005.

32 The term ‘self-determination’ has been used to describe both a social and political principle, and a government

In Western Australia, the 1970s were for many Aboriginal people a time of significant political transition whereby governance was devolved from the state (and other parties such as the church groups running Aboriginal missions) to Aboriginal people.

The establishment of Aboriginal councils in Western Australia also coincided with the creation of the Aboriginal Lands Trust (ALT) in 1972 following the passing of the *Aboriginal Affairs Planning Authority Act 1972* (WA) (AAPA Act) which repealed the *Native Welfare Act 1963* (WA). The governance arrangements for the ALT included a statutory Aboriginal advisory board.³³ Over the next decade; leases for ALT land were granted to Aboriginal community councils. This was the first time the state had invited Aboriginal people in Western Australia to the decision-making table. The majority of Aboriginal community councils established during the 1970s and 1980s in Western Australia were incorporated through the *Associations Incorporation Act 1895* (WA) (later the *Associations Incorporation Act 1987* (WA)), which was intended to cater for organisations such as sporting clubs and not necessarily a large and multifaceted Aboriginal community council. While many Aboriginal community councils have now transitioned to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act), some remain under the *Associations Incorporation Act 1987* (WA) to this day.³⁴

During this era the *Aboriginal Communities Act 1979* (WA) was also passed. This enabled Aboriginal people, for the first time, to govern communities that were predominantly made up of Aboriginal people as well as to make by-laws in their community.³⁵ While the Aboriginal Communities Act offered Aboriginal community councils some degree of autonomy, the Minister of Aboriginal Affairs still retained a large degree of control over them.³⁶ Additionally, relationships between Aboriginal-run boards and non-Aboriginal administrators, such as the chief executive officer and other council staff, were often (and continue to be) problematic given the limited capacity that many Aboriginal people in the community have to interpret and monitor the day-to-day running of a council. It is arguable that these current issues stem from the shifting power relationships that occurred in the transition from the mission and reserve days, and from church or state control to increasing independence. This transition was not made smoothly and continues to impact on communities and native title holders today.³⁷ While the Aboriginal Communities Act initially applied only to two Aboriginal community councils, it currently extends to 27

policy approach to Indigenous affairs. There are distinct differences between these two uses of the term: see further Brennan, S, Gunn, B & Williams, G 2004, 'Sovereignty' and its relevance to treaty-making between Indigenous peoples and Australian Governments', *The Sydney Law Review*, vol. 26, no. 3, pp. 307–52.

- 33 *Aboriginal Affairs Planning Authority Act 1972* (WA) (AAPA Act) created the ALT in 1972 to receive former Aboriginal reserves or mission lands held by the Native Welfare Department and other state government agencies. Under the AAPA Act the ALT is governed by an Aboriginal board who provide advice to the Minister for Aboriginal Affairs on ALT lands. When the AAPA Act was introduced in 1972, it replaced a series of legislative instruments extending back to the *Aborigines Act 1889* (WA) that had outlined the governance of land held by the Western Australian government 'for the use and benefit of the aboriginal(sic) inhabitants': *Aborigines Act 1889* (WA), section 8.
- 34 This occurred despite the passing of the *Aboriginal Councils and Associations Act 1976* (Cth). Sanders discusses the corporatisation of the Indigenous sector as a form of governance in details: W Sanders, *Towards an Indigenous order of Australian government: Rethinking self-determination as Indigenous affairs policy*, vol. 230, CAEPR Discussion Paper, Canberra, 2002. Today some Aboriginal councils have transitioned to the Commonwealth Indigenous corporations legislation which has now become the *Corporations Aboriginal and Torres Strait Islander Act 2006* (Cth) (CATSI Act), although there are still a number of Aboriginal community councils that remain under the *Associations Incorporation Act 1987* (WA). This legislation is administered by the Western Australian Department of Commerce and the *Associations Incorporation Bill 2014* is under consideration.
- 35 Currently, 27 communities in Western Australia have community by-laws under the *Aboriginal Communities Act 1979* (WA), although only 24 are valid and at least three of these do not use their bylaws.
- 36 A Minister is able to being able to proclaim independently: whether a community now no longer is eligible to fall under the act; whether the boundaries a community have changed; and whether to accept or reject proposed by-laws for the community.
- 37 See, for example, T Rowse, *White Flour, White Power: From Rations to Citizenship in Central Australia*, Cambridge University Press, Cambridge, 1998; Haebich, A, *For Their Own Good: Aborigines and Government in the South West of Western Australia 1900–1940*, University of Western Australia Press, Crawley, 1992.

Aboriginal community councils in Western Australia.³⁸ The Western Australian Law Reform Commission's 2006 review of the Aboriginal Communities Act noted that the power to create by-laws has potential to impact on the creation of community justice groups and, more importantly, define community boundaries relevant to the enforcement of trespass.³⁹ However, the power of exclusion conferred on community councils contradicts recognised native title rights and interests in communities. In nearly all cases where new by-laws, amended by-laws or extension of the 'community lands' are contemplated there are implications for native title rights and interests that need to be addressed.

Though the NTA came into force in 1993, the first native title corporation wasn't established in Australia until 1997 and in Western Australia not until 2002.⁴⁰ By this time the governance system of Aboriginal communities in Western Australia had been firmly entrenched, and many of the councils governing Aboriginal communities, such as the Bidyadanga Aboriginal Community La Grange Inc. (Bidyadanga Council), had lead roles in areas such community services, employment, economic development, and engagement with state and Commonwealth government agencies in the community.

In Western Australia a number of native title determinations have been made over areas where existing Aboriginal community councils hold leases of ALT land.⁴¹ As an increasing number of native title claims are finalised, traditional owners are seeking the transfer of ALT leases, especially where ALT lands overlap with or 'sit on top of' native title determined areas. However, there can exist unique barriers to native title holders being included in the governance of the councils; most notably the fact that traditional owners are more likely than other community members to live outside a community boundary on outstations and places that are culturally significant to their family. For example, as a result of these boundaries, many Karajarri people, the traditional owners for Bidyadanga, are not eligible to vote in council elections or be nominated for election.⁴² The Karajarri people are also a minority within their community and have only recently been able to develop stronger relationships with the Bidyadanga Council through formal agreement over the development of infrastructure in the Bidyadanga community.⁴³ As noted by Wensing and Taylor, 'Existing tenure arrangements in remote communities in Western Australia are regarded by the Australian Government to be an obstacle to the expansion of government-backed home ownership programs.'⁴⁴ However, the original negotiation of housing with the Bidyadanga Council in the first instance reflects a preference for established forms of governance and perpetuates a limited understanding of Aboriginal cultural diversity and cultural decision-making.⁴⁵ Native title holders were the last, rather than the first, to be engaged in decision-making processes.

