



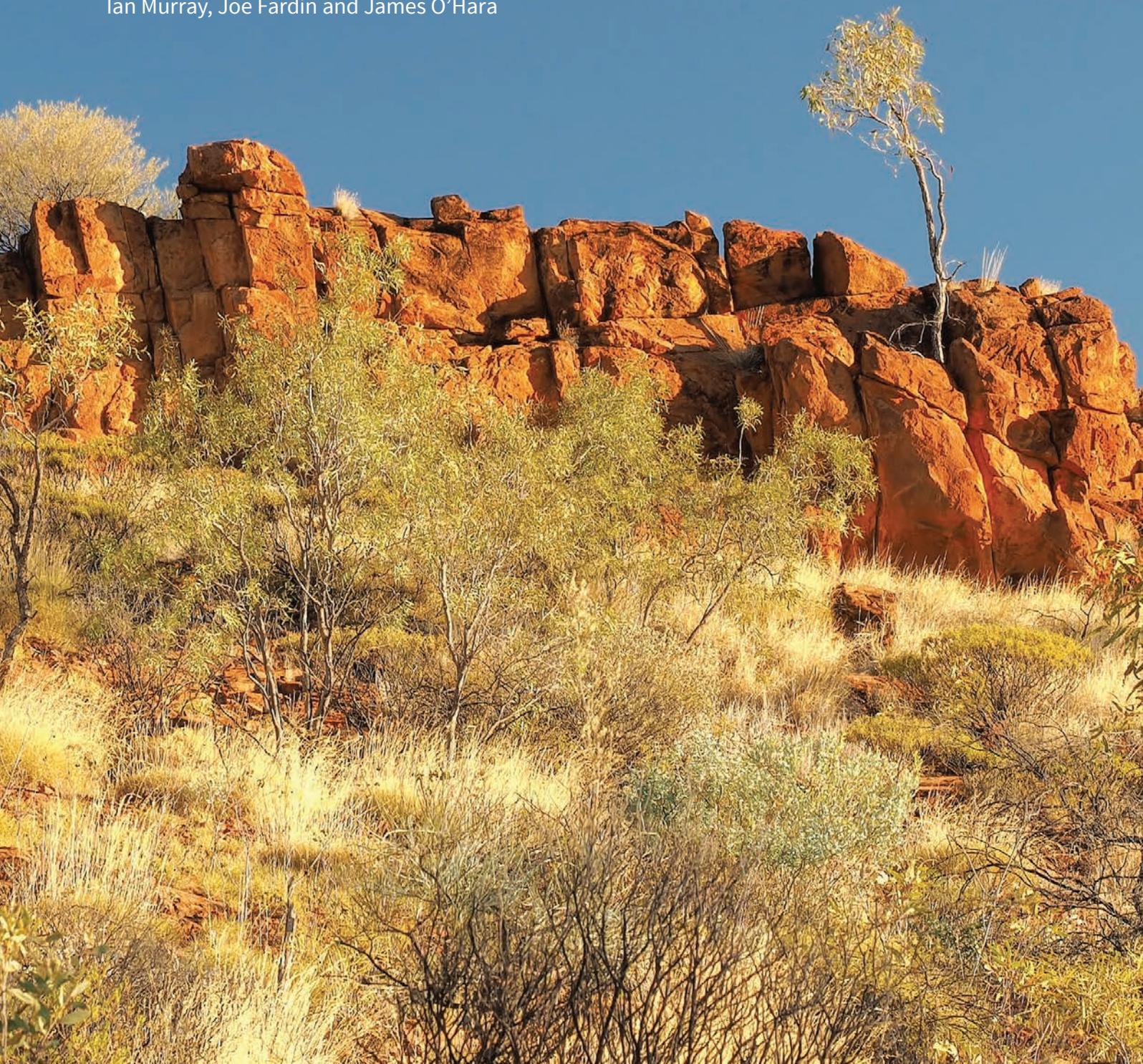
THE UNIVERSITY OF
**WESTERN
AUSTRALIA**

Arts, Business, Law
and Education

Centre for Mining, Energy and Natural Resources Law
UWA Law School

Co-designing Benefits Management Structures

Ian Murray, Joe Fardin and James O'Hara





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Authors: Ian Murray, Joe Fardin and James O'Hara
Title: Co-designing Benefits Management Structures

Cover design and printing: UniPrint, The University of Western Australia.

Print ISBN 978-0-6480784-0-1 (hard cover)
Print ISBN 978-0-6480784-1-8 (soft cover)
EPub ISBN 978-0-6480784-2-5

How to use this document

This monograph is intended as a reference for stakeholders involved with benefits management structures, including Indigenous community members, Indigenous corporation executives and directors, trustees, resource proponents, and advisers. It should help stakeholders establish BMSs, consider ways to improve existing BMSs and to build the body of knowledge on BMSs and the sharing of that knowledge.

We have called the process ‘co-design’ because we have worked with BMS stakeholders through a series of interviews and focus groups to identify BMS purposes and challenges and to refine and add to the design considerations and best practice suggestions derived from the literature and our desktop analysis.

The following practical overview highlights the main areas covered:

1. What is a BMS?

A description of the nature and function of BMSs is provided in Chapter 2. This chapter explains what BMSs are, what they do, and why. This is important because BMSs are relatively new and complicated structures.

2. What information currently exists about the structure and operation of Indigenous organisations that might form part of a BMS?

Next, Chapter 3 considers what general research has been done about Indigenous organisations, focussing on how they are designed. This covers two main areas: the legal structures that make up BMSs (such as trusts and corporations), and how they operate (in terms of things like decision making and governance).

3. What are the main challenges faced by BMSs?

Specific issues faced by BMSs are discussed in Chapter 4. Identifying these issues is an important part of improving the overall functioning of BMSs.

4. What considerations should inform the design or review of a BMS?

Building on the challenges and the information that currently exists about Indigenous organisations, Chapter 5 offers twelve design considerations for BMSs – things for all stakeholders to bear in mind when discussing, designing and reviewing them.

5. How can I apply the design considerations to a BMS?

Chapter 6 applies the design considerations to an example BMS based on a common structure used in Western Australia’s Pilbara region. It shows how the design considerations work, where improvements can be made and potential ‘best practice’.

6. General recommendations for BMS ‘best practice’

The final part of this document, Chapter 7, makes some general recommendations about BMS ‘best practice’.

Contents

Foreword	vi
Table of Acronyms and Abbreviations.....	viii
Executive Summary	xi
Acknowledgments & Funding	xxvii
Authors	xxviii
1. Introduction	1
2. What Is a BMS and What Is Its Purpose?	7
2.1 Legal entities	8
2.2 Decision making, asset protection and information sharing functions	10
2.3 The purpose of a BMS.....	15
3. General Research on the Structure and Operation of Indigenous Organisations that May form Part of a BMS	20
3.1 Legal structures	20
3.1.1 Indigenous Corporations.....	21
3.1.2 Trusts	28
3.1.3 Land Councils.....	29
3.2 Impact of agreement making on structure	35
3.3 Impact of law and culture on structure	36
3.4 Operation and governance of Indigenous organisations	36
3.5 Comparative perspectives.....	43
3.5.1 Canada	43
3.5.2 United States.....	45
3.5.3 New Zealand.....	47
4. Specific Issues Raised by BMSs.....	51
4.1 Supporting autonomy	51
4.2 Every community/family/individual is different	52
4.3 Incorporating traditional laws and customs	53
Case Example – MG Corporation	54
4.4 Need for capacity building – especially due to complexity	58
4.5 Governance	61
Case example: Njamal People’s Trust	62
Case example: Groote Eylandt	64
4.6 Communication and participation	67
4.7 Overlapping decision making bodies	72
Case example: Ngarluma.....	75
Case example: Gumala Foundation	76
4.8 Filling boards/committees & succession planning	79
4.9 Administration costs and scale of compliance activities.....	80

4.10	Equity.....	81
4.11	Timing of funding for the Indigenous corporation ‘doer’	85
4.12	Restrictions on economic development	87
4.13	Geographical remoteness and dispersion.....	88
4.14	Professional trustees and inherent conflicts of interest.....	89
4.15	Interactions with pre-existing structures and with government.....	92
4.16	Strategic planning to achieve BMS purposes	93
4.17	Change	93
4.18	Implementation versus structure	94
4.19	Siloing	95
5.	Twelve Design Considerations for Your BMS	98
5.1	Customisation	103
5.2	Legal adequacy.....	104
5.3	Certainty	107
5.4	Allegiance.....	108
5.5	Incorporation of traditional law and custom & intercultural adequacy	110
5.6	Sensitivity to motivational complexity	112
5.7	Durability	115
5.8	Simplicity.....	116
5.9	Efficiency.....	116
5.10	Autonomy	118
5.11	Inter and intra-generational equity (<i>Equity</i>)	121
5.12	Capacity to pursue purpose	123
6.	Pilot Structure: Applying the Design Considerations to Identify Specific Best Practice & Room for Improvement	130
6.1	Summary.....	131
6.2	Pilot structure.....	141
6.2.1	Examples of context.....	142
6.2.2	Legal entities	146
6.2.3	Decision making, asset protection, information sharing and general operation of the structures.....	148
6.3	Application of design considerations to the pilot structure.....	158
6.3.1	Customisation.....	158
6.3.2	Legal adequacy	161
6.3.3	Certainty	173
6.3.4	Allegiance.....	174
6.3.5	Incorporation of traditional law and custom & intercultural adequacy	176
6.3.6	Sensitivity to motivational complexity	178
6.3.7	Durability	182

6.3.8	Simplicity.....	183
6.3.9	Efficiency.....	184
6.3.10	Autonomy	185
6.3.11	Equity.....	187
6.3.12	Capacity to pursue purpose.....	191
7.	Applying the Design Considerations to Identify General Best Practice	194
7.1	Communication and participation.....	195
7.2	Enhanced strategic planning	199
7.2.1	Articulating inputs, outputs, outcomes and impacts	200
7.2.2	Measuring attainment of inputs, outputs, outcomes and impacts	201
7.2.3	Balancing attainment of purpose against investment/distribution	203
7.3	Overlapping decision making bodies – building certainty and inter-personal trust.....	204
7.4	Equity and the use of a future fund.....	208
7.5	Dealing with complexity in aid of achieving flexibility	210
7.6	Windows approach.....	213
7.7	Professional trustees	215
8.	Bibliography	218
	General.....	218
	Material Relevant to Canadian Benefits Management Structures	241
	Material Relevant to United States Benefits Management Structures	245
	Material Relevant to New Zealand Benefits Management Structures	249
9.	Index.....	251
	Appendix A.....	254
	List of Interviewees	254
	Appendix B.....	257
	Comparative Perspectives	257

Foreword

It's my pleasure to write a foreword for this timely and valuable work addressing a significant and practical challenge in bringing about Indigenous economic and social development. Native title over the last 20 years has developed in a way that has significantly improved the financial outcomes for Indigenous people from the development of their traditional land. Determinations of native title rights and interests, particularly exclusive native title rights and interests, have become commonplace, along with many Indigenous Land Use Agreements under the Native Title Act. By mid-2019 there were over 1300 registered ILUAs covering vast areas of Queensland, South Australia, Victoria and Western Australia. The result has been significant payments to Indigenous communities. All parties want those payments to provide effective benefits, both economic and social, to Indigenous people. Ensuring such benefits requires the development of appropriate structures, appropriate in the sense of providing control to Indigenous people, meeting their needs and providing administrative and financial efficiencies. This work has sought to provide a "reference for stakeholders involved with Benefits Management Structures" to meet those challenges and ensure the best outcome in the design of Benefits Management Structures.

