

**The governance of Trust funds: challenges for lawyers, anthropologists,
and their Aboriginal beneficiaries**

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Paper presented to the Centre for Native Title Anthropology Workshop

***Trustee corporations and their Indigenous beneficiaries: meeting challenges
in the sustainable utilization of trust funds***

Alice Springs, 27-28 May 2021

Background and rationale for this presentation

The focus of this paper, and the workshop as a whole, is not only on compensation held in trust by Prescribed Bodies Corporate, but also on trusts holding funds for Aboriginal beneficiaries more generally. Nonetheless, it is useful to begin with some observations about PBCs in particular, to make a more general point.

PBCs are established under the *Corporations (Aboriginal and Torres Strait Islander) Act*, comprising over 600 pages and focusing almost exclusively on what the Act itself usefully terms the ‘internal governance’ of the corporations themselves.

However, the matters most relevant to this paper, and the workshop, are to be found in the PBC Regulations. Specifically, what will likely be an increasingly important function for PBCs holding native title in trust is set out in Regulation 6(b) – that is, to hold money (including payments received as compensation or otherwise related to the native title rights and interests) in trust;

and in 6(c) to *invest or otherwise apply money held in trust as directed by the common law holders*. Regulation 7(c) and 7(d) set out the identical functions for agent PBCs.

How this direction is to be implemented is a matter for each Trust.

That is, while the principles and mechanisms by which internal governance of the PBC is to be conducted are prescribed in compendious detail in the CATSI Act, the governance principles by which the common law holders are to ‘direct’ their PBC to apply the money held in trust, and **how** the PBC is to engage with the native title holder beneficiaries in determining how the trust funds are to be utilised, are *left essentially unspecified*.

It is this arena, the governance of trust funds for Aboriginal beneficiaries, which I wish to focus on here, and provides the overarching theme of this CNTA workshop.

It is not that attention has not been given to this arena. For instance, Trust Deeds set out a range of categories to which funds can be applied – for example a range of ‘charitable’ purposes such as ‘alleviating poverty’, education bursaries, white goods subsidies, and what might be thought of as ‘cultural’ objectives such as outstation support and heritage protection.

In what are represented as best-practice mining agreements, a range of benefits are negotiated which include such matters as employment and training, engagement of Aboriginal businesses, and heritage protection, as well as direct payments to Aboriginal organisations who then manage their utilisation.

The key point to make here, is that for most of these, people have **to apply** to the trust corporation, or as I have seen in one case, put their case to a general meeting of a trustee corporation.

I will make one other preliminary comment: I am mindful of the significance to ‘strengths-based’ approaches to Community Development frameworks, and some of my observations here may seem unnecessarily negative. But that is not my intention:

I am not making moral judgements in this paper concerning supposed 'weaknesses' to be found within contemporary Aboriginal societies in dealing with and managing trust monies. Rather, on the basis of my own observations over the years I am outlining certain deeply embedded ways of being in the contemporary world which Aboriginal people may bring to bear in their engagement with PBCs and other trust corporations, which in my view have their origins, at least in part, in classical Aboriginal society. They may have challenging or problematic implications, I will propose in this paper, but at the same time they reflect Aboriginal people's strength and resilience in coping with their contemporary worlds, and so are 'strengths based' in a rather more nuanced sense.

Sociocultural features of many Aboriginal beneficiary groups

It is beyond argument that colonisation has severely and negatively impacted all Aboriginal peoples, and inter-related factors such as exclusion and marginalisation, welfare dependency, poor health, and associated social problems continue to take a significant toll. However, it is also the case that through what can only be seen as extraordinary resilience, many Aboriginal people bring distinctive (albeit adapted and transformed) values to bear within their own societies, and in their engagement with the wider Australian society.

Key insights which anthropology can bring to the arena of trusts concerns certain distinctive Aboriginal social, political, ethical and economic values and practices which certainly have been impacted since colonisation, but which also have deeply ancient origins. Key instances of these of relevance to the governance of corporations and trust funds are discussed briefly in the following sections. I begin with 'localism' since it is manifested in the expression of autonomy, in many forms of social and political life, notions of cultural authority and identity, and more specifically in views concerning 'representative' boards in Aboriginal corporations.