38 Bidyadanga Aboriginal Community La Grange Incorporated and the Bardi Aborigines Association Inc.

39 Law Reform Commission of Western Australia (LRC) *Aboriginal Customary Laws. The interaction of WA law with Aboriginal law and culture*. Final Report, 2006, viewed 20 February 2015, <http://www.lrc.justice.wa.gov.au/_files/P94_FR.pdf>.

40 Pers. Comms, Allen Broomhead, National Native Title Tribunal, 19 June 2014. Since 1994, the average length of time for a native title determination by consent was almost six years and for determination by litigation almost seven years: National Native Title Tribunal, *National Report: Native Title*, National Native Title Tribunal, Perth, 2011.

41 For example there are substantial overlaps in Karajarri, Ngururrpa, Kiwirrkurra, Ngaanyatjarra, Bardi and Jawi, Daminmanger, Uunguu and Balangarra country: see National Native Title Tribunal *Indigenous Estates and Determinations of Native Title*, 2015, viewed 23 July 2015, <http://www.nntt.gov.au/Maps/Indigenous_Estates_and_Determinations_A1L.pdf>.

42 T Tran, LM Strelein, JK Weir, C Stacey & A Dwyer, *Native title and climate change: changes to country and culture, changes to climate: strengthening institutions for Indigenous resilience and adaptation*, National Climate Change Adaptation Research Facility, Gold Coast, 2013 ; JK Weir, *Karajarri: a West Kimberley experience in managing native title*, AIATSIS Research Discussion Paper, no. 30, AIATSIS, Canberra, 2011.

43 C Stacey & J Fardin, *Housing on native title lands: responses to the housing amendments of the Native Title Act*, Land, Rights, Laws: Issues of Native Title, vol. 4, no. 6, Native Title Research Unit, AIATSIS, Canberra, 2011.

44 E Wensing, & J Taylor, *Secure tenure options for home ownership and economic development on land subject to native title*, AIATSIS Research Discussion Paper, no. 31, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2012, p.5.

45 JK Weir, *Karajarri: a West Kimberley experience in managing native title*, AIATSIS Research Discussion Papers, no. 30, AIATSIS, Canberra, 2011.

Other RNTBCs, such as the Bardi Jawi RNTBC, have been working with local community councils — the Ardyaloon, Djarindjin and Lombadina councils — on their native title lands.⁴⁶ The Bardi Jawi Governance Project is an initiative aimed at resolving conflicts between the three community councils and the RNTBC. The project identified four key issues: a lack of clarity about who makes decisions and about what; confusion about the roles and responsibilities of the RNTBC and community councils; a lack of coordination or collaboration for future planning in Bardi Jawi country; and a need for better communication between the community councils and the RNTBC.⁴⁷ These issues are common to many RNTBCs post determination, especially where ALT landholdings have created council structures in ignorance of cultural governance.

In a prescient review of the ALT in 1996, Senator Neville Bonner warned that the ALT was another ‘government polic[y] which decimated Aboriginal culture and society’⁴⁸ and that ALT lands carry with them ‘a vestige of a history of discrimination against Aboriginal people’.⁴⁹ Bonner saw the divestment of ALT lands as the restoration of lost decision-making power, and his primary recommendation to the Minister for Aboriginal Affairs was the transfer of all ALT lands into the ownership of Aboriginal people by 2002.⁵⁰ The question of which ‘Aboriginal people’ remains outstanding.

Currently, ALT lands comprise 27 million hectares or 12 per cent of the landmass in Western Australia.⁵¹ The large majority of the ALT estate is made up of reserves over Ngaanyatjarra lands.⁵² The remaining lands are made up of reserves in the Kimberley and Pilbara, with a very small percentage of the land being within the vicinity of the metropolitan area. In remote communities the divestment of ALT lands would transfer to traditional owners a resource base from which they can fund their operations.⁵³ In particular, income from renting former ALT lands for township services and buildings could provide a viable source of income.⁵⁴

Following the creation of the ALT, areas of land were leased to the emerging Aboriginal community councils to support their operations and independence. This decision came about in response to unsuccessful attempts to establish an Aboriginal land rights regime in Western Australia.⁵⁵ The transfer of these leases to Aboriginal community councils in the 1970s and 1980s gave power and authority to these organisations to administer services in the respective communities and be a point of engagement

46 Bardi Jawi Governance Project Newsletter, 1 2011, viewed 24 June 2014, < <http://aiatsis.gov.au/sites/default/files/docs/research-and-guides/native-title-research/BJGOVNEWSLETTER1sm.pdf>>.

47 Bardi Jawi Governance Project Newsletter, 1 2011, p. 2, viewed 24 June 2014, < <http://aiatsis.gov.au/sites/default/files/docs/research-and-guides/native-title-research/BJGOVNEWSLETTER1sm.pdf>>.

48 N Bonner, *Report of the Review of the Aboriginal Lands Trust*, Government of Western Australia, Perth, 1996, p.5. The very fact that the ALT still holds land ‘on behalf’ of Aboriginal people at this point in time is remarkable. The continued existence of a trust which makes decisions for Aboriginal people is indicative of the failure of successive governments to understand the significance of land to Aboriginal people and, ultimately, to recognise Aboriginal people’s aspirations to management their country.

49 N Bonner, *Report of the review of the Aboriginal Lands Trust*, Government of Western Australia, Perth, 1996, p.5.

50 N Bonner, *Report of the review of the Aboriginal Lands Trust*, Government of Western Australia, Perth, 1996, p.5.

51 Department of Aboriginal Affairs, ‘Aboriginal Lands Trust’ webpage, viewed 20 June 2014, <<http://www.daa.wa.gov.au/about-the-department/boards/aboriginal-lands-trust/>>. For a full list of the estate as at July 2009, please see: Department of Aboriginal Affairs, ‘Aboriginal Lands Trust Properties’, viewed 1 February 2015, <http://www.daa.wa.gov.au/globalassets/pdf-files/land/alt_estate_13112015.pdf>.

52 Some of the Ngaanyatjarra lands have overlaps with areas where native title has been determined.

53 Department of Premier and Cabinet, *Guide to the Government Indigenous Land Use Agreement and Standard Heritage Agreements*, Perth, 2012.

54 Steering Committee for the Review of Government Service Provision (SCRGSP), *Overcoming Indigenous Disadvantage: Key Indicators 2005*, Productivity Commission, Canberra. The then Department of Indigenous Affairs commissioned with the Living on Our Lands project in partnership with the Aboriginal Land Trust in order to ‘identify and assess the range of land tenure arrangements on Aboriginal held land and determine how these lands can be best used to increase economic development, provide greater home ownership opportunities and improve asset management and service delivery’: Department of Indigenous Affairs, *Annual Report 2011–12*, Government of Western Australia, 2012. The final report has never been publicly released and there is no mention of the study in the Department’s 2012–13 Annual Report.