Dr. Ian Murray and Joe Fardin bring valuable background and experience to this difficult task. Both are members of the Law School and the Centre for Mining Energy and Natural Resources Law at the University of Western Australia. Ian Murray has substantial experience in the area of regulatory and government issues facing not for profits, taxation and resource development, and has been combining that background in the area of furthering Indigenous economic development for some time. Joe Fardin has worked for most of his professional legal career in the area of Indigenous land rights, which in Western Australia necessarily means dealing with the mining industry and seeking to reach agreements which result in the development of Benefits Management Structures.

The methodology of this work involved extensive consultation with involved parties including Aboriginal community members, Aboriginal corporation executives, trustees, resource proponents and professional advisers. The authors have described the approach as "co-design", indicating that the outcome very much represents the involvement of all those parties. The consultation focused on the Pilbara in Western Australia, the location of many Indigenous Land Use Agreements and resource developments on Aboriginal land that should provide benefits to Aboriginal people.

In developing design considerations the authors prioritised, as they must, customisation to meet the particular circumstances of the Indigenous people and legal adequacy, to ensure that all legal requirements were met. The remaining 10 design considerations range from certainty through to incorporation of traditional law and custom through to capacity, and emphasise that the development of any structure will necessarily involve a balancing of elements, for example, certainty with autonomy. The work will enable Indigenous people and other parties, including resource proponents, to seek agreement on a structure which adopts an approach which meets their needs and the particular circumstances. The authors tested the design considerations by their application to a

“pilot structure” representing a common form of structure adopted in the Pilbara. The test provides a particularly valuable examination of the challenges, for example, the difficulty of ensuring adequate involvement in decision-making by members of an Aboriginal community, and the different ways the challenges might be met in the development of a structure. The work uses the design considerations to develop “best practice approaches” which should prove of invaluable assistance to those seeking to agree upon an effective Benefits Management Structure.

There are of course limitations in any work of this nature. It is an initial groundbreaking study which will hopefully lead to further research. The authors propose the development of a “toolkit” of best practice to further facilitate development of Benefit Management Structures. The challenge to establish a structure that will bring about the best possible outcomes is ongoing, but this is a very welcome and extremely useful contribution.

Richard Bartlett

Professor of Law and Chairman, Centre for Mining Energy and Natural Resources Law,
University of Western Australia

Author of “Native Title in Australia”, fourth edition, 2020

Table of Acronyms and Abbreviations

ACA Act	<i>Aboriginal Councils and Associations Act 1976 (Cth)</i>
ACNC	Australian Charities and Not-for-profits Commission
AFS licence	Australian financial services licence
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ALRA	<i>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</i>
<i>Altman and Martin's Power, Culture, Economy</i>	Jon Altman and David Martin (eds), <i>Power, Culture, Economy: Indigenous Australians and Mining</i> (ANU E Press, 2009)
ANCSA	<i>Alaska Native Claims Settlement Act of 1971</i> 43 USC (1971)
<i>Bauman, Strelein and Weir's Living with Native Title</i>	Toni Bauman, Lisa Strelein and Jessica Weir, <i>Living with Native Title: The Experiences of Registered Native Title Corporations</i> (AIATSIS Research Publications, 2013)
BHP-Banjima Agreement	Comprehensive Agreement entered into in November 2015 between BHP and BNTAC and the Banjima People
BHP-Niyaparli Agreement	Comprehensive Agreement entered into in 2012 between the Niyaparli People and BHP
BIA	Bureau of Indian Affairs
BMS	Benefits management structure
BNTAC	Banjima Native Title Aboriginal Corporation RNTBC
CAEPR	Centre for Aboriginal Economic Policy Research, ANU
CATSI Act	<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)</i>
CFRT	Crown Forestry Rental Trust
CIC	Community interest company
Corporations Act	<i>Corporations Act 2001 (Cth)</i>
DOI	Department of the Interior
GAC	Gumala Aboriginal Corporation

GEAT	Groote Eylandt Aboriginal Trust
GEPL	Gumala Enterprises Pty Ltd
GIPL	Gumala Investments Pty Ltd
Gumala Foundation or Foundation	Gumala General Foundation
<i>Hunt et al's Contested Governance</i>	Janet Hunt, Diane Smith, Stephanie Garling and Will Sanders (eds), <i>Contested Governance: Culture, Power and Institutions in Indigenous Australia</i> (ANU E Press, 2008)
IBA	Impact and Benefits Agreement
INAC	Department of Indigenous and Northern Affairs Canada
Karlka	Karlka Nyiyaparli Aboriginal Corporation
LALC	Local Aboriginal land council
<i>Levin's Observations</i>	Adam Levin, 'Observations on the Development of Native Title Trusts in Australia' (2016) 22(2) <i>Trusts & Trustees</i> 241
LTC	Licensed trustee company
<i>Mantziaris and Martin's Native Title Corporations</i>	Christos Mantziaris and David Martin, <i>Native Title Corporations: a Legal and Anthropological Analysis</i> (The Federation Press, 2000)
<i>McCrae, Nettheim & Beacroft's Indigenous Legal Issues</i>	Heather McCrae, Garth Nettheim and Laura Beacroft, <i>Indigenous Legal Issues: Commentary and Materials</i> (Thomson Reuters, 4 th ed, 2009)
MFCo	Myer Family Company Ltd
MG Corporation	Yawoorroong Miriuwung Gajerrong Yirrgeb Noong Dawang Corporation
<i>Murray & Wright</i>	Ian Murray and Stephen Wright, 'The Taxation of Native Title Payments for Indigenous Groups and Resource Proponents: Convergence, Divergence and Reform' (2015) 39(2) <i>University of Western Australia Law Review</i> 99
NAC	Ngarluma Aboriginal Corporation RNTBC
<i>Nettheim, Myers and Craig's</i>	Garth Nettheim, Gary Meyers and Donna Craig, <i>Indigenous Peoples and Governance Structures: A Comparative Analysis of</i>

<i>Indigenous Peoples and Governance Structures</i>	<i>Land and Resource Management Rights</i> (Aboriginal Studies Press, 2002)
NSW ICAC	New South Wales Independent Commission Against Corruption
NTA	<i>Native Title Act 1993</i> (Cth)
NTKML	Ngarluma Tharndu Karrungu Maya Ltd
OFA	Ord Final Agreement
ORIC	Office of the Registrar of Indigenous Corporations
OST	Office of the Special Trustee
PBC	Prescribed body corporate
PSGE	Post Settlement Governance Entity
Rio Tinto-Banjima Agreement	Claim-wide native title agreement entered into in April 2016 between Rio Tinto and BNTAC and the Banjima People
Rio Tinto-Niyaparli Agreements	Native title agreements entered into between Rio Tinto and the Niyaparli People on and from March 2011
RNTBC	Registered native title body corporate
<i>Scambary's My Country</i>	Benedict Scambary, <i>My Country, Mine Country: Indigenous People, Mining and Development Contestation in Remote Australia</i> (ANU E Press, 2013)
<i>Scott's Institutions and Organizations</i>	W Richard Scott, <i>Institutions and Organizations</i> (Sage, 4 th ed, 2014)
SROI	Social Return on Investment
YLUA	Yandi Land Use Agreement

Executive Summary

Introduction

1. Australia has seen an expansion in the number and size of resource and other projects affecting Indigenous land, coupled with ongoing recognition of Indigenous interests through Native Title and other related processes.
2. A significant result of this activity has been the formation and operation of 'Benefits Management Structures'. BMSs are structures that receive payments from land use agreements and that hold and distribute assets for Indigenous peoples and groups. As the term BMS is widely used in Australia by resource proponents and Indigenous communities we have also adopted it even though it is controversial to label payments connected with acts that impair native title rights as 'benefits'.
3. This monograph:
 - Examines the structure, operation and purposes of BMSs (Chapter 2).
 - Reviews the general research on the structure and operation of Indigenous organisations (Chapter 3).
 - Analyses key issues raised in practice by BMSs (Chapter 4).
 - Builds on the key issues for BMSs and the information that currently exists about Indigenous organisations in Chapter 5 by offering twelve design considerations that can guide the design or review of a BMS. It does so starting from a neo-institutional framework, but as informed by stakeholder feedback.
 - Applies the design considerations in Chapter 6 to an example BMS, the 'pilot BMS', based on a common structure in Western Australia's Pilbara region. This pilot BMS shows how the design considerations work, where improvements can be made and potential examples of 'best practice'.
 - Employs the design considerations in Chapter 7 to develop a range of more general best practice approaches, in response to several of the key issues raised in Chapter 4 and the areas for improvement and 'best practice' examples in Chapter 6.

Why is research needed into BMSs?

4. Land use agreements resulting in payments to BMSs present significant opportunities and risks for Indigenous peoples.
5. The management of assets provided under such agreements to a BMS is critically important.

6. This research should benefit BMS stakeholders by helping them:

- Understand and establish a BMS.
- Consider structural and operational improvements.
- Identify beneficial features of existing BMSs.

What is the research project and what are its limitations?

7. In 2016, researchers at UWA asked the following research question: What considerations are relevant to designing or reviewing the legal structure for a BMS?

