

Centre for Native Title Anthropology, ANU

**Common mistakes in PBC design and
operation: anthropological insights**

An online workshop with Cairns-based NTRBs

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Common design and operational mistakes

Today, I want to focus on three particular issues:

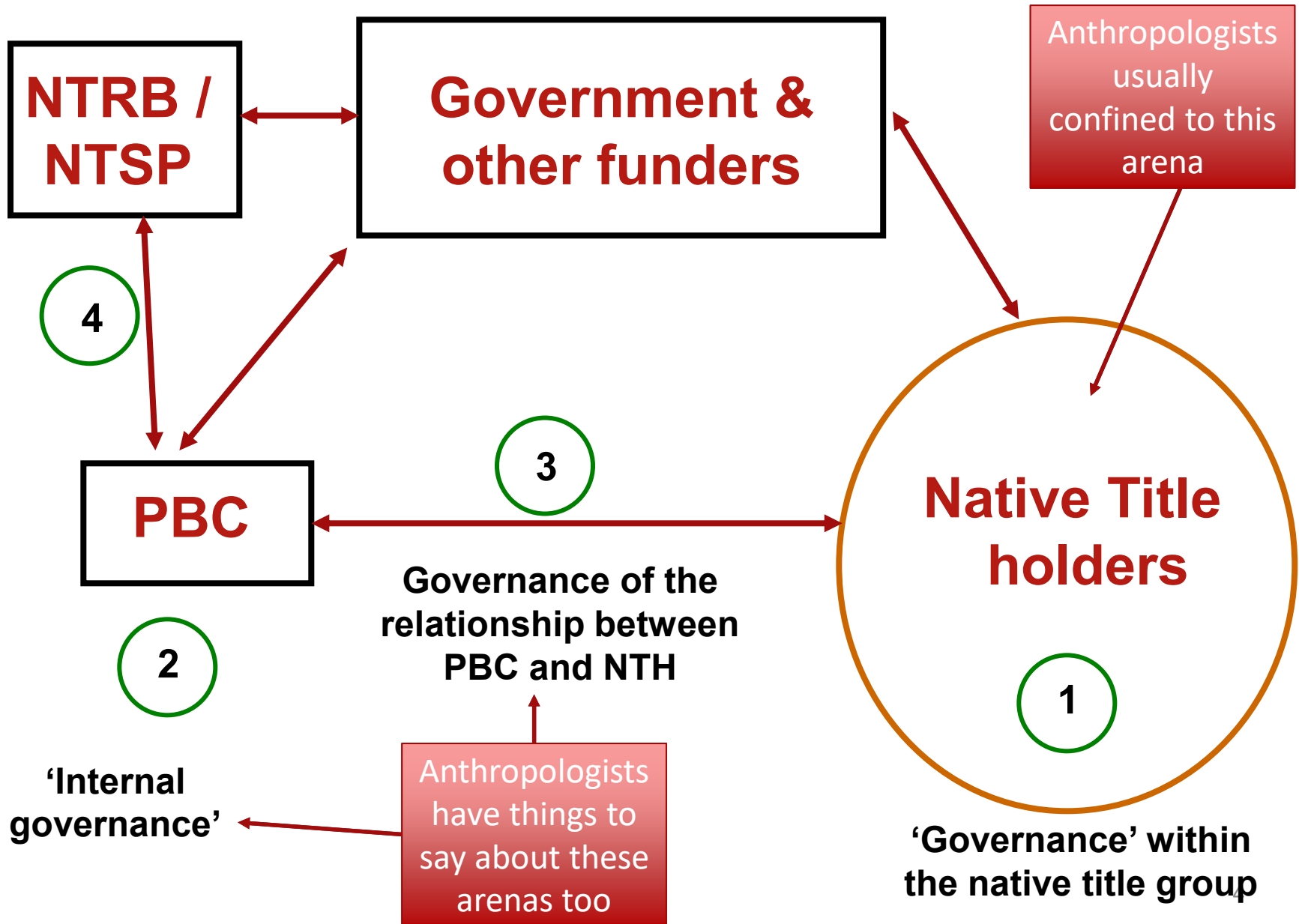
1. Too much attention paid to ‘internal governance’ of the PBC, not enough on what it does (e.g. esp. its statutory functions of holding/managing NT)
2. Inadequate attention paid to consultation and decision-making in dealings with native title, matters re country, etc
3. Assuming that because it is a native title corporation, it should operate under law and custom; e.g.:
 - PBC membership = the NT group’s membership
 - in all its decision-making, especially in its ‘internal governance’

Aim today is to provide tools to think and work with

Different governance arenas?