55 Department of Indigenous Affairs, *Lost Lands Report*, Perth, 2004, p.26. The Western Australian Government’s attempt to introduce land rights legislation failed in the upper house in 1985.

for government departments. In assuming this administrative role, community councils become the default bodies for making decisions about the use of land. Only since the advent of native title has the state been able to readily identify the right people for country and therefore the right people to hold the land title. However, this requires all parties to recognise a shift in power from the organisations that have historically held the leases (community or shire councils) to traditional owners, who are represented through their RNTBCs.

The Western Australian Government, through the Department of Aboriginal Affairs (DAA), has adopted — to varying degrees — a policy of divesting the ALT estate to Aboriginal people since the late 1990s⁵⁶ but has noted considerable barriers to the timely transfer of ALT lands due to:

- the difficulty of locating the ‘right people’ for country
- the lack of sustainable Aboriginal organisations with resources to carry out their responsibilities of land ownership and management
- the lack of Aboriginal organisations with robust governance arrangements
- the lack of resources to meet liabilities on ALT lands.⁵⁷

The DAA has not pursued any form of land tenure reform to date, despite the potential economic development base offered by the transfer of ALT lands to RNTBCs. More broadly, the divestment of ALT land in Western Australia is greatly impinged by the need to resolve overlapping land tenures and develop mechanisms for the administration of these lands, with the resolution of community conflict treated as a secondary concern to the achievement of economic security.

With the growing number of RNTBCs and native title determinations on ALT lands, there are fewer barriers to identifying the right people for country. However, the majority of RNTBCs have little to no income⁵⁸ and therefore do not meet the ALT’s requirement that organisations have a sustainable operating capacity. As of June 2014 there have been no divestments of ALT land to RNTBCs; however, there are a large number of RNTBCs who have been in discussion with the ALT about land transfers for some time. It is the DAA’s preference to divest not directly to an RNTBC but to a landholding entity that could potentially sit under the RNTBC in a corporate structure.⁵⁹

Where ALT lands are held, the need for ministerial approval for leasing arrangements could also impact on the ability of native title holders to leverage economic gains from leasing income.⁶⁰ In some instances such as in the Ngaanyatjarra Council area, the Tjambu Tjambu Aboriginal Corporation (Kiwirrkurra) RNTBC has been able to successfully retain their native title decision-making powers where parts of the ALT lands overlap with their determined native title lands.⁶¹ However, the ability of the Tjambu Tjambu to

56 A Land Transfer Program was adopted by the ALT board in 1999, and while this is not currently an active policy of the DAA, the divestment of the ALT estate remains as a policy objective of the DAA. S Beeseley, pers. comm, 17 March 2014.

57 Cited in Steering Committee for the Review of Government Service Provision (SCRGSP), *Overcoming Indigenous Disadvantage: Key Indicators 2005*, Productivity Commission, Canberra, 2005, p. 228; see also D Casey, Report of the review of the Department of Indigenous Affairs, prepared for the Department of Premier and Cabinet, Perth, 2007, <<http://www.dampierrockart.net/Aboriginal%20Department%20Review%20Report.pdf>>, viewed 28 January 2015.

58 PF, McGrath, C Stacey & L Wiseman, ‘An overview of the Registered Native Title Bodies Corporate regime’, in T Bauman, L Strelein & J Weir (eds), *Living with native title*, AIATSIS Research Publications, Canberra, 2014.

59 S Beeseley, pers. comm, 17 March 2014.

60 Leasing approval is required for reserves under Part 4 of the *Land Administration Act 1997* (WA) and Part 3 of the *Aboriginal Affairs Planning Authority Act 1972* (WA).

61 *Brown v Western Australia* [2001] FCA 1462 (19 October 2001), [12]. In the judgment it was noted that ‘in relation to the leases issued to the Ngaanyatjarra Land Council over Reserve Number A40783, A40886 and Special Lease 3116 10897, the [native title holders], by virtue of their traditional ownership of the area, are deemed to be members of the Ngaanyatjarra Land Council in accordance with the constitution of the Ngaanyatjarra Land Council. The Ngaanyatjarra Land Council must only exercise its prerogatives under the leases

exert decision-making authority over the ALT lease is subject to the governance of the broader Ngaanyatjarra Land Council of which they are members. These fragile governance arrangements, once again, stem from the need to separate the functions and responsibilities of the Tjama Tjama RNTBC and those of the Ngaanyatjarra Council which has historically provided services to the Kiwirrkurra community including native title representation up until 2007.⁶²

These broader transitions in the native title sector need to be coupled with appropriate state government land tenure reform. The majority of RNTBCs who are currently in discussion with the state are interested in two types of available tenure: freehold or reserve. The divestment of ALT lands will either require the creation of a new form of Aboriginal title, or the transmission of ALT tenure into more 'vulnerable' tenures such as alienable freehold. Further, there still remains considerable ministerial and executive control over how ALT lands are administered and there can be legal and practical impediments to the transfer of ALT lands to RNTBCs.⁶³

For the Yawuru Native Title Holders Aboriginal Corporation RNTBC, represented by Nyamba Buru Yawuru Ltd, their native title determination encompasses a number of ALT properties.⁶⁴ Some ALT properties on Yawuru country were listed as part of a 2010 native title settlement which involved Yawuru entering into two global ILUAs with a package of land and monetary payments totalling \$196 million.⁶⁵ However divestment of the ALT leases did not occur during the negotiations of the Yawuru ILUAs due to issues of liability, existing complex lease arrangements and unresolved servicing and infrastructure issues. Divestment of ALT land could provide Yawuru with opportunities to address chronic housing shortages in Broome, however this would require that any divestment is accompanied with adequate funding to cover costs associated with rehabilitating the land, restoring any infrastructure that currently exists on these properties and negotiating the removal of any pre-existing leases over the land.

The concerns of traditional owners over the infrastructure (especially housing) on ALT lands and the complex administration and maintenance issues have also impacted on the Balanggarra Aboriginal Corporation RNTBC in the Kimberley. In 2014 Balanggarra RNTBC fought a state government decision to demolish infrastructure in the remote community of Oombulgurri, despite offering to take on financial responsibility for the community independent of government funding. Balanggarra RNTBC received a native title determination over the community, a former mission that is currently ALT land, in 2013, but have had little success in being recognised by the state government as the decision-makers for country.⁶⁶

after consulting with the particular traditional owners of a particular area affected by any land use proposal. As a result of the foregoing the Applicants exercise full authority pursuant to the terms of the leases over the whole of the Claim Area'.