8. To address this question, the researchers reviewed the academic literature on BMSs, Indigenous organisations that might form part of BMSs and on institutional design, using neo-institutionalism as the key theoretical framework. Neo-institutionalism focuses on how BMS rules might be applied by human beings and under social institutions and how the actions of people and social institutions might result in changes to BMS rules. The researchers also undertook a case study review of several existing Western Australian Pilbara BMSs to create an amalgam 'pilot' BMS for testing.

9. At the same time, the researchers conducted a series of interviews and focus groups with relevant stakeholders, as well as seeking comments on earlier versions of this document. The stakeholders include Aboriginal community members, Aboriginal corporation executives, trustees, resource proponents, and professional advisers and are listed in Appendix A. The stakeholders predominantly had a focus on BMSs used in the Pilbara. The interviews and focus groups helped identify BMS purposes and challenges which informed the design considerations and also helped to refine and add to the design considerations and best practice suggestions derived from the literature and desktop analysis of the 'pilot' BMS.

10. Whilst the literature analysed is drawn from Australia and around the world, the interviews and focus groups have been focussed on the Pilbara, as have the BMS 'pilot' structure documents. So some caution is justified before applying the proposed design considerations and best practice approaches in other settings. In particular, the duration and quantum of payments for many of the Pilbara structures will justify more complex arrangements than should be adopted elsewhere. Further, the particular structures used in the Pilbara should be viewed as examples, not the only possible outcomes from the design considerations. Eg, there may be space to consider greater devolution of decision making or broader involvement in decision making, or a lesser reliance on trusts fulfilling such a wide array of functions.

11. Nevertheless, a close examination of the Pilbara structures and the views of the stakeholders involved in those structures is a useful starting point for thinking about principles that may have general application. First, given the size and duration of the Pilbara BMSs, the various stakeholders have engaged in much thought and planning to design the structures, often over many years. Second, the Pilbara BMS

documents are being used as reference documents in other contexts, thereby influencing planning and negotiations in other areas. Third, the generally large duration and quantum of payments mean that Pilbara BMSs are likely to have a proportionately large impact justifying closer examination of their design.

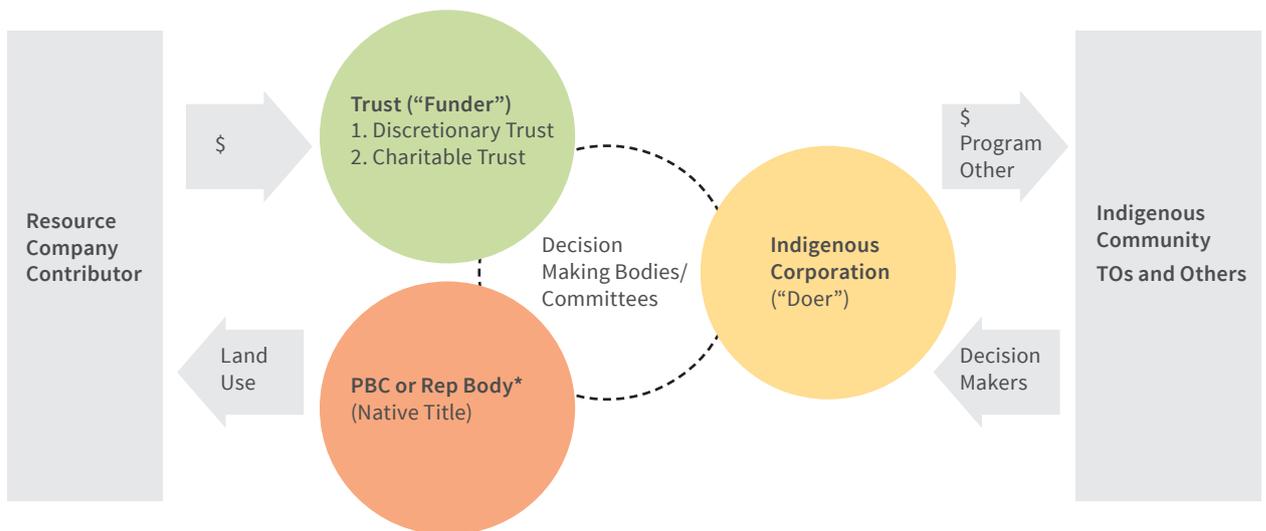
What are Benefits Management Structures?

- 12. Typically, BMSs include one or more trusts, a trustee and a representative incorporated entity and may include a Prescribed Body Corporate or Native Title Representative Body. While the trust or trusts do the ‘funding’, the corporations undertake the ‘doing’ of activities or business on behalf of the local Indigenous community.

- 13. The entities comprising a BMS are, fundamentally, private associations, presenting significant flexibility in addressing matters such as decision making processes and the allocation of decision making powers. Independent or stakeholder involvement may be incorporated into BMS decision making, and different approaches can be adopted for different classes of decisions. Asset protection may be effected through the use of external custodian trustees or capital protected ‘future funds’. Finally, different approaches are also possible for structuring information flows between BMS decision makers and stakeholders.

- 14. A diagrammatic example of a BMS is set out below.

Diagram No. 1 – Common BMS



*May be the same entity as the Indigenous Corporation.

What has the research project found?

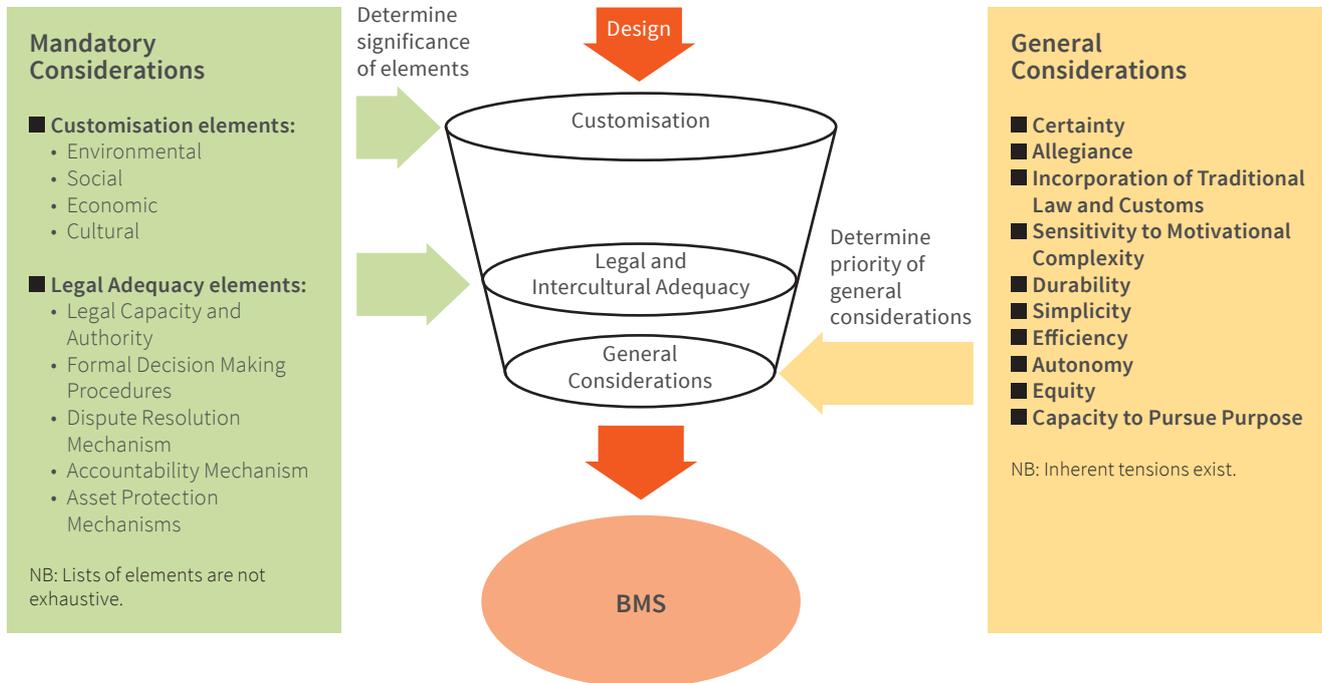
15. BMSs share common features of their legal structures and of distribution and asset protection functions, such as the use of a trust and hybrid decision making powers within each entity. They are reasonably flexible and will vary from place to place in order to fit the diverse circumstances in which they operate.
16. While noting that BMSs should not be expected to pursue all goals of an Indigenous community, stakeholders were materially consistent in the BMS purposes that they identified, but different groups of stakeholders placed different levels of emphasis on certain purposes. In particular:
 - Aboriginal community and corporation representatives tended to focus first on BMSs as vehicles to build autonomy and self-determination and second on socio-economic development.
 - While supporting autonomy, resource proponent representatives and trustee officers tended to place greater emphasis on socio-economic development for an Indigenous community, sometimes viewing autonomy as an instrumental means to achieving such development.
17. All groups of stakeholders noted that expectations that BMSs should be able to address all issues or pursue all goals of an Indigenous community were unrealistic.
18. Key issues raised in practice by BMSs include:

The need to support autonomy	Recognising every community, family and individual is different	Incorporation of traditional law and custom
Need for capacity building	Governance	Communication and participation in decision making
Overlapping decision making bodies	Filling boards/committees and succession planning	Administration costs and the scale of compliance activities
Achieving equity	Timing of funding for the Indigenous corporation 'doer'	Restrictions on economic development
Geographical remoteness and dispersion	Professional trustees and inherent conflicts of interest	Interactions with pre-existing structures and with government
Strategic planning to achieve BMS purposes	Change	Implementation versus structure
Siloing		

19. These findings mean there is no ideal BMS model. However, the research has found:
 - Twelve, more flexible, institutional design considerations that can be applied to design and amend BMSs.
 - There are many features of current BMSs that are operating well; there are also aspects that can be improved. Specific examples are set out further below.

Design considerations for BMSs

Diagram No. 2 – Design Considerations



20. It is important that **Customisation** and **Legal adequacy** must always be satisfied, even though the remaining 10 considerations can be balanced against each other. This is because all BMSs must be customised to the particular environmental, social, cultural, economic, and political conditions of the relevant Indigenous community. In addition, **Legal adequacy** must be satisfied in order for the BMS to exist and straddle Indigenous laws and cultures and the broader Australian legal system and society.