- **Governance is about people, relationships, and processes, the way people do things, the systems they are located in, interactions with government, and the way power is distributed and used.**
- **A governance ‘arena’ involves a particular set of relationships, rules, and processes - where people do things in particular ways: Example: an Aboriginal medical service**
- **Decision-making is one part of governance: Need to adopt decision-making processes appropriate for each arena.**
- **Each ‘arena’ involves different forms of governance;** for example
 - Potentially different, even incommensurate, ‘cultural’ values and understandings
 - different matters about which decisions have to be made;
 - Differentials in knowledge about these matters;
 - different processes for making decisions;
 - different people who should make the decisions;
 - different people whose interests might be affected by a decision;
 - Differentials of power and authority.

Different PBC governance 'arenas'



Arena 2, 'internal governance'

Matters to be set out in the PBC's Rules



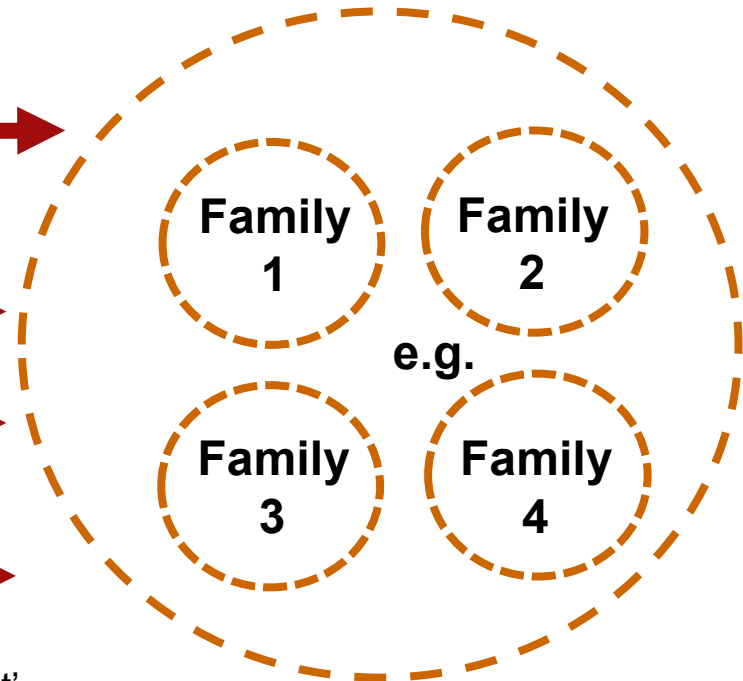
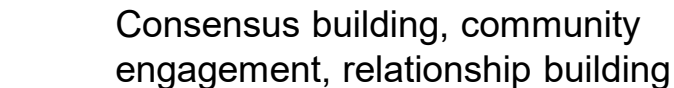
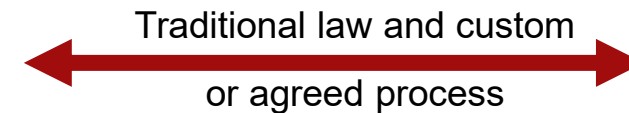
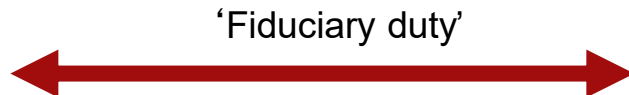
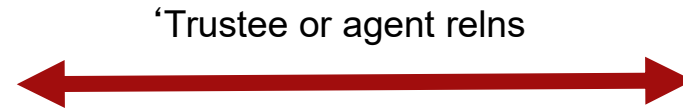
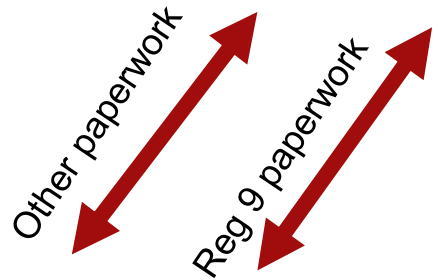
Rule 1	Name
Rule 2	Dictionary and interpretation
Rule 3	Objectives
Rule 4	Powers of the corporation
Rule 5	Membership of the corporation
Rule 7	Annual general meetings and general meetings
Rule 8	Directors of the corporation
Rule 9	General duties of directors
Rule 10	Functions, powers and duties of directors
Rule 11	Directors' meetings
Rule 14	Finances and recordkeeping
Rule 17	Dispute resolution process
Rule 20	Amendment of the constitution
Schedule 1	Determination of native title
Schedule 2	Native title decision—consultation and consent