- 62 Kiwirrkurra Community Layout Plan Report and Provisions, 2004, <http://www.planning.wa.gov.au/dop_pub_pdf/Kiwirrkurra_LP1_Amendment_4_report.pdf>. Central Desert Native Title Services assumed the native title functions from the Ngaanyatjarra Council (Aboriginal Corporation).
- 63 Under the land transfer process, the ALT can transfer land to an Aboriginal entity for the 'use and benefit of Indigenous people' although the entity would not have ownership of the land which remains a crown reserve. Also under a proclamation of the AAPA Act, traditional owners can enforce permits only where the land is managed by the Minister for Aboriginal Affairs or the ALT. RNTBCs who do decide to proceed with divestment will need to embark on a process that requires going through both houses of parliament (minimum 9–12 months) to formally administer leases.
- 64 These properties included One Mile, Airport Reserve, Morrell Park and Kennedy Hill, one of the most significant cultural areas for the Yawuru with Dreaming tracks and songlines: see further Yawuru Native Title Holders Aboriginal Corporation RNTBC *Submission on the Shire of Broome Local Planning Strategy and Local Planning Scheme No.6*, 2003, <<http://www.yawuru.com/wp-content/uploads/2013/10/Yawuru-Submission-on-Shire-Planning-Strategy-Final.pdf>>.
- 65 National Native Title Tribunal, Yawuru Area Agreement Indigenous Land Use Agreement, NNTT reference no. WI2010/004; National Native Title Tribunal, Yawuru Prescribed Body Corporate Indigenous Land Use Agreement, NNTT reference no. WI2010/003.
- 66 *Aboriginal community outraged by State Government demolition plan*, 2014, television program, ABC TV, Perth, 20 June, viewed 15 October 2014, <<http://www.abc.net.au/news/2014-06-20/aboriginal-community-outraged-by-state-government/5540466>>.

Existing land tenure arrangements have the potential to deny traditional owners the opportunity to take on responsibilities (such as housing administration) and can hamper the transfer of leases (due to poorly maintained infrastructure).

While there have been proposals in the past to create new forms of tenure to mitigate the inflexibility of existing tenure to adequately accommodate native title interests, the state's position is that the existing lands administration act has an appropriate range of tenures.⁶⁷ As a consequence of this inflexibility, if an RNTBC seeks the divestment of ALT into freehold, native title rights must be extinguished.⁶⁸ The potential extinguishment of native title places RNTBCs in a very difficult position, given the deep political, cultural and social significance of native title. It also highlights the states' inability to interpret the complexity of native title as a whole, rather than as a property right. As a consequence, traditional owners are forced to assert their native title rights and interests in existing and limited tenure regimes and governance structures.

Queensland – Cape York and the Torres Strait

Similar to the Kimberley and Western Desert, State administration over Indigenous communities in the Cape York Peninsula and Torres Strait was centralised with administrative control handed over from church missions to the Queensland State government.⁶⁹ It was not until the increasing recognition of the need to restore Indigenous control over land that Aboriginal and Torres Strait Islander Reserves (known as a Deed of Grant in Trust, or DOGIT lands) could be vested in, or 'gifted' to local Aboriginal and Torres Strait Islander Shire Councils.⁷⁰ The creation of DOGIT land articulated Indigenous land ownership in the form of Aboriginal or Torres Strait Islander Freehold, which is secure like freehold land, but cannot be sold, and must be held in trust for the benefit of Aboriginal or Torres Strait Islander peoples connected to a specific area through a historical association. This geographic connection however, does not account for Aboriginal and Torres Strait Islander people who were forcibly removed from their traditional lands. Further grants of trust lands were, despite significant overlap, not on the basis of Aboriginal or Torres Strait Islander law and custom – the foundation of native title recognition.

In 2010, the introduction of the *Land Valuation Act 2010* (Qld) amended the *Aboriginal Land Act 1991* (Qld), *Torres Strait Islander Land Act 1991* (Qld) and *Land Act 1994* (Qld) to enable an RNTBC to become a trustee of former DOGIT lands.⁷¹ Under the new section 27 of the *Land Act 1994* (Qld) an RNTBC can hold 'land under the *Aboriginal Land Act 1991* (Qld) for a broader group of Indigenous beneficiaries concerned with the land, including native title holders, traditional owners and those with an historic

67 Wensing and Taylor note that in Western Australia 'individuated forms of tenure continue to be preferred over other forms of tenure that also have the potential to address impediments to economic development and home ownership': E Wensing, & J Taylor, *Secure tenure options for home ownership and economic development on land subject to native title*, AIATSIS Research Discussion Paper, no. 31, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2012, p. 15.

68 E Wensing, & J Taylor, *Secure tenure options for home ownership and economic development on land subject to native title*, AIATSIS Research Discussion Paper, no. 31, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2012.

69 For an extensive review see for example: R Nelson, JH Holmes, M Hardy, *Land tenure systems and issues of Cape York Peninsula*, Office of the Co-ordinator General, Brisbane, 1995.

70 Note that 'DOGIT lands' is a commonly used term to refer to Deed of Grant in Trust Lands. It is not intended to be used in a derogatory manner.

71 This measure was implemented following community resistance to the Hopevale Aboriginal Congress becoming trustee of former DOGIT lands. In the explanatory memoranda of the *Land Valuation Bill 2010* (Qld) it was noted that:

In the consultation for the transfer of the Hope Vale deed of grant in trust under the Aboriginal Land Act 1991, Aboriginal people sought the option to have land transferred to a registered native title body corporate, an organisation under the Corporations (Aboriginal and Torres Strait Islander) Act 2006, and for it to hold the land broadly for Aboriginal people as a land trust. However, as the Aboriginal Land Act 1991 currently operates, if a registered native title body corporate is granted land it must hold it for the native title holders of the land, <<https://www.legislation.qld.gov.au/Bills/53PDF/2010/LandValB10Exp.pdf>>, 8.

connection, rather than only those persons that hold native title.⁷² In some instances potential conflicts between the native title holders and the rights and interests of other Indigenous community members have been resolved at the community level through committee structures that provide guidance where native title rights and interests and other community interests may overlap.

State regulation of resource use has implications for the rights of native title holders vis-à-vis the rights of non-native title holders but Indigenous members of the community. For example, under section 174 of the *Community Services (Aborigines) Act 1984* (Qld), membership within a local council area also enabled the taking of fish and animals by traditional means for consumption 'despite the provisions of any other act'. The interaction between community status and status as a native title holder has implications for those who have accesses to resources within a community area. Conflicts may arise where historical peoples are seen as contravening traditional law and custom in the taking of resources despite their legal right to do so as a result of being a member of a community. In some areas this has been resolved through the establishment of a committee that is responsible for decision-making over the taking of resources such as turtle and dugong.