21. Summary of the design considerations:

- **Customisation:** Building or changing a structure to suit a particular community looking at factors such as group size, family/language group composition, where people live, what they want to do and how they make decisions. It is also important to get the proper balance between individual and family needs and the needs of the whole community.
- **Legal adequacy:** Structures need to comply with the law and work within the law. They need a way of knowing who is in the community and who can speak for a family or the community, how to make decisions and who is in charge of those decisions, how to resolve disputes, and how to take care of the community's property (money, vehicles, etc).

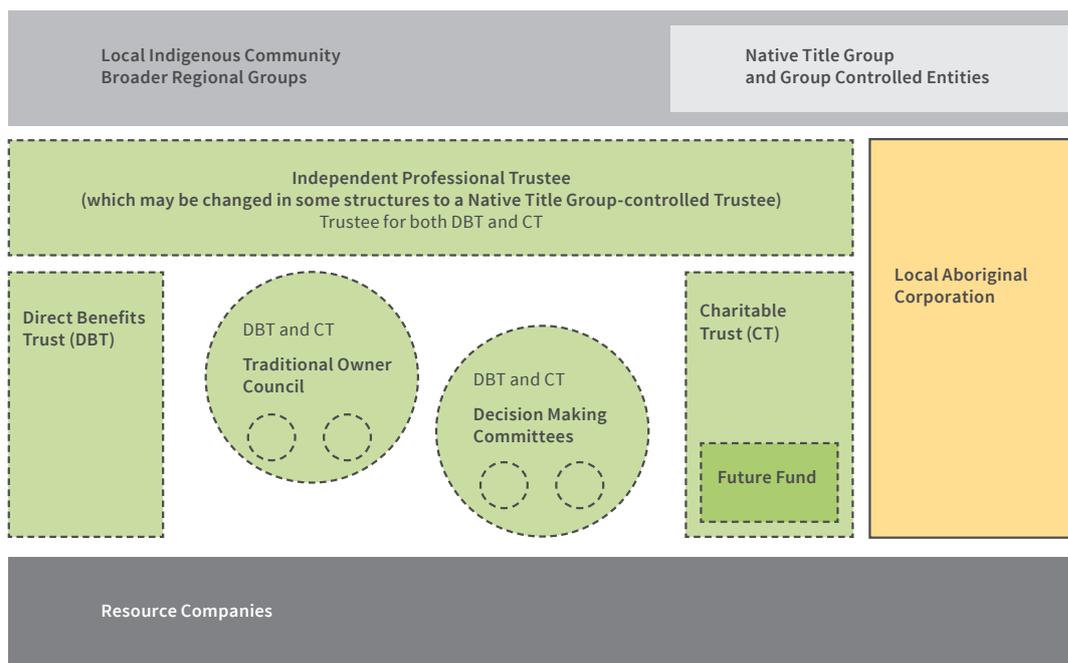
- **Certainty:** Structures need a clear way of working with people from outside the community and to protect money or other things received from those people and to resolve arguments.
- **Allegiance:** Structures need to hold the trust and respect of the community because a structure is meant to represent and work for that community.
- **Incorporation of traditional law and custom & intercultural adequacy:** Structures should be built on and help to protect Indigenous culture.
- **Sensitivity to motivational complexity:** People have different reasons for doing things. Structures need to be able to work with this. Structures should help people feel like they share the same goals as the structure. For example, by including different people in decisions, having decision makers explain reasons for decisions to the community and having ways to encourage decision makers to think about what other people might want.
- **Durability:** There need to be ways to change a structure so that it can keep growing and improving over time. But it should not be too easy to change.
- **Simplicity:** Keeping structures as simple as possible.
- **Efficiency:** It is important to keep costs down, both in running the structure and when dealing with other people outside the structure. Sometimes spending money up front on ways to build trust and develop certainty can save money in the long run.
- **Autonomy:** Members of the community need to be able to make their own decisions individually and as a whole: self-determination. Structures should give members the information and support they need to make decisions in a timely and appropriate way.
- **Inter and intra-generational equity:** Money and other things should be distributed fairly between members of the community and a fair share should be set aside for future generations. This may mean that some money needs to be prioritised for current generations who have missed out on opportunities that will be available through the BMS for future generations.
- **Capacity to pursue purpose:** The structure should support the community to work out what to do with their structure, how best to do it, and how to monitor and keep track of achievements over time. This can be about cultural, economic, social or other goals.

22. The design considerations can be used to understand the form and function of BMSs, as well as allowing the deliberate prioritisation of one consideration against another. Key trade-offs include ***Certainty/Autonomy*** and ***Simplicity/Incorporation of traditional law and custom***.

Application of design considerations to pilot BMS

23. The research project applied the 12 design considerations to some existing BMSs, amalgamated together as an example ‘pilot structure’, to test the practical application of the design considerations and to identify beneficial features and areas for improvement.
24. The ‘pilot structure’ comprised a charitable trust, a discretionary direct benefits trust, a professional trustee company and an Indigenous corporation (the Local Aboriginal Corporation). A portion of the funds received had to be retained in a ‘future fund’, which is essentially a capital and (to some extent) income protected endowment fund.

Diagram No. 3 – Interrelationship and Decision Making Bodies comprising the ‘Pilot Structures’



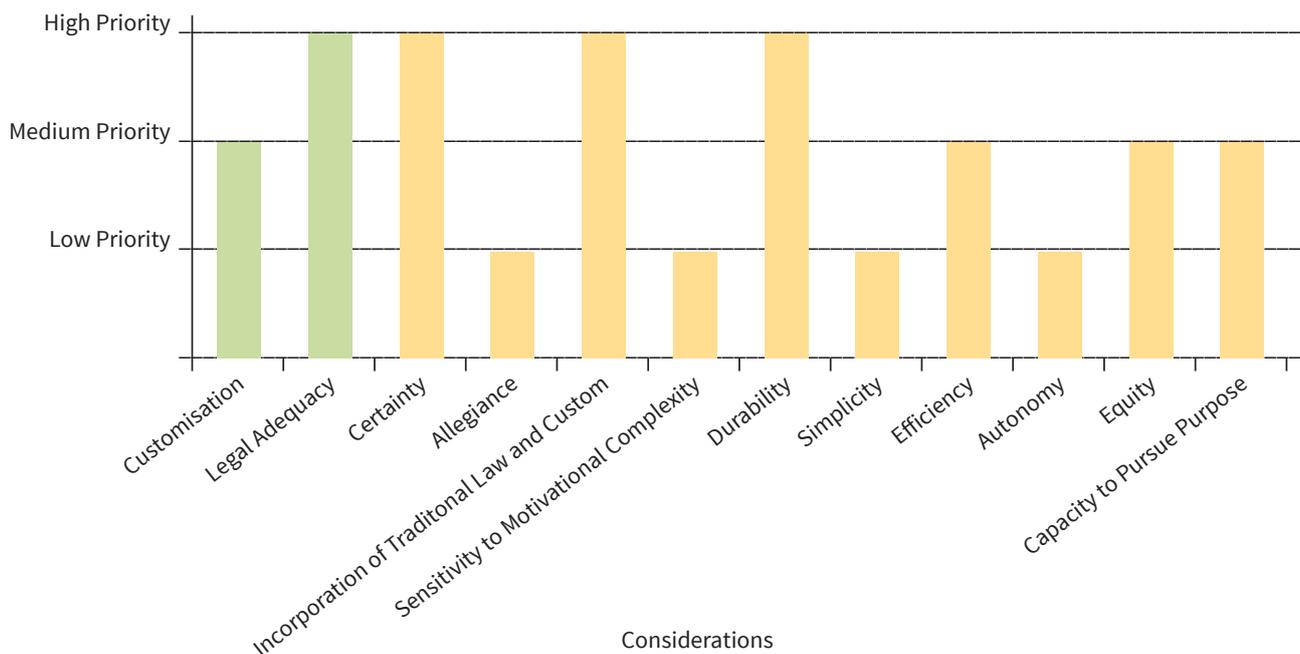
25. The structure provides for representation on the Traditional Owner Council to be a fair and just representation of the local Aboriginal community. The Council makes strategic decisions, such as approving BMS distribution policies and strategic plans. It contains no independent members. There are no formal training requirements for its members. It was originally envisaged as the primary representative body for the local Aboriginal community.
26. There are greater financial and legal compliance expertise requirements for Decision Making Committee members, reflecting the committee’s greater focus on

oversight of trust administration, although it too is required to be representative of the local Aboriginal community. A certain number of places on the Decision Making Committee may be reserved for representatives of identified sub-groups. A place is also reserved for an independent member. The Decision Making Committee generally consults with the trustee in relation to trust administration and can also issue binding directions on some matters such as distributions of assets and the preparation of annual and strategic plans. However, the professional trustee has a compliance veto. The Decision Making Committee is involved in strategic and day-to-day operational decisions.

27. The Local Aboriginal Corporation applies for funding from the trusts and implements projects.

28. The review found that the pilot BMS does relatively well at satisfying **Customisation** and **Legal adequacy**. It also prioritises 6 of the remaining 10 considerations moderately or highly:

Diagram No. 4 – BMS Priorities



29. Areas where the pilot BMS prioritises design considerations highly or moderately provide potential examples of best practice. For instance:

- The ‘windows approach’ of providing mechanisms to support and recognise, but not codify or internalise, traditional law and custom. Recognition of traditional law and custom is subject to limits that are both temporal (eg the trustee may act without consent or consultation if the trustee has attempted to consult or obtain consent at least twice within three months) and derived from substantive norms in the broader Australian community (eg trustee veto for failure to comply with Australian law and for oppression of minority

members). This helps maintain a balance between **Certainty** and **Incorporation of traditional law and custom & intercultural adequacy**.