PBC internal governance set by:

- The CATSI Act;
- Corporations Act
- Australian law more generally
- etc

Arena 3, Native Title Decisions

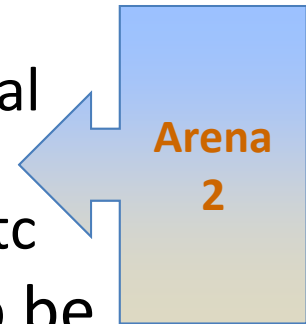
Government and NNTT and NTRBs



Different kinds of decisions

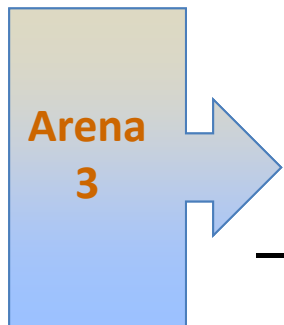
- **Made within the PBC**

- PBC directors make most decisions about internal governance: the directors’ “own thinking”
- But guided by Strategic and Operational Plans etc



- **Decisions of the native title group** that are to be implemented or passed on by the PBC

- Decisions directors can make themselves but have to follow rules made by the native title holders – but they may agree that certain kinds of decision making gets moved to PBC (e.g. Regulation 9 re ‘standing consents’)
- The native title holders have to **make** the decisions. The PBC directors **take** and pass on their decisions to government etc: NOT the directors’ “own thinking”

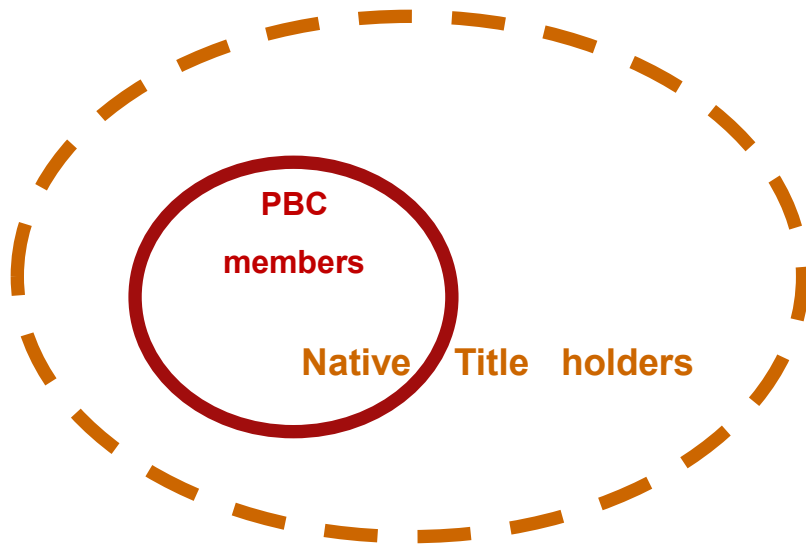


Conflating membership of PBC with membership of the NT holding group

Why do PBCs have members?