These local community struggles however, have now become embedded within broader tenure reform processes. The Queensland State Government has undertaken three interrelated tenure reform initiatives designed to improve economic development opportunities. These initiatives include leasing and freehold conversion arrangements to promote home ownership and economic security, support for regional planning processes and enabling business diversification on existing tenures.⁷³ The State Development, Infrastructure and Industry Committee (SDIIC) Inquiry into the future and continued relevance of government land tenure across Queensland noted that any planning and tenure reform in the region needs to recognise that 'native title interests are paramount' and that the interaction between native title and dealings on land need to be addressed on the planning level as a future act. This would require the development of regional Indigenous Land Use Agreements (ILUAs), as diversification of existing non-indigenous tenure could not occur without impacting on recognised or claimed native title.⁷⁴ The majority of recommendations made by SDIIC were aimed at the development of a Future Development Area ILUA to address barriers faced by Indigenous parties in pursuing compensation and economic development opportunities over native title lands. However all the recommendations made by SDIIC with respect to native title were not accepted by the Queensland Government, which instead opted for a narrow approach towards streamlining agreement making rather than ensuring the protection of native title rights and interests.⁷⁵

There have been two other initiatives aimed at promoting individual wealth within remote Aboriginal and Torres Strait Islander communities; particularly in Cape York via the creation of long term leases or the conversion of Indigenous landholdings into freehold. Legislation introduced by the *Aboriginal and Torres Strait Islander Land Holding Act 2013* (Qld) enables DOGIT lands to be 'split up' into individual tenures to facilitate secure home ownership and business assets.⁷⁶ Taylor and Wensing argue that:

72 This amendment also appears in the *Torres Strait Island Land Act 1991* (Qld).

73 State Development Infrastructure and Industry Committee (SDIIC), *Inquiry into the future and continued relevance of government land tenure across Queensland: final report*, Report no. 25, Brisbane, 2013.

74 State Development Infrastructure and Industry Committee (SDIIC), *Inquiry into the future and continued relevance of government land tenure across Queensland: final report*, Report no. 25, Brisbane, 2013, p.4. The inquiry notes that 68 per cent of land in Queensland is administered by the government the majority of which would have significant native title implications. The SDIIC also noted that the regulatory importance of addressing native title recognising that 65 per cent of the state has been claimed or will be subject to a native title determination in the future.

75 Queensland Government, Department of Natural Resources and Mines, 'Queensland Government response to the Inquiry into the Future and Continued Relevance of Government Land Tenure across Queensland', <<http://www.parliament.qld.gov.au/documents/committees/SDIIC/2012/01-Government-land-tenure/gr-rpt25-23Aug2013.pdf>>.

76 It is noted that the principal policy objective of the legislation is to 'provide residents of Indigenous Deeds of Grant in Trust (DOGIT) and Indigenous reserve land to be able to apply for perpetual leases for private home ownership and special leases for commercial purposes': *Aboriginal and Torres Strait Islander Land Holding Bill*

emphasis on secure tenure is arguably about protecting public investments in housing and related infrastructure and less about providing secure tenure for Aboriginal people on terms that will enable them to set and implement their own development goals, since the outcome of the tenure reform process rarely results in a stronger form of Aboriginal ownership and control over land.⁷⁷

One of the major challenges of tenure reform is the ability of RNTBCs to legally assume the role of land managers. Legal arrangements are contingent upon the willingness of State governments to reform land management legislation in light of the recognition of native title. One notable example from Queensland is the decision of *Gibson & Ors v The Minister for Finance, Natural Resources and the Arts & Anor*⁷⁸ which dealt explicitly with whether or not the trustee functions required by section 38(3)(b)(1) of the *Aboriginal Land Act 1991* (Qld) would conflict with the functions of RNTBCs under sections 57 and 58 of the NTA.

In the decision, it was argued that the role of the Hopevale Aboriginal Congress RNTBC (Congress) as grantee of the Deed of Grant in Trust land was incompatible with its responsibilities as an RNTBC. These arguments relate to the differences between how beneficiaries are defined under the Land Act and how native title holders are defined under the NTA.⁷⁹ The major difference being recognition of traditional owners based on demonstrated law and custom and recognition based on historical connections, many of which have come about as a result of imposed government policies.

It is clear from the Hopevale example that these roles are not mutually exclusive. In *Gibson* an analogy was made between commercial trustees who would perform a number of functions simultaneously and the role of the RNTBC which could have dual responsibilities in a community. Justice Henry noted that the functions of a RNTBC relate specifically to native title matters.⁸⁰ One of the key issues raised was where commercial development over DOGIT lands may be inconsistent with native title rights and interests. However it was noted by Justice Henry that this conflict would arise regardless of whether or not the RNTBC was the grantee of the DOGIT. Further this conflict may be more readily resolved by the RNTBC in its position as grantee, having consultation duties toward common law native title holders.

The *Aboriginal and Torres Strait Islander Land Holding Act 2013* (Qld) also seeks to resolve some of the tenure inconsistencies created by the original 'Katter' leases under the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld).⁸¹ In particular, in the 1980s many Indigenous families were left with unresolved tenures following an election where an incumbent government chose not to honour the proposed leasing arrangements. The new legislation revives this leasing arrangement (via agreement making) for access to Indigenous lands. However, the 2013 Act goes further to not only deal with those inconsistencies but enable the breakup of community townships – like Swiss

2012 (Qld), plain English statement, <<http://www.parliament.qld.gov.au/documents/committees/arec/2012/ATSIILandHolding/PlainEnglish-ATSIILB.pdf>>.

77 E Wensing, & J Taylor, *Secure tenure options for home ownership and economic development on land subject to native title*, AIATSIS Research Discussion Paper, no. 31, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2012, p. 11.

78 [2012] QSC 132 (17 May 2012).

79 In the Queensland Supreme Court trial decision, Justice Henry weighed this argument with the legislative provisions. The most relevant arguments presented were as follows:

- The functions of an RNTBC and its duties as a grantee of a DOGIT are incompatible
- There are potential breaches of trust related to ex gratia payments received as a part of the transfer
- Inconsistency between state land management function and native title federal legislation

80 *Gibson & Ors v The Minister for Finance, Natural Resources and the Arts & Anor* [2012] QSC 132 (17 May 2012), [32]. A second issue raised was an ILUA signed by Congress not to damage Aboriginal Cultural Heritage (that was formerly identified by the Hope Vale Aboriginal Shire Council). However, it was identified that these duties were already implicit within the *Aboriginal Cultural Heritage Act 2003* (Qld). It is further noted that it is open to RNTBCs to also become Aboriginal Heritage Bodies under the legislation, further supporting the confluence of the roles of grantee and holder of native title rights and interests rather than divergence.