- The use by the pilot BMS of a charitable trust, incorporating a future fund, plus a discretionary trust works well to ensure some financial saving for future generations, a broad range of benefits to individuals from the current generation and broader and development-focussed community projects that are sensitive to traditional law and culture and to levels of need within the current generation. These represent best practice features in aid of **Equity**, albeit some improvements could be made to better acknowledge non-monetary benefits for future generations and the need to prioritise those in need in the present generation.
30. However, the pilot BMS could perform better against the principle of **Allegiance**, in particular, by improving information flows and creating greater potential for direct involvement in decision making by members of the relevant Aboriginal community. These processes, combined with capacity building (which should be made a more express and extensive requirement under the pilot BMS documents), would also improve performance against **Autonomy**.
31. There is scope to enhance **Sensitivity to motivational complexity**, especially by applying this consideration to trustees so as to screen out some options, impose sanctions and encourage internalisation of BMS goals.
32. **Simplicity** is not satisfied by the pilot BMS. However, lack of simplicity is not easy to address as much of the complexity brings other advantages. In particular, significant scope and flexibility to address factors such as the size and capacity, complexity, aspirations and organisational culture of the relevant Aboriginal community, in aid of **Customisation**. However, the complexity of the BMS documents, has the potential to impede the practical achievement of flexibility and so **Customisation** could be improved by supporting or simplifying implementation processes contained within or contemplated by the pilot BMS documents.
33. The pilot BMS features multiple decision making bodies with overlapping functions. This is partly due to using a professional trustee company, which supports governance and asset protection (in aid of **Legal adequacy**), as well as separation of powers (helping **Sensitivity to motivational complexity**). The multiple and hybrid decision making bodies maintain **Autonomy**. It can be viewed in this sense as a potential best practice model, at least for Indigenous communities that need time to build capacity. However, uncertainty about roles, responsibilities and liabilities can also reduce **Legal adequacy** and **Efficiency** and hinder achievement of BMS goals (**Capacity to pursue purpose**).
34. While the pilot BMS provides an ability to articulate the precise purposes within the broad possibilities enabled by the BMS, articulation of those purposes and measuring

achievement of outcomes against those purposes could be improved via better strategic planning for **Capacity to pursue purpose**.

35. It might also be possible to improve the pilot BMS by reflecting further on the inclusion of some entities or the weight of the roles they are given in a BMS, due to the following changes that have occurred since structures akin to the pilot BMS were first developed:

- The number of PBCs has increased dramatically and proposed reforms to the CATSI Act may improve their **Efficiency** and **Legal adequacy**. If a community has already has a PBC with a degree of operational capacity, it may be possible to give that PBC a greater role – especially in communication and participation – and to use it in place of a trust committee such as a Decision Making Committee. The Noongar Settlement BMS and the Canadian Innuvialuit structure provide examples of structures which provide a greater role for Indigenous corporations within a BMS. To an extent, so does the Yindjibarndi BMS discussed in Part 6.2.3.
- Charity and taxation law changes have reduced the gaps addressed by use of a discretionary trust, meaning that in some circumstances, a community might elect to have only one (charitable) trust, materially aiding **Simplicity** and **Efficiency**. Technical and practical issues will remain in other circumstances.

Best practice

36. Based on the key issues raised in Chapter 4 and the areas for improvement and ‘best practice’ examples in Chapter 6, the following best practice approaches were tested with and generally supported by stakeholders.

37. An important contextual note, arising from **Customisation**, is that the pilot BMS and many of the stakeholder interviews related to Pilbara BMSs with large asset bases and large annual revenues. Some measures recommended as best practice should be implemented only in part for smaller BMSs.

<p>Improving BMS communication and participation by moving away from heavy reliance on general meetings and representatives (Part 7.1)</p>	<p>This might involve:</p> <ul style="list-style-type: none"> • Reporting mechanisms to ensure trustees are motivated to pursue communication and consultation. • Other procedural mechanisms to motivate communication and consultation such as a charter of good conduct, communication protocols and general board/committee coordination processes. • Capacity building about the opportunities for communication and participation at both the community and BMS corporation board/trustee/BMS trust committee levels – including stronger trust deed and constitutional requirements for capacity building.
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	<ul style="list-style-type: none"> • Exploring alternative consultation and communication approaches such as family group meetings and electronic communications (for instance, to disseminate strategic plans). <p>Note that this does not mean that all Indigenous community members should be asked to vote on every BMS issue.</p>
<p>Enhancing strategic planning by specifying outcomes and impacts in plans (in addition to financial inputs and activity and distribution outputs); and measuring and reporting achievement of those outcomes and impacts (Part 7.2)</p>	<p>BMS annual and strategic plans generally focus on expenditure and on BMS governance and administrative systems, with broader outcomes and impacts only considered to a limited extent. Approaches to address this would include:</p> <ul style="list-style-type: none"> • Trust deeds and corporation constitutions should more strictly require the identification of outcomes (client specific effects) and impacts (longer-term social changes) that a BMS intends to achieve – but mindful of the costs involved. • Trust deeds and corporation constitutions should require trustees and corporations to report on steps taken to identify outcomes and impacts. • Increased use of demographic and other data to identify specific outcomes and impacts, which could potentially be a BMS document requirement as it is under several land use agreements. • Greater Indigenous community communication and participation in strategic planning, as recommended immediately above. • Improved alignment and coordination of strategic planning processes between BMS decision making bodies. <p>In terms of measuring achievement of outcomes, while BMS trust deed reporting provisions do often require trustees to report generally on achievement of outcomes against the annual and strategic plans, the specific items that trustees are required to include in reports are BMS costs, activities and distributions – not the effect of these actions. To address this:</p> <ul style="list-style-type: none"> • BMS constituent documents should be amended to reduce reporting on costs, activities and distributions and increase reporting on outcomes and impacts and on actions taken to measure such outcomes and impacts. This reporting process requirement is generally recommended rather than KPIs due to the risks for mission drift and implementation costs. • Consideration should be given to measurement at the level of individual community members where appropriate and where IT systems support it. <p>Balancing the pursuit of outcomes and impacts against other BMS goals such as investment and distributions to discretionary trust recipients will be aided where an independent monitor is in place, for instance, akin to the auditor of the Trustee’s Annual Report under the pilot BMS.</p>

	<p>A further simple measure that would help the pursuit of outcomes and impacts is for BMSs to ensure that decision makers have access to a copy of the BMS's mission and strategic goals at all meetings so that they can identify how their decisions relate to the mission and goals.</p>
<p>Reducing transaction costs arising from interactions between overlapping decision making bodies through an <i>Efficiency</i> lens of building certainty and interpersonal trust as outlined in Part 7.3</p>	<p>Uncertainty can be reduced through institutional mechanisms and opportunism can be reduced by building interpersonal trust. In particular, measures would include:</p> <ul style="list-style-type: none"> • Enhanced coordination and communication processes, such as joint BMS entity meetings; the establishment of a coordination committee made up of members from the various entities; and communications protocols. • Clarifying or changing the functions of decision making bodies. While amalgamation was suggested by various stakeholders, amalgamating the Decision Making Committee and Traditional Owner Council may reduce <i>Customisation</i> and <i>Incorporation of traditional law and custom & intercultural adequacy</i> and so would need to be approached sensitively. However, changes such as reducing the role of the Traditional Owner Council to purely strategic matters might materially improve certainty without eliminating the Traditional Owner Council. Alternatively, given the greater prevalence of PBCs, the Decision Making Committee could itself be replaced by a PBC board, leaving the Council intact. Indeed, even for <i>Efficiency</i> reasons, it may be preferable to leave two committees/decision making bodies in place, but with a better delineation of responsibilities. • More radical approaches might involve: <ul style="list-style-type: none"> ○ Reducing the trust functions to asset protection and investment and increasing the BMS Indigenous corporation functions, so that the roles of the trust committees are materially reduced. A variation of this approach that envisages a slightly more active role for the trustee would involve the trusts as grant-making philanthropic foundations akin to the Gates Foundation – setting broad themes and holding grant-recipients accountable. At least the second of these approaches is possible under the pilot BMS documents. However, shifting decision making to BMS Indigenous corporations will also shift some of the uncertainty that currently exists under the trusts to the corporation, so the shift should not be considered a solution purely of itself.

	<ul style="list-style-type: none"> ○ Devolving many of the operational functions of the Decision Making Committee to subgroups within a community, such as family or clan groupings, which would be consistent with improving communication and participation at such local levels. While this may improve Efficiency through greater personal trust at the local level, there should be caution in balancing these gains against the potential for high governance demands and administrative costs from the creation of local level decision making bodies. ● Guaranteeing some core ongoing funding for decision making bodies, such as a BMS Indigenous corporation, particularly where it has PBC statutory responsibilities. ● Training more potential committee members so that members can be replaced more easily if they act opportunistically. ● Reporting measures, such as the provision of progress reports by each BMS entity on policy implementation to all decision making bodies; or reporting by an independent monitor on the level of coordination between BMS entities – which could, for instance, be included in a role such as that under the pilot BMS of the auditor of the Trustee’s Annual Report, with coordination another matter in the Trustee’s Annual Report audited by the auditor. ● Greater resourcing and support of dispute resolution processes, including development and adoption of a code of conduct by BMS stakeholders. <p>There are cost implications to many of the measures, but if they reduce uncertainty and build trust, they may actually result in a net gain for Efficiency.</p>
<p>The use of a future fund, in conjunction with the use of a charitable trust and a discretionary trust represents best practice to achieve <i>Equity</i>, but could better acknowledge the importance of non-monetary benefits for future generations and could permit alternative interpretations of intergenerational justice (Part 7.4)</p>	<p>The importance of non-monetary benefits to intergenerational justice, such as the maintenance and transmission of culture, should be better recognised. Further, permitting alternative interpretations of intergenerational justice that contemplate more priority for those in need now, means not being so strongly tied to ‘generational neutrality’, which results from the pilot BMS definition of ‘Target Capital Base’ as being a capital amount that would permit future fund income to match the projected annual resource company contributions received over the foreseeable future.</p> <p>One way to achieve these changes without losing the benefits of a future fund, would be to permit a portion of the future fund to be used for social impact investment. While social impact investing raises risks for asset protection and hence Legal adequacy, the best practice suggestions for strategic planning should assist in balancing pursuit of purpose and pursuit of monetary returns. Additionally, there appears to be greater capacity to pursue development projects under BMS charitable trusts than is currently being utilised. Improved strategic planning would help here too.</p>