The primacy of 'localism'

In Australian Aboriginal societies generally, and not just those in remote regions, priority is given to values and interests asserted at the small-scale, locally based or even individual levels. Strong emphasis is typically placed on the identities and autonomy of individuals and local groups, including those referred to by Aboriginal people as 'families'. Self-reliance and individual and local-group autonomy are highly valued, and the political system is characterised by an intense 'localism' (Martin and Finlayson 1996).

A key form of local group in Aboriginal societies is what they term the 'families', which can be found across much of contemporary Aboriginal Australia, from remote regions to urban areas. These are not to be understood as referring merely to 'extended' forms of non-Aboriginal family structures. Anthropological research has demonstrated that these contemporary Aboriginal 'families' can be seen in many areas as the successors to the land-holding units of the 'classical' Aboriginal societies (e.g. 'clans'). They are defined through shared common descent from specific named ancestors, while larger 'families' may themselves comprise recognised sub-groups identified by particular surnames, and defined in terms of descent from intermediate forebears from generations below those of the earliest remembered ancestors.

These 'families of polity' (as the anthropologist Peter Sutton (2003) has termed them) are not the only 'structural' feature of Aboriginal societies, but they do play a central role in defining and organising ethical frameworks, and social, economic and political relations within the Aboriginal domain.

Aboriginal 'families' then, are political and jural entities, not the 'private' units of stereotypical Anglo-Australian society. Disputes may involve focal individuals, but such individuals' positions in part rely on their capacity to mobilise members of their family networks to their cause.

Localism also has important ethical implications. A person's strongest ethical commitments are usually to their immediate kin and family, and those from other groups may well be viewed with a lack of trust, a degree of suspicion or even on occasion hostility. A notion of the 'wider common good' or shared 'community' or sometimes even 'family' interests can be relatively absent in such societies or groups. This has significant implications for the governance of corporations, and for how 'representative' structures such as corporate boards may be viewed by beneficiaries, and how the members of those boards may understand their own roles.

It is important to note here that while Aboriginal localism has most certainly been accentuated through much colonial and more recent history – for example, the introduction of the welfare-based cash economy has had a major impact – in my opinion it has ancient origins in the necessities of hunter gatherer life, where people lived and moved for much of the time in small bands and where mutual trust and shared identity were keystones of everyday life.

Political contestation and outright open conflict and on occasion violence within and between Aboriginal groups often centers on the legitimacy or otherwise of claims to rights and interests in traditional lands.

One consequence of this strident 'politics of identity' can be a continuing focus on the constant negotiation and renegotiation of relationships among individuals and sub-groups within a complex and factionalised Aboriginal polity, rather than on engagement with the broader non-Aboriginal society.

Another manifestation of localism is evident with autonomy. There is typically a strong resistance by individuals and local groups to being bound by the decisions of others, including those who nominally act for, or represent them, and indeed a mistrust of ceding the management of their rights or interests to others (especially where country, or money, are concerned).

This originates in part in the high value placed on individual and local-group autonomy, and on a resistance to hierarchy outside of the traditional religious / ritual arena.

Aboriginal people are typically extremely cautious or often even hostile to delegating authority to nominated or elected 'representatives'. That is, the principles underlying representative democratic institutions and also incorporated organisational structures by which individuals or groups delegate the right to speak for their interests to 'representatives,' do not necessarily operate within Aboriginal societies.

A person's occupation of a formal institutional position such as 'chairman', 'board member', 'delegate' or 'proxy' does not necessarily give that person the authority or legitimacy within Aboriginal systems of values to 'speak' for others, or to make decisions about matters that they see as their business only – quintessentially, about country, and about money.

I will return to the implications of political and ethical localism for so-called 'representative' boards below.

Language groups ('tribes', 'First Nations' etc)

A brief note here. For some purposes (such as for native title claims), language groups or what are sometimes called by Aboriginal people 'tribes' or in more recent times First Nations, do have a certain political and social reality, but it is limited.

Importantly in my view, language groups do not necessarily provide political units with defined common goals and aspirations and a clearly established leadership. Members share the identity label, are linked through kinship, may share or assert affiliation with the language, and may assert in common their connections to particular traditional country. Whether particular families or individuals can be the subject of significant disputation. And they do not necessarily form a stable and cohesive unit for achieving autonomy and self-determination – it is at the lower level, the constituent 'families' and in some cases even at the local kin group, that in my experience people seek to achieve these.