81 For further review of this program see: Auditor General, *Home Ownership on Indigenous Land Program*, Audit Report No. 23 2010–11, Australian National Audit Office, Canberra 2010, [113]–[121].

cheese – in order to facilitate home ownership in remote Aboriginal communities.⁸² Indeed, it has been observed in communities such as Kowanyama, that housing on perpetual lease holdings were less likely to be maintained as individual lessees did not have access to the economies of scale from bulk maintenance servicing carried out by the Council, especially in a remote and season dependent community. More importantly, the land allocation process would be conducted by the trustee which in most cases would be the Aboriginal Shire Council in the majority of Aboriginal communities, especially in the Cape York which has previously come under threat of amalgamation.

The Kowanyama community is facing further challenges in the transfer of its current DOGIT from the Aboriginal Shire Council to the RNTBC. These challenges mainly stem from the fear that once transferred; the Aboriginal Shire Council will lose control over its asset base or the security of existing infrastructure and housing. However, conversely for the Abm Elgoring Ambung RNTBC which holds native title over the land, and the community which predominantly consists of native title holders, there is a risk that the Shire Council could become amalgamated, with community control centralised at the state government level.⁸³ Coupled with the impact of better resourced and salaried councillor positions on Aboriginal Shire Councils, many traditional owner structures will be unable to compete with established Aboriginal Shire Council systems in the administration of land, despite being the holder of native title rights and interests. In some instances where traditional owners act as councillors and directors of their RNTBCs they can inadvertently undermine the future control of community tenure and the long term economic benefits of lease arrangements. Similarly, RNTBCs cannot apply for local government grants which could potentially overlap with and support RNTBC activities.⁸⁴

In the Torres Strait, the Mura Badugal (Torres Strait Islander) Corporation RNTBC is the first RNTBC in the Torres Strait to have achieved the divestment of a DOGIT to the RNTBC in 2014.⁸⁵ Following the administrative changes made to Torres Strait Island Councils through the *Local Government and Other Legislation (Indigenous Regional Councils) Amendment Act 2007* (Qld), which merged smaller island councils under the umbrella of a Torres Strait Island Regional Council (TSIRC), the Badu people contested the acquisition of the DOGIT for Badu Island by TSIRC. This was driven by the Badu Island Council, before amalgamation into TSIRC occurred. Badu Island Council argued that an acquisition of the DOGIT by TSIRC would remove ownership from the Badugal people and leveraged rights under the *Torres Strait Islander Land Act 1991* (Qld) (TSILA), to block the DOGIT transfer to TSIRC. In negotiations, the Badu Island Foundation Ltd (BIF) – a community controlled enterprise and non-government organisation on Badu Island was originally identified to hold the lease. However Mura Badugal RNTBC was later selected by the Badugal people through the consultation process as the appropriate community organisation to hold the DOGIT on trust for Badu people.

Under the court orders it was the state's obligation to transfer the DOGIT and therefore there was no budgetary limit placed on the consultation process for the DOGIT transfer. It took seven years of community consultation and negotiations between Mura Badugal RNTBC, TSIRC and the Queensland government over the terms of the DOGIT transfer, and divestment was achieved in 2014. This involved identifying the facilities and access points required by TSIRC and the Queensland government to perform their duties and devising a schedule of divestment that acknowledged the different roles played by local government and the RNTBC within the community. The financial support for extensive community consultation (which occurred not just on Badu but with Badugal

82 Auditor General, *Home Ownership on Indigenous Land Program*, Audit Report No. 23 2010–11, Australian National Audit Office, Canberra 2010, [122]–[124].

83 Local Government Reform Commission *Report of the Local Government Reform Commission*, July 2007.

84 L Strelein 'Native Title Bodies Corporate in the Torres Strait: finding a place in the governance of a region', in T Bauman, L Strelein & J Weir (eds), *Living with native title*, AIATSIS Research Publications, Canberra, 2014.p.65. Further RNTBCs are ineligible for Financial Assistance Grants to Local Governments under the *Local Government (Financial Assistance) Act 1995* (Cth).

85 P Ahmat, C Tamwoy and M Namoa, 2014, presentation made to the National Native Title Conference in Coffs Harbour, 3rd June 2014.

people on the mainland in areas such as Cairns) was a critical factor in the achievement of the DOGIT transfer, as seen through the Bardi Jawi Governance project discussed above. Additionally Mura Badugal RNTBC and BIF, through a memorandum of understanding, share a CEO and administrative staff. BIF is a community enterprise which generates sustainable income from various business activities on Badu Island, and resources the operation of administration for both organisations which greatly assisted in the process.

Mura Badugal, being the land lord and having successfully negotiated lease agreements with state, commonwealth, local government and local businesses generates a sustainable income and resources for its operations and a joint organisational structure with BIF, enables the RNTBC to administer the DOGIT land independently from government grants. Badu Island is somewhat unique in this respect compared to other RNTBCs in the region, and for other RNTBCs there have been greater obstacles in achieving not only DOGIT transfers, but the adequate resourcing and community support to sustain and administer DOGIT lands.

On Mer (Murray Island), which is home to the Meriam people who achieved native title through the landmark Mabo decision, the divestment of a similar but unique lease – a community reserve lease – to Mer Gedkem Le (Torres Strait Islander) Corporation RNTBC was achieved in 2013.⁸⁶ Mer Gedkem Le RNTBC did not yet have established business enterprises and required support from the state in the initial stages to administer the lands. However the state government only provided funding support with the transfer for Mer Gedkem Le RNTBC to employ an administrative officer for one year. Following this period, the Torres Strait Regional Authority (TSRA) (a Commonwealth authority) has had to provide support to Mer Gedkem Le, and this has raised concerns about cost shifting between the state and the commonwealth. In a recent policy submission, the TSRA highlighted cost shifting for DOGITs as a key issue and recognises this as a central barrier to achieving further divestments.⁸⁷ Additionally the Ministerial requirements for divestment of a DOGIT are that the RNTBC has a certain level of operational capacity and that the divestment won't cause community disruption, often resulting in township leases remaining with TSIRC.⁸⁸

The Department of Natural Resources and Mine's (DNRM) Discussion Paper on providing freehold title in Aboriginal and Torres Strait Islander Communities aims to promote the conversion (and ultimately extinguishment) or surrender of native title rights and interests into freehold land titles as existing options were perceived to not be sufficient enough for 'Aboriginal people and Torres Strait Islanders wishing to own their homes and pursue commercial interests in their communities'.⁸⁹ This process ultimately means that communally held interests in land based on native title rights and interests would be mainstreamed as private property rights. While these options should be available to communities who want to pursue them, the core need to ensure that cultural governance is not eroded does not feature in or is supported by the reform process. In the Cape York and Torres Strait, the transfer of a DOGIT, or reserve lease, to the RNTBC was a critical stage for each traditional owner group to realise recognition of complete land ownership from the state. Wensing and Taylor also note that more sustainable outcomes are achieved by working with community driven forms of cultural governance.⁹⁰ These additional considerations are rarely prioritised in discussions about tenure reform in remote communities.