	<p>There may also be scope to consider replacing some or all of the discretionary trust's functions through an expansion of the charitable trust's role and direct payments to individual community members. This would require resolution of technical and practical issues with economic development and investigation of the technical and practical bounds on the trustee of the charitable trust or the BMS Indigenous corporation playing a funds management facilitation role for the funds paid directly to community members.</p>
<p>Dealing with complexity in aid of achieving flexibility (Part 7.5)</p>	<p>A degree of complexity is required of BMS documents in order to provide flexibility to address factors such as the size and capacity, complexity, aspirations and organisational culture of the relevant Indigenous community. However, to ensure that complexity does not eliminate the practical achievement of flexibility, the implementation processes contained within or contemplated by BMS documents should be supported or simplified, while retaining optionality. For example:</p> <ul style="list-style-type: none"> • More resources for capacity building (including individualised approaches) and stronger trust deed and constitutional requirements for capacity building. • Development of operational guides and procedures, including requiring such development in BMS trust deeds and constitutions. • Purchasing, partnering or building specialist expertise on matters fundamental to operating a BMS, which again might include support in constituent document service provider provisions or a constituent document mandate for the establishment or membership of coordinating bodies. <p>The final example highlights the need to avoid a silo mentality and to coordinate with others, whether that be government, NGOs or other BMSs.</p>

38. In addition:

<p>The 'windows approach' (Part 7.6)</p>	<p>The 'windows approach' is exemplified by the pilot BMS and is an innovative response to some of the difficulties of incorporating traditional law and custom.</p> <p>It permits recourse to traditional law and custom for decision making, but does so without codifying those rules in the BMS documents, enabling law and custom to continue to evolve. However, it is a more structured approach than an unfettered ability to make determinations by way of an undefined concept of 'traditional law and custom', which would otherwise raise the difficulty of trying to obtain an authoritative declaration of laws and customs and the issue of timeliness of decisions. Instead, the windows approach provides an Indigenous community, or BMS committees, with the option of adopting traditional decision making processes in circumstances where the trust deeds or BMS Indigenous corporation constitution also provide a mechanism for</p>
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	<p>recognising the selected traditional decision making process (so that an authoritative decision could be obtained from a court if required) and support for the implementation of that decision making process.</p>
<p>Professional trustees bring advantages and risks so that it is controversial whether they are a best practice feature in all circumstances. They are more likely to prove a net advantage for Indigenous communities that need time to build capacity, but if they are used, several precautions should be adopted to ameliorate several key risks identified by stakeholders. (Part 7.7)</p>	<p>Professional trustees can help ensure Legal adequacy due to their governance capacity and asset protection function as well as aiding separation of powers (helping Sensitivity to motivational complexity).</p> <p>However, there is a key tension between impeding Autonomy in the short term and building Autonomy (through support for capacity building) in the longer term. Often, to support Autonomy in the short term, there is an increase in the number and overlap of decision making bodies within a BMS so as to ensure that the Indigenous community retains a decision making role. This has, in particular, Efficiency implications, for which mitigating steps have been considered above.</p> <p>There are also risks that professional trustees might act in their own interests rather than in pursuit of BMS purposes. While conflicts of interest are relevant for all BMS decision makers, some are uniquely raised by professional trustees and need to be addressed:</p> <ul style="list-style-type: none"> • Conflicts of interest arising from the investment of BMS funds with related parties should be addressed by prohibiting professional trustees under the BMS documents from taking on the investment mandate. Lessons can be learned here from the Financial Services Royal Commission. • The risk that trustees focus on technical compliance and quantum of services delivered rather than outcomes could be dealt with by way of unbundling trustee services to a greater extent and by incorporating extrinsic and intrinsic motivations for communication and strategic planning processes, as well as reporting on fees. • Rather than having the professional trustee manage the change of trustee process in all circumstances, a greater role could be given to the BMS Indigenous corporation. <p>BMS provisions that permit the Indigenous community to select a lesser or greater scope of matters over which it wishes to make decisions and that permit a community to progressively build capacity and organisation over time (in support of Autonomy and Customisation) are best practice and should be included and strengthened where possible. In particular, enabling a transition from a professional trustee company to an Indigenous community-controlled trustee over time is a key example and should ideally be included.</p>

Terminology

39. The term ‘Aboriginal’ is used in relation to Aboriginal people from the Pilbara region of Western Australia and their BMSs. Otherwise, the terms ‘Indigenous people’,

‘Indigenous community’, or ‘Indigenous’ have been used to refer generally to Aboriginal and Torres Strait Islander people and to First Nations people more broadly.¹ This has been done to highlight the relevance of the research to Indigenous peoples around the world and to provide consistency with the use of ‘Indigenous’ for international instruments that are relevant to the design considerations, such as the *United Nations Declaration on the Rights of Indigenous Peoples*.

Future Research and Further information

40. Details of the research monograph will be made available on the UWA Centre for Mining, Energy and Natural Resources Law at:
www.law.uwa.edu.au/research/cmenrl
41. More specific research publications from the research project are already available:
 - Murray, Fardin and O’Hara, ‘Designing Native Title Asset Management Structures for Culture, Law, Love and Money’ (2017) 36(1) *Australian Resources and Energy Law Journal*
42. The stakeholder engagement focussed the best practice approaches discussed above on particular issues. However, the design considerations enable the development of a range of best practices, including by helping to formulate responses to each of the BMS issues discussed in Chapter 4. It is thus possible to formulate a ‘tool kit’ of best practice BMS features, drawn from examples that work well in practice, in response to each design consideration - and supporting the construction of alternative BMSs. That is the next stage for the research project, along with looking further into the issue of achieving economic development under a BMS.
43. UWA research team contacts:
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¹ Cf AIATSIS, *Indigenous Australians: Aboriginal and Torres Strait Islander People* (21 March 2018) <<https://aiatsis.gov.au/explore/articles/indigenous-australians-aboriginal-and-torres-strait-islander-people>>.

Acknowledgments & Funding

The research project on which this monograph is based has been funded by BHP, Rio Tinto and the University of Western Australia and we thank them for their support. Thanks are also due to the National Native Title Council and the Minerals Council of Australia for providing support to present and test the research findings at the Melbourne University Native Title – Industry Invitation Seminar Series 2019.

Numerous people have also provided their time and their views on the operation of BMSs and on the development and implementation of this research project. In particular, staff from BHP, Rio Tinto and UWA's Energy and Minerals Institute have been generous with their time, as have the interviewees listed in Appendix A. A number of additional lawyers, barristers and anthropologists have also provided informal feedback, as have participants at the Indigenous Business Enterprise & Corporations Conference 2016, the Centre for Native Title Anthropology Annual Conference 2017, the Centre for Social Impact Social Impact Festival 2017, the AIATSIS Native Title Representative Body Workshop February 2018, the Rio Tinto BMS Operational Excellence Forum 2018, the AIATSIS National Native Title Conference 2018 and the Melbourne University Seminar Series identified above. The members of our Expert Panel (drawn from the UWA Law School, School of Indigenous Studies and the Centre for Mining, Energy and Natural Resources Law) have given sage guidance.

Donella Raye has provided much assistance and support throughout the project with our stakeholder engagement and communications strategy.

We are also grateful for the research assistance provided by Nikki Chan, Wygene Chong, Liam Elphick and Ava Hill-De Monchaux. Thank you also to Dorinda Cox and Margaret Drayton for facilitation assistance.

Thanks are due to Professor Richard Bartlett and to two anonymous peer reviewers for kindly undertaking a peer review of this monograph and for providing detailed and very valuable suggestions. Dr Sarah Prout Quicke also commented incisively on an earlier draft. Your assistance in improving the research is much appreciated.

This monograph, to the extent noted, uses and contains information that has been provided by:

- entities belonging to BHP Group Limited and/or BHP Group plc;
- entities belonging to Rio Tinto Limited and/or Rio Tinto plc; and
- the interviewees listed in Appendix A.

All opinions and conclusions drawn are those of the authors alone. To the extent this publication draws on information provided by others, it should not be assumed that any views expressed are also necessarily those of those others (including any of the entities listed above).

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Since joining UWA in 2011, Ian has conducted and published various pieces of research (including in collaboration with native title group advisers) on native title and tax and native title Benefits Management Structures: [link to publications](#).



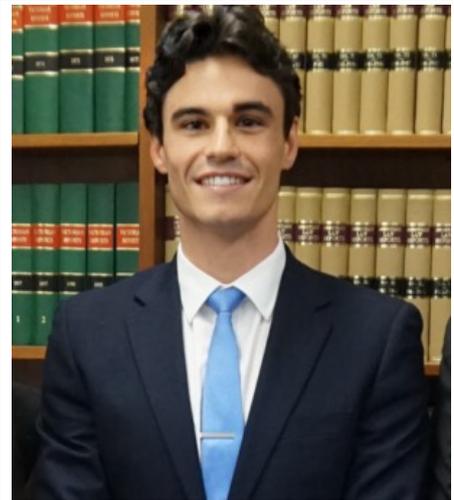
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Joe Fardin is a mining and Indigenous land rights lawyer. He holds a Bachelor of Laws and a Bachelor of Arts (Anthropology), and a Master of Laws with Distinction from the University of Dundee. He has over a decade of experience working with native title groups and has led two native title claims to determination by consent. He has extensive experience in the litigated, arbitral, regulatory reform, and policy development aspects of Indigenous land ownership and mining laws, and the relationship between the two. He has a particular interest in the unique issues surrounding the tripartite interaction between industry, government and Indigenous interests in the minerals industry. To this end he has advised clients in Australia and internationally on land access and mineral sector agreement making from within governments, law firms, NGOs and international governmental organisations and as a consultant. He is now engaging with these issues in his role as Associate Director, Centre for Mining, Energy and Natural Resources Law at the University of Western Australia. Joe is also an associate member of AMPLA.



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1. Introduction

This monograph considers the institutional design of BMSs that receive, hold and distribute assets deriving from native title land use and related agreements. The objective is to identify considerations that are relevant to designing or reviewing the legal structure for such BMSs. Applying these considerations permits identification of best practice and of areas where greater priority could be given so as to achieve a better fit between the BMS on the one hand and, on the other, the broader institutional context in which it exists, the BMS' organisational goals and the behaviour of individuals who interact with the BMS.

Agreements between Indigenous communities and others, formed in relation to the national framework provided by the NTA,² represent the principal means by which parties achieve practical recognition of Indigenous peoples' rights, culture and significance.³ Collectively, native title land use agreements involve billions of dollars per year.⁴ They present key social, economic and cultural opportunities and risks for Indigenous people. Therefore, management of the benefits provided under such agreements to BMSs is critically important.

With a view to supporting the management of benefits within a BMS, this monograph responds to the research question: what considerations are relevant to designing or reviewing the legal structure for a BMS?