Aboriginal corporations

There are now several thousand Aboriginal-controlled organisations around Australia, ranging from virtual 'post box' PBCs to commercial and service delivery corporations with turnovers of millions of dollars. As with non-Aboriginal organisations, there is also considerable diversity in terms of the success or otherwise with which these organisations operate. There is a substantial literature on the factors that contribute to successful Aboriginal organisations (e.g. Finlayson 2007a, 2007b; Hunt and Smith 2006, 2007; Martin and Finlayson 1996), but I don't canvass this terrain here.

However, it is important to make the seemingly obvious point that Aboriginal people bring their own distinctive political, social, ethical and other values to bear on their involvement with their own organisations, whether they are running them or seeking resources or services from them. These values have important implications for how these organisations function, most particularly when they aim to represent the interests of, or provide services to, a diverse Aboriginal constituency.

For example, the typical strong political and ethical commitment to immediate kin and family referred to above have important implications for Aboriginal Boards, including those of Trustee corporations. To take just one instance, the legal requirement for a board member to act in accordance with their fiduciary duty to the organisation itself can directly conflict with deeply embedded ethical and political obligation of the individual concerned to further the interests of and support their own 'mob' or family.

More fundamentally, the entailments of localism and its associated emphasis on individual and local group autonomy, and its political and ethical dimensions, is that the concept and practice of 'representation' can be seen as quite problematic from within Aboriginal societies.

The difficulty that Aboriginal people can have in trusting someone else from outside their own immediate kin, for example, as 'representing' their interests on the board can lead to the de-stabilising 'politics of representation'. This in my view is one of the key reasons why, across Australia, many Aboriginal organisations are characterised by an absence of trust in their Boards, intense competition amongst families and other subgroups, and by corporate histories in which competing factions (typically comprising influential individuals and their 'families') alternate in their control of the board, or fission off to form new organisations.

Political conflict in these organisations will often be conducted through manipulation of membership and meeting processes to establish control of boards (and therefore of organisational resources). The 'politics of representation' can also be seen sometimes in the attempts by individuals and sub-groups within the wider organisational constituency to assert control over the means by which membership of the organisation and the composition of its board are determined.

A further, and very significant, cause of the politics of representation is that representative structures can never truly reflect the nature of the diversity and the shifting alliances which characterise Aboriginal political systems.

It is a common mistake, repeated across Aboriginal Australia including by those providing advice on the establishment of Aboriginal corporations, to focus attention largely on capturing the diversity of the constituency in the representative structure itself, rather than focusing on developing mechanisms to ensure **that the manner in which the organisation delivers its services** – or provides access to trust funds in our case – reflects and incorporates that diversity.

That is, I suggest that conventionally most attention – including that by the beneficiaries themselves – is paid to the governance structures and procedures of the trust corporation itself, and not enough to the governance of what the corporation's functions are – for instance, how a PBC holding compensation funds in trust for common law holder beneficiaries 'applies' those funds 'as directed' by the beneficiaries, as the language of PBC Regulations 6 and 7 puts it.

In the next section, I turn to a consideration of the relationship between a Trust (whether a set of individual Trustees or a Trust corporation) and the beneficiaries, which I see as integral to the ability of a Trust to sustainably deliver tangible benefits to beneficiaries consistent with the objects of the particular Trust.

The relationship between an Aboriginal Trust and its beneficiaries

My focus in this section is on matters relevant to establishing a productive and trusted relationship between a trustee corporation and the beneficiaries.

There seem to be few mechanisms in most Trusts apart from meetings and grant or loan application processes for beneficiaries to access funds or other support. This would potentially disadvantage those beneficiaries who for whatever reason – poor education, not politically adept or powerful, not being competent in cross-cultural situations – are less capable or willing to be proactive in accessing funds. One consequence of this - it seems to me - is that those who are most in need of assistance from a Trust having reduced opportunities to access benefits from it.

This would particularly be the case where larger scale meetings – such as Trust AGMs – provide the primary decision-making forum for the allocation of Trust funds.