86 Mer Reserve Transfer Indigenous Land Use Agreement (ILUA), <http://www.atns.net.au/agreement_print.asp?EntityID=6135>, viewed 14 October 2015.

87 Torres Strait Regional Authority, 2013, Submission to the Native Title Organisation Review, 30 September 2013, <<http://www.deloitteaccessconomics.com.au/our+services/economic+analysis+and+policy/native+title/submissions>>, viewed 20 June 2013.

88 See further *Torres Strait Islander Land Act 1991* (Qld), s 59.

89 Queensland Government *Providing Freehold Title in Aboriginal and Torres Strait Islander Communities*, Discussion Paper, Department of Natural Resources and Mines, Brisbane 2012, 2.

90 E Wensing, & J Taylor, *Secure tenure options for home ownership and economic development on land subject to native title*, AIATSIS Research Discussion Paper, no. 31, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2012, pp. 19–20.

Ways of facilitating the role of RNTBCs in tenure reform

One of the greatest challenges that native title holders face in achieving complete control of their traditional country through tenure resolution, is the issue of organisational capacity and resourcing for RNTBCs. On one hand state governments have requirements for any future landholding body to have a sustainable operating capacity, and on the other there is an absence of any adequate and committed funding for RNTBCs to perform their statutory functions, enlarged by taking on tenure responsibilities from both the commonwealth and state/territory governments, particularly when they are first established.⁹¹ This places RNTBCs in a deadlock for achieving outcomes on their country, including realising economic development opportunities through the divestment of ALT or DOGIT lands to RNTBCs that may in turn provide resourcing to support the capacity of the RNTBC.

Poorly resourced RNTBCs face competition for government funding and resources with established community or shire councils that have historically played key roles in administering government funding for community services, land management and housing. For the traditional owners who have been recognised as native title holders, there is limited space in the political landscape of their local communities for native title interests to be recognised and respected, particularly when their interests are in competition with non-Indigenous designed governance regimes that are better resourced than RNTBCs.⁹² Even where RNTBCs are able to gain recognition, resources are not made available to RNTBCs to carry out their functions. Native title is meant to be protected from erosion through the future acts scheme which ensures that dealings over native title lands are valid when specific procedural requirements are met.⁹³ With respect to tenure resolution, native title cannot be overridden by state based legislation, but it is simple for states to compulsorily acquire native title as a part of its land management activities and as a result, seriously eroding native title.⁹⁴

At the same time, state governments have responsibility for developing mechanisms for the administration of land tenures in order to promote economic and social development for Indigenous and non-Indigenous communities. However, options proposed in Western Australia and Queensland promote a specific economic model and do not engage with the historical dispossession caused by previous policies nor the potential dispossession that can be caused by proposed tenure reform processes. As previously argued by Wensing and Taylor, the 'arrangements most likely to succeed will be those that build on existing and traditional institutions, which bring with them crucial economic assets including traditional governance structures and Indigenous social and cultural capital.'⁹⁵ Similarly, Altman et al note that changing land tenure does not address the multitude of barriers to economic development in remote areas and is contrary to experience in New Zealand where the individualisation of titles weakened Maori community structures and governance.⁹⁶

91 At June 2013, approximately 80 per cent of RNTBCs had little to no income or assets. PF, McGrath, C Stacey & L Wiseman, 'An overview of the Registered Native Title Bodies Corporate regime', in T Bauman, L Strelein & J Weir (eds), *Living with native title*, AIATSIS Research Publications, Canberra, 2014.p.33.

92 The incorporation of some Aboriginal councils under the *Incorporations Associations Act 1987* (WA) is not favourable to the DAA as this legislation is intended to provide an avenue of association that is more applicable to a sports club. The current system means that there is little regulation of these organisations, it is difficult for the DAA to exert control over these organisations, and it is also almost impossible for the state to wind them up if they are dysfunctional.

93 These provisions were significantly amended in the 1998 amendments to the NTA.

94 *Western Australia v Commonwealth* [1995] HCA 47 (16 March 1995). See also *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20.

95 E Wensing, & J Taylor, *Secure tenure options for home ownership and economic development on land subject to native title*, AIATSIS Research Discussion Paper, no. 31, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2012, p. 20.

96 JC Altman, C Linkhorn, & J Clarke, *Land rights and development reform in remote Australia*, CAEPR Discussion Paper 276/2005, Australian National University, Canberra, 2005. For other comparative views see: R Boast, 'Individualisation - an idea whose time came, and went: The New Zealand Experience' in L Godden and M Tehan (eds) *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures*, Routledge, 2010.

Culturally appropriate and considered planning can support and enhance Indigenous rights beyond the recognition phase.⁹⁷ Lane notes that the restoration of dispossessed lands to Indigenous peoples is not only a matter of recognition but a productive exercise over how resources are shared.⁹⁸ The focus on converting Indigenous land tenures into freehold title diverts investment away from the effective administration of unique Indigenous landholdings despite the gains that can be made by clarifying how native title interacts with land and water management regimes.

The capacity requirements that governments place upon RNTBCs in the negotiation of divesting landholdings, place little consideration on the historical context that has generated the contemporary environment in which Indigenous communities exist today – particularly conflicts between native title holders and local shire or community councils. Additionally the methods in which the capacity of Indigenous organisations is assessed by governments often focus on narrow measures that overlook not only the complexity of Indigenous organisations, but also engages with a deficit paradigm that ignores the strengths and potential capacities of RNTBCs.

The capacity of RNTBCs is driven and dependent on a myriad of conditions and factors, many of which are highly contextual to the social, political and economic histories of the place in which the organisation is embedded. In addition to cultural capacity, to function effectively, RNTBCs require a range of different resources or ‘assets’ (including financial, human and physical assets).

For Indigenous organisations such as RNTBCs, achieving these capacities is highly dependent on complimentary financial resources, particularly in the initial stages of the organisational establishment, to ensure that they are enabled to meet their legal and other responsibilities, make effective and informed decisions and to deliver upon the aspirations of their communities.

Bauman, Strelein and Weir argue that the creation of a corporate sector in RNTBCs ‘without concomitant funding and other support is a policy failure’.⁹⁹ Since RNTBCs were able to meet at a national level for the first time in 2007 they have been lobbying the Commonwealth government for adequate funding, yet this has yet to transpire, and the number of RNTBCs only continues to grow.¹⁰⁰ Government and industry both place an immense amount of expectation, and demand for time, on RNTBCs, that is additional to the demands and expectations placed upon RNTBCs by their own community. Yet the reality for RNTBCs across Australia is a widespread chronic lack of adequate funding, particularly in the initial stages of an RNTBC’s establishment, with 80 per cent of RNTBCs having little to no income or assets.¹⁰¹ Without the necessary financial resources RNTBCs are unable to employ staff and are driven solely by the volunteer input of their directors, and the assistance of Native Title Representative Bodies and Service Providers.¹⁰²

Traditional owners, when being told that they are required to raise the organisational capacity of their RNTBC before they can receive funding or a transfer of land, argue that their perceived lack of capacity is directly tied to the lack of government and community support for their functions and operations, creating a ‘chicken or egg’ scenario between traditional owners and government. For

97 MB Lane, The role of planning in achieving indigenous land justice and community goals, *Land Use Policy* 23(4): 385–394, 2006.