A variation of 'grounded theory' was adopted to address this question.⁵ This varied approach looks first to the existing literature and theory to identify BMS purposes, functions, issues and design considerations, before seeking qualitative feedback from stakeholders and then considering whether that feedback requires changes to the approach. As is traditional,⁶ this has been done in an iterative process so that stakeholders have provided views on the purposes of BMSs along with the general structure and operation research and key issues arising for BMSs, as well as the design considerations arising therefrom and the subsequent application of the design considerations to the pilot BMS and to generate general best practice recommendations. This research methodology is particularly suited to the exploratory research of this

² The agreements are not necessarily formed 'under' the NTA. In particular, common law contracts are entered into not infrequently, albeit those common law contracts may contemplate entry into an Indigenous Land Use Agreement or section 31 deed in accordance with the NTA.

³ Preamble to the NTA.

⁴ By the 2011-12 financial year, such payments were already estimated to be close to \$3 billion in total: Rob Heferen et al, 'Taxation of Native Title and Traditional Owner Benefits and Governance Working Group: Report to Government' (Report, 1 July 2013) 14, 13. See also Miranda Stewart, Maureen Tehan and Emille Boulot, 'Transparency in Resource Agreements with Indigenous People in Australia' (Working Paper Series No. 42015, July 2015) 14.

⁵ This methodology has been described as an 'extended case method' approach: Earl Babbie, *The Practice of Social Research* (Wadsworth Cengage, 12th ed, 2010) 310.

⁶ Cf Keith Punch, *Introduction to Social Research: Quantitative and Qualitative Approaches* (SAGE Publications, 2nd ed, 2005) 56.

project⁷ and it enables a participatory model of research that respects and integrates Indigenous perspectives into the research process.

In employing this methodology, we reviewed the academic literature on: BMSs; Indigenous organisations that might form part of BMSs; and on institutional design. We also undertook a case study review of several existing Western Australian Pilbara BMSs to create an amalgam 'pilot' BMS for exploratory testing.

At the same time, we conducted a series of interviews and focus groups (listed in Appendix A) with relevant stakeholders, including:⁸

- Aboriginal community members (including directors of Aboriginal corporations and members of BMS trust committees).
- Aboriginal corporation executives.
- Trustee representatives.
- Resource proponent representatives.
- Professional advisers for other stakeholders.

The interviews and focus groups helped identify BMS purposes and challenges which informed the design considerations and also helped to refine and add to the design considerations and best practice suggestions derived from the literature and desktop analysis of the 'pilot' BMS.

In considering that literature and the interviews and focus groups, we have been mindful that there have been changes in recent years that affect the advantages and disadvantages of the different types of legal entities that might be used in a BMS. Some of the literature and the interviews and focus groups start from the position of the 'pilot' BMS, but the developments mean that more radical thinking may be appropriate in some contexts. In particular:

- The number of native title determinations has increased significantly since the mid-2000s, when structures akin to the 'pilot' structure were being developed, with the result that the number of PBCs has increased around fourfold between the mid-2000s and the present.⁹ There is potentially thus a pre-existing incorporated entity that has developed a reasonable degree of operational capacity that could be used instead of an additional BMS Indigenous corporation or in place of trust committees such as Decision Making Committees.¹⁰

⁷ Earl Babbie, *The Practice of Social Research* (Wadsworth Cengage, 12th ed, 2010), 296, 310, 326; Ariadne Vromen, 'Debating Methods: Rediscovering Qualitative Approaches' in David Marsh and Gerry Stoker (eds), *Theory and Methods in Political Science* (Palgrave Macmillan, 3rd ed, 2010) 249, 257.

⁸ Ethics approval was obtained from UWA's Human Research Ethics Committee, RA/4/1/8511.

⁹ ORIC, 'The Top 500 Aboriginal and Torres Strait Islander Corporations 2015-16' (Report, November 2017) 19.

¹⁰ See, especially, Parts 4.6, 7.1 and 7.3.

- Proposed reforms to the CATSI Act discussed in Part 3.1.1 (including those contained in the Native Title Legislation Amendment Bill 2019 (Cth)) should enhance the attractiveness of PBCs and other CATSI Act corporations by increasing accountability at the same time as reducing regulatory burden.
- Over the last decade, charity law has developed such that it is now more likely that a native title group will be considered a sufficient section of the community (reducing the need for a discretionary trust or other vehicle focussed solely on the native title group).
- Charity law now permits a greater degree of economic development, albeit not all economic development activities may be pursued through a charity. However, taxation reforms also mean that economic development payments inconsistent with charity status could be made directly to native title holders in a tax free fashion, again reducing the need in some cases for a discretionary trust to be part of the BMS.¹¹

At this stage, something more needs to be said about the key theoretical framework used to consider BMS purposes, functions, issues and design considerations. The research is based on neo-institutionalism, which, in broad terms, places the research focus on institutions rather than the aggregated behaviour of individuals.¹² Most neo-institutionalists agree that ‘institutions’ comprise sets of laws, rules and customs that guide and give meaning to human behaviour – both constraining and enabling it.¹³ Many also adopt more expansive definitions that embody sets of norms, values and cultural beliefs.¹⁴ Institutions can also be conceived at different levels, such as the societal level, which would include property law as an institution, and at the level of specific organisations,¹⁵ with organisations being formalised institutions for collectively pursuing particular goals.¹⁶

¹¹ See especially Parts 2.1, 3.1.2, 4.10 and 4.12.

¹² Acknowledging that there are various separate schools of neo-institutionalism and different approaches within those schools. For instance, historical institutionalism, rational choice institutionalism, sociological institutionalism, new economic institutionalism and resource-based economic theory: Thomas Koelble, ‘The New Institutionalism in Political Science and Sociology’ (1995) 27(2) *Comparative Politics* 231, 232; Peter Hall and Rosemary Taylor, ‘Political Science and the Three New Institutionalisms’ (1996) 44(5) *Political Studies* 936, 936; Andre Lecours, ‘New Institutionalism: Issues and Question’ in Andre Lecours (ed), *New Institutionalism – Theory and Analysis* (2005) 8-11. Scott also adds neo-institutional approaches in cognitive psychology and cultural anthropology: *Scott’s Institutions and Organizations* ch 2.

¹³ See, eg, *Scott’s Institutions and Organizations* 56-64.

¹⁴ Thomas Koelble, ‘The New Institutionalism in Political Science and Sociology’ (1995) 27(2) *Comparative Politics* 231, 234; Andre Lecours (ed), *New Institutionalism – Theory and Analysis* (2005) 6-8; *Scott’s Institutions and Organizations* 56-70.

¹⁵ See, eg, *Scott’s Institutions and Organizations* 104-7; Peter Hall and Rosemary Taylor, ‘Political Science and the Three New Institutionalisms’ (1996) 44(5) *Political Studies* 936. Cf Douglass North, ‘Economic Performance Through Time’ (1994) 84(3) *American Economic Review* 359, 361.

¹⁶ Cf *Scott’s Institutions and Organizations* 111; Philip Selznick, *Leadership in Administration: A Sociological Interpretation* (Row, Peterson and Company, 1957) 5-6; Brayden King, ‘Organizational Actors, Character and Selznick’s Theory of Organizations’ (2015) 44 *Research in the Sociology of Organizations* 149, 163-4; Michael Rowlinson, *Organisations and Institutions: Perspectives in Economics and Sociology* (Macmillan Business, 1997) 82-9 (though Rowlinson distinguishes between organisations and institutions in several ways).

Neo-institutionalism asserts that institutions affect behaviour, and seeks to explain the ways in which institutions do so.¹⁷ In addition, it tries to explain the creation of and change in institutions, including as a result of the behaviour of persons interacting with those institutions.¹⁸ Neo-institutionalism is also cognisant that institutions at the organisation level fit within a broader institutional environment.¹⁹ Indeed, the emphasis of neo-institutional theory on the socio-cultural context in which organisations operate and the broader environment within which they exist makes it a very attractive theoretical base for examining BMSs given they are simultaneously influenced by Indigenous law and culture and general Australian law and culture.

By institutional 'design', we mean the creation or shaping of the laws, rules and customs that constitute a BMS. As lawyers, our focus is on the formal laws, rules and customs, the trust deeds, corporate constitutions and applicable legislation,²⁰ but mindful that these laws, rules and customs will both shape and be shaped by individuals and by broader institutional settings. 'Design' means looking for 'goodness of fit' between the shape of BMS rules on the one hand and, on the other:

- the broader institutional context in which the BMS exists;
- the BMS's organisational goals; and
- what neo-institutionalism tells us more generally about the way that institutions affect the behaviour of individuals and are themselves affected in turn.²¹

We thus use 'design' in a broader sense than some organisational design researchers who distinguish design from neo-institutional theory by limiting design to mean applied and pragmatic research into new organisational systems.²²

Shaping BMS rules to fit the institutional context in which the BMS is set means, fundamentally, ensuring that it is customised to the needs and circumstances of the stakeholders; most especially, the relevant Indigenous community. Further, to exist, a

¹⁷ Andre Lecours (ed), *New Institutionalism – Theory and Analysis* (2005) 8-11, Peter Hall and Rosemary Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44(5) *Political Studies* 936, 937-40.

¹⁸ *Scott's Institutions and Organizations* ch 5; Andre Lecours (ed), *New Institutionalism – Theory and Analysis* (2005) 11-14; Peter Hall and Rosemary Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44(5) *Political Studies* 936, 937.

¹⁹ See, eg, *Scott's Institutions and Organizations* 182-4.

²⁰ With much less focus on matters such as workforce planning and management practices.

²¹ R E Goodin, 'Institutions and Their Design' in R E Goodin (ed), *The Theory of Institutional Design* (Cambridge University Press, 1998) 1, 33-4. While many neo-institutional studies have tended to focus on why institutions have failed, changed, or been created, rather than advocating general principles of design, that is not true of all neo-institutional studies and thus neo-institutional theory also contains valuable insights for prescribing design features: *Scott's Institutions and Organizations* 274-5. Cf Lex Donaldson, 'The Conflict Between Contingency and Institutional Theories of Organizational Design' in Richard Burton, Dorthe Håkansson, Thorbjørn Knudsen and Charles Snow (eds), *Designing Organizations: 21st Century Approaches* (Springer, 2008) ch 1; Nicolay Worren, *Organization Design: Simplifying Complex Systems* (Routledge, 2018) 4-8.