- Essentially for purposes of answering the question as to who owns the corporation
- Not set up to reflect or represent the different groups within the Native Title Group (but can do)
- This is also the case with the Directors
- However, the notion of 'representation' itself is problematic within Aboriginal polities

Conflating membership of PBC with membership of the NT holding group



- **Membership of the native title group is:**
 - a **CATEGORY** of people, not a list
 - recognised in a native title determination
 - defined by traditional law and custom

For Reg 8, all the affected native title group members must be consulted and give their consent, **NOT JUST THOSE WHO ARE PBC MEMBERS**

- PBC members cannot automatically make native title decisions at AGMs: they are not all of the relevant native title holders.

- **PBC members** are (mostly) native title holders who have applied for membership and been accepted by the PBC in accordance with its rules
- PBC membership is a **LIST** or a defined **SET** of individuals
- The list will never be complete, or accurate – people die and are born
- PBC membership is a subset of the native title holding group
- The CATSI Act and PBC Regs allow non-native title holders to be members (if Reg 8 followed)

Problems with meetings

- ‘Community’ meetings are a profoundly important means by which NTRBs and NTSPs, other Aboriginal organisations, governments etc etc engage with Aboriginal groups
- Our legal colleagues often use them to get ‘instructions’ from clients
- They also have become deeply incorporated into Aboriginal political processes (‘Before *Tjukurrpa*, now *mitingi*’)
- However, it is important to understand the values and practices which Aboriginal people may bring to their participation in community meetings

Authority and leadership

- Typically there is a high stress on personal and local group autonomy (contrasts with 'communal' image)
- Originally traditional authority lay largely with senior men through control of religion (but diversity across Australia)
- Contested authority, esp. in contemporary, secular world; thus relying on 'elders' may be problematic in many arenas
- Such authority as there is typically may not extend beyond the particular kin or family group, and even there does not extend to much of mundane life
- Will typically be different forms / knowledge in different arenas, potentially different modes/orders of authority

Responsibilities and loyalties

- Typically, people's primary *ethical* and *political* responsibilities are to their close kin and family ('localism')
- These can be reflected in strong support for family – but also in conflict and competition amongst families and individuals associated with them
- The more distant the connections of shared kinship and life experience, the less the ethical and political commitments to others, and the higher the degree of suspicion, may be
- Bringing strong cultural traditions into organisational processes can compromise its legitimacy and effectiveness
- Especially a problem for organisations serving a wider group or community (which is the case for many PBCs where the native title holders have been historically dispersed)

Problematic notion of 'Representation'

Indigenous 'polity' (political system) characterised by;

- High stress on egalitarianism / personal autonomy / 'self-help' ethos
- Intense commitment to and identity through local groups – ethical imperatives typically lie within the kin group
- Thus, the idea of others 'representing' one's interests can be problematic, seen as non-legitimate
- Can lead to the 'politics of representation', particularly in organisations ('stacking' AGMs etc)
- But 'representation' (in all its meanings) is fundamental to organisational governance

Meetings and political process

- As earlier, meetings / gatherings play fundamental roles in Aboriginal political systems
- Provide forums where public ratification of events / decisions can be made ('jural public' – Sutton)
- In many ways actually create a polity (Fred Myers)
- Provide forums where individuals may compete for influence / status, and where tensions amongst them or amongst families are given public airing
- People may not necessarily feel bound by 'decisions' made at meetings (Myers)

Meetings and decision making

Meetings may be a necessary part of decision making processes, traditional or otherwise. However:

- To be legitimate and sustainable, decisions typically require involvement from wide range of those who may hold or assert interests in the matter
- Typically, the *process* of decision making is just as important as any outcomes
- Who has authority to make decisions or be involved in decision making can itself be subject to dispute
- Community meetings are not always good venues for information dissemination
- But as discussed earlier may be necessary for ratification of decisions, acting as the 'jural public' (Sutton)

Meetings and decision making

- The best process may be to use small/family group consultations to disseminate information, to establish a two-way dialogue, and to build consensus, which is finally ratified in a public meeting
- This is necessarily resource intensive and time-consuming. It requires:
 - Making it clear that these are not decision-making forums but information and sounding out preliminary views
 - An explicitly consistent methodology to be applied across all family consultations, including use of effective communication strategies
 - An explicit and consistent process of recording and feeding back views across across all groups consulted, and seeking consent to do so
- Smaller group meetings help to build relationships and trust in a process, which are critical to overall successful informed consent.