98 MB Lane, The role of planning in achieving indigenous land justice and community goals, *Land Use Policy* 23(4): 385–394, 2006.

99 T Bauman, L Strelein & J Weir, ‘Navigating complexity: living with native title’, in T Bauman, L Strelein & J Weir (eds), *Living with native title Living with native title*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2013, p.1.

100 Department of the Prime Minister and Cabinet, *Guidelines for basic support funding for Prescribed Bodies Corporate*, Land Programs Branch, Canberra, June 2013, <http://www.nativetitle.org.au/documents/FaHCSIA_PBCBasicSupportGuidelines2013.pdf>, viewed 20 June 2014.

101 PF, McGrath, C Stacey & L Wiseman, ‘An overview of the Registered Native Title Bodies Corporate regime’, in T Bauman, L Strelein & J Weir (eds), *Living with native title*, AIATSIS Research Publications, Canberra, 2014, p.33.

102 PF, McGrath, C Stacey & L Wiseman, ‘An overview of the Registered Native Title Bodies Corporate regime’, in T Bauman, L Strelein & J Weir (eds), *Living with native title*, AIATSIS Research Publications, Canberra, 2014.

the RNTBCs with native title recognised in existing Aboriginal or Torres Strait Islander communities, they are immediately placed in competition with the Indigenous community or shire council that is likely to be the established recipient of any grant funding available. This creates conflict between organisations that are not attempting to replace each other, and in the absence of under resourcing, could be establishing agreed ways of working together based generally on RNTBCs governing decisions about land use and councils providing services to the community.

RNTBCs face an additional challenge as they are drawn into a Commonwealth versus state conflict over who is responsible for providing adequate support funding for RNTBCs, particularly when they are first established.¹⁰³ Further, the competition between state and federal legal regimes also has the potential to exclude traditional owners who are perceived to have not gained legitimacy through democratic local shire or community council elections.

For RNTBCs, the political environment in which they exist is consistently and relentlessly being reformed, yet RNTBCs lack the resources to engage more broadly with reforms that are imposed upon them.¹⁰⁴ A policy approach centred around the capacities that RNTBCs lack – and therefore deeply entrenched in a paradigm of ‘deficit thinking’ – overlooks the latent capacity of RNTBCs, who currently survive off a significant investment of volunteer time by their directors and who have the potential to be significant drivers within their communities to achieve government priorities centred around addressing Indigenous disadvantage.

It is no surprise, given the conditions described above, that RNTBCs face significant challenges in achieving the level of operational capacity that governments seek before they will approve the divestment of land to native title holders. However it is divestment that can support commercial development on country and the generation of income to support RNTBCs, as well as consolidate and support culturally appropriate Indigenous governance. The conflicts generated by historical policies need to be recognised by giving traditional owners and those with historical association through residence opportunities to resolve extant conflicts exacerbated by policies of dispossession. This resolution process should be a precursor to any land transfers in order to ensure that future decision-making, whether it be over native title, Aboriginal and Torres Strait Islander freehold or leases remain robust.

Conclusions

Tenure reform is not only a legal process related to the specifics of legislation but is more importantly a conversation about how competing interests are negotiated. Conflict occurs within Indigenous communities where old established organisations, such as community councils or local shire councils and culturally grounded organisation such as RNTBCs, are trying to fill a new space. Both organisations are premised by the promise of reconciliation to address Aboriginal and Torres Strait Islander disadvantage yet have varied forms of resources, forms of representation and governing legislative regimes in order to achieve this mandate. Practical issues arise with respect to how these land tenures can be reconciled and the subsequent institutions that have drawn legitimacy, authority and financial income, as a result of being trustees of these land tenures, has the potential to erode the original purposes of recognising and returning Indigenous lands.

The idea of ‘reforming’ Indigenous held lands is not new and has come and gone in the Australian policy context in multiple iterations. The negotiation of multiple interests needs to occur in a manner that respects and accounts for Indigenous cultural interests in land. According to Sullivan, Australian Aboriginal Policy has been characterised by distinctive phases: ‘conflict and appropriation; protection

103 Outside of the income that a rare few receive through either state settlements or commercial agreements, RNTBCs are encouraged to seek grant funding to get many of their aspirations for community, environmental, and cultural programs off the ground.

104 PF, McGrath, C Stacey & L Wiseman, ‘An overview of the Registered Native Title Bodies Corporate regime’, in T Bauman, L Strelein & J Weir (eds), *Living with native title*, AIATSIS Research Publications, Canberra, 2014.

and segregation; assimilation and integration; and self-determination or self-management.¹⁰⁵ True self-determination requires the provision of the necessary decision-making powers and resources directly linked to recognised rights and interests in order to ensure that Indigenous groups have the appropriate 'space' to contribute to the wellbeing of their communities. Without this, the objective of native title as a vehicle for recognising, respecting and protecting Aboriginal and Torres Strait Islander peoples unique cultures and customs will not be achieved.

However building contemporary Indigenous governance, which has survived the impact of colonialism to varying degrees, requires time, energy and resources to succeed. It is important to remember that after successive Australian governments have spent 200 years trying to dismantle Indigenous governance and cultural authority for land, it has only been a recent 40 year history where Indigenous governance has been recognised and supported by the governments. More work needs to be done to restore the authority of Indigenous people to speak for their country.

Aboriginal and Torres Strait Islander Councils were created in an era when government policy on the treatment of Indigenous people was shifting from repression and control to self-determination. However in this beginning phase, limited understandings about the cultural diversity of Indigenous people, led to the creation of organisations that may not be culturally legitimate. However these organisations have come to be the primary face of engagement with external stakeholders and are 'speaking for country' often without cultural authority.

RNTBCs, with the advent of native title, have emerged from an era of reconciliation between Indigenous and non-Indigenous Australia, and which reflects a greater understanding of Aboriginal people and culture, particularly in relation to cultural diversity yet, for the most part, been marginalised by existing structures. The key challenge of diversifying Indigenous landholdings is the need to support Indigenous aspirations for security of tenure consistent with their cultural perceptions and needs. At the same time, outstanding issues of securing community capacity and governance need to be addressed.

105 P Sullivan, *Belonging Together: Dealing with the politics of disenchantment in Australian Indigenous Policy*, Aboriginal Studies Press, Canberra, 2011.

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