Such meetings provide a highly problematic means for informing and seeking input from members of what are sometimes dispersed and deeply factionalised group. This is for a number of interrelated reasons, which are to be found across Aboriginal Australia and in part reflect political and ethical discussed previously. They include:

- meetings are very prone to being dominated by those who use them for political strategizing and positioning, which means that it is difficult if not impossible to ensure effective participation of those who may have equivalent rights but less political standing;
- Meetings can provide forums which become dominated by grievances which people bring as it provides the only occasion for them to do so;
- They usually provide a poor basis for informed decision-making, particularly around complex and technical matters;
- They do not facilitate typical Aboriginal decision-making processes of extended consideration and discussion, involvement of appropriate individuals on the basis of seniority, knowledge and so forth, and consensus building, within the local groups (e.g. families') where such processes have force. This is in part because in aggregating local, highly autonomous and sometimes disputing groups in larger so-called 'community' meetings, they disempower certain beneficiaries and their family groups from effective participation.
- Meetings are nonetheless necessary mechanisms by which formal ratification to a proposal can be given by the relevant 'jural public' – that is, the relevant total set of people who have a legitimate right to have, and express, and opinion on the matter. However, they need to be preceded by a considered and dispersed process of information dissemination, consultation and consensus building, so that the meeting essentially ratifies informed decisions that have already been reached – for instance, with a process of family-based consultations with the aim of building a consensus on issues such as how decisions on Trust fund allocations should be made.

Session 2 tomorrow, presented by the Central Land Council's Community Development Unit along with Warlpiri Traditional Owners, provides a ground-breaking example of how participatory Community

Development principles have been implemented in the governance of trust funds generated from income streams from Aboriginal lands.

Later in that same session, I set out a hypothetical case study of how a participatory family and community development process might be established from significant payments flowing from a major mining agreement.

A consequence of what I characterise as the inherently passive and reactive terms of the relationship between Beneficiaries and a Trust, as established in the Trust Deed, can be that many are reduced to opportunistic means for getting at least some personal benefit from it – for example, through fees for attending General Meetings of the trust.

More generally, the dominant relationship between many of the Beneficiaries and a trust can be one of “*opportunistic rent seeking*” (Martin 2008) by the Beneficiaries. By this is meant a constellation of attitudes and actions including:

- little sense of ‘ownership’ of the Foundation, including little direct involvement in its operations or its decision-making processes;
- little evidence of commitment of the beneficiaries to a notion of the wider common good to be served by a trust – the evidence seems to suggest that they risk being reduced to seeking instrumental individual or family advantage;
- the essential relationship between the Beneficiaries and a trust can seem to be, for most, a reactive or passive one;
- there appears to be little or no planning or decision making in which the Beneficiaries themselves are or can be actively involved.

How might this be addressed? Background ideas and principles

The following pre-figures and draws from my case study presentation tomorrow.

A summary conclusion to be drawn from the above is that one key focus of the governance of a Trust’s activities as a whole should be on the *governance of the relationship between the Trust and the beneficiaries* (including governance of how the trust funds should be applied), not just the internal governance of the Trustee corporation.

Furthermore, to take into account the sociocultural factors outlined above, the governance of this relationship should have as its guiding principles:

- it should provide mechanisms for active participation amongst the beneficiaries at local and possibly family group levels;
- it should aim to replace the often reactive and passive relationship between beneficiaries and the trust with one based on active participation and a sense of ‘ownership’;
- it should aim to replace the common situation of opportunistic rent seeking with structured processes in which people have a meaningful say in the operations of the trust, while still

maintaining appropriate mechanisms for prudential control and determining an overall strategic direction for the trust, consistent with its objectives;

- it should provide mechanisms by which beneficiaries, at the levels which are meaningful to them such as family or residential groups, can plan for their futures and the role which resources from the trust might play in those futures, and are thus able to move away from the opportunistic and short-term seeking for resources to a longer-term family and community development perspective;
- it should have a pre-eminent focus on working with the beneficiaries to build their capacity to make informed choices not just about how the trust might assist them, but about their lives.

It is my opinion that these principles should be implemented through a *participatory planning and capacity development* methodology. Examples of how this might be undertaken are set out in some of the presentations tomorrow, including that of the Central Land Council's Community Development Unit.