²² See, eg, Georges Romme, 'Making a Difference: Organization as Design' (2003) 14(5) *Organization Science* 558; Nicolay Worren, *Organization Design: Simplifying Complex Systems* (Routledge, 2018) ch 1. Of course, insights from research into the practical application of new systems of organisation is relevant to BMSs and we refer to such research. In addition, writers such as Romme and Worren accept that some neo-institutional theory also pertains to design.

BMS must also be consistent with the Australian legal system and standards, such as corporate governance practices. The existence of organisational goals requires that a BMS have means of pursuing such goals. A BMS's asset-management function requires that those goals include an approach to the distribution of assets (typically in pursuit of social, economic and cultural benefits).²³ Given the critical relationship to the relevant Indigenous community, autonomy and self-determination might typically be expected to be fundamental BMS goals and,²⁴ in any event, as institutions comprise and reflect values, the processes adopted by a BMS should be consistent with its goals (including distributing benefits to Indigenous community members) and thus based on autonomy and self-determination. Design also requires regard to general matters such as efficiency, and stakeholders' motivations for acting.

The above methodology is employed in the following structure used by this monograph:

- The structure, operation and purposes of BMSs are examined in Chapter 2.
- The general research on the structure and operation of Indigenous organisations is reviewed in Chapter 3.
- Key issues raised in practice by BMSs are analysed in Chapter 4.
- Building on the key issues for BMSs and the information that currently exists about Indigenous organisations, Chapter 5 offers twelve design considerations that can guide the design or review of a BMS. It does so starting from a neo-institutional framework, but as informed by stakeholder feedback. This provides anthropological, economic, sociological, political science, philosophical and psychological underpinnings for the design considerations, thus aiding their application.
- The design considerations are applied in Chapter 6 to an example BMS – the 'pilot BMS' – based on a common structure in Western Australia's Pilbara region. This pilot BMS shows how the design considerations work, where improvements can be made and potential examples of 'best practice'.
- Chapter 7 then employs the design considerations to develop a range of more general best practice approaches, in response to several of the key issues raised in Chapter 4 and the areas for improvement and 'best practice' examples in Chapter 6.

Before moving on to the structure, operation and purposes of BMSs, it is relevant to consider whether the proposed design considerations and best practice approaches are generalisable beyond the Pilbara. The literature analysed in this monograph is drawn from Australia and around the world and thus ensures that the BMS issues are placed in that broader context. However, the interviews and focus groups have been

²³ As to BMS goals, see Part 2.3.

²⁴ Ibid.

focussed on the Pilbara, as have the BMS 'pilot' structure documents. Thus, some caution is justified before applying the proposed design considerations and best practice approaches in other settings. In particular, the duration and quantum of payments for many of the Pilbara structures will justify more complex arrangements than should be adopted elsewhere. Further, the particular structures used in the Pilbara should be viewed as examples, not the only possible outcomes from the design considerations. As discussed in various places in this monograph, there may well be space to consider greater devolution of decision making or broader involvement in decision making, or a lesser reliance on trusts fulfilling such a wide array of functions.

Nevertheless, a close examination of the Pilbara structures and the views of the stakeholders involved in those structures is a useful starting point for thinking about principles that may have general application. First, given the size and duration of the Pilbara BMSs,²⁵ the various stakeholders have engaged in much thought and planning to design the structures, often over many years.²⁶ Second, the Pilbara BMS documents are being used as reference documents in other contexts, thereby influencing planning and negotiations in other areas.²⁷ The practices and administration systems developed and adopted by professional trustees and other stakeholders also form a ready practical base for administration.²⁸ As one stakeholder noted, 'The Pilbara structures are driving traditional owner expectations and mining company compliance and behaviour around Australia and beyond'.²⁹ This reflects neo-institutionalism's insight that organisations performing similar functions tend toward homogeneity, with later organisations modelling themselves on earlier ones.³⁰ Third, the duration and quantum of payments mean that the Pilbara BMSs are likely to have a proportionately larger impact, making their design all the more important.

²⁵ See, eg, Ian Murray, 'Native Title Tax Reforms: Bull's Eye or Wide of the Mark?' (2013) 41(3) *Federal Law Review* 497, 507; Aboriginal corporations in the Pilbara that are included in ORIC's top 500 Aboriginal and Torres Strait Islander corporations list have an average income around double that of the top 500 as a whole: ORIC, 'The Top 500 Aboriginal and Torres Strait Islander Corporations 2015-16' (Report, November 2017) 10.

²⁶ Cf Professional Adviser 5 March 2019; Trustee Officer 8 March 2019; Resource Proponent Manager 10 August 2017; Briana Shepherd, 'Banjima People Celebrate after Pilbara Native Title Deal Signed in Kings Park Ceremony' *ABC News* (online) 4 November 2015 <www.abc.net.au/news/2015-11-04/bhp-billiton-and-banjima-people-sign-pilbara-native-title-deal/6913522>; Michael Gordon, 'Landmark Rio Deal to Deliver Billions to Aborigines' *Sydney Morning Herald* (online) 3 June 2011 <www.smh.com.au/national/landmark-rio-deal-to-deliver-billions-to-aborigines-20110602-1fiwq.html>.

²⁷ See, eg, Professional Adviser 3 May 2019.

²⁸ See, eg, Trustee Officer 8 March 2019.

²⁹ Professional Adviser 3 May 2019.

³⁰ See nn 692 and 695 and accompanying text.

2. What Is a BMS and What Is Its Purpose?

In exchange for concessions about native title and other rights and for ongoing assistance in relation to activities on Indigenous lands, land use agreements provide for financial ‘benefits’ (such as upfront lump sum payments; fixed annual payments; royalties based on value of output; land and equity participation), non-financial ‘benefits’ (such as training, employment, supplier contracting opportunities and business development) and frameworks for Indigenous people and others to work together on matters such as the environment and community participation.³¹

Different categories of recipient receive the assets transferred pursuant to land use agreements. Those include corporations established under the CATSI Act, proprietary limited companies, companies limited by guarantee, discretionary or fixed trusts, charitable trusts and, sometimes, incorporated associations.³² Trusts are not legal entities, but rather relationships involving a series of obligations owed by the trustee in relation to property that the trustee holds for the benefit of certain persons or (in the case of a charitable trust) purposes. To reduce verbiage, we have nevertheless referred to trusts as ‘entities’ unless the context requires otherwise.

BMSs are comprised of the related entities that receive, manage and distribute the ‘benefits’ referred to above. Historically, the creation of those entities has often followed on from entry into a land use agreement,³³ although as noted in Chapter 1, with increased prevalence of native title determinations, Indigenous communities increasingly have pre-existing entities.³⁴ BMSs typically include one or more trusts, a trustee and a representative incorporated entity. The trusts do the ‘funding’, while the corporations engage in the more risky ‘doing’ of activities. There can be multiple BMSs per Indigenous community or multiple Indigenous communities per BMS. The terminology ‘benefits management structure’ is widely used in this context by resource proponents and Indigenous communities in Australia and hence we have adopted this terminology, even though there is some controversy about applying the label ‘benefits’ to payments connected with acts that impair native title rights, especially when there is typically no veto right in relation to those acts.

The following schematisation shows one possible BMS model:³⁵

³¹ *Levin's Observations*, 245.

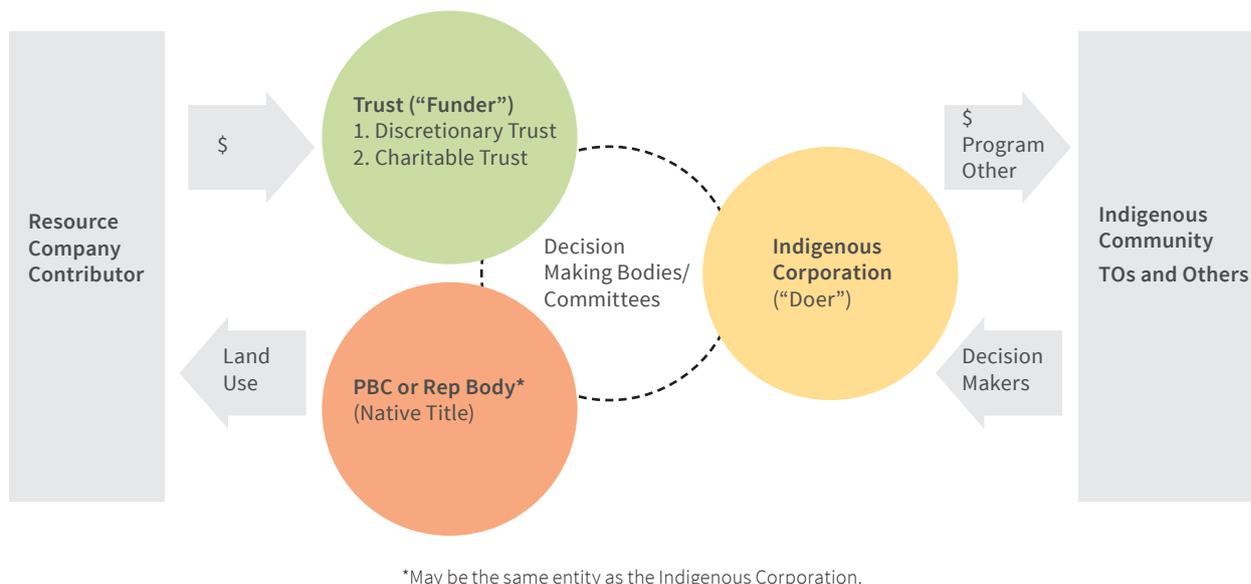
³² Miranda Stewart, Maureen Tehan and Emille Boulot, ‘Transparency in Resource Agreements with Indigenous People in Australia’ (Working Paper Series No. 4/2015, July 2015) 17-20. For a table of each entity and the corresponding reporting obligations, see Appendix B.

³³ Cf Pilbara Aboriginal Corporation Officer 12 March 2019.

³⁴ Cf Professional Adviser 5 March 2019.

³⁵ For other diagrammatic representations see, eg, *Murray & Wright*; Appendix A in Miranda Stewart, Maureen Tehan and Emille Boulot, ‘Transparency in Resource Agreements with Indigenous People in Australia’ (Working Paper Series No. 4/2015, July 2015).

Figure 2.1 – Common BMS



A number of generalisations can be made about the entities disbursing and receiving assets pursuant to land use agreements. The first set of generalisations relate to the legal nature of the entities themselves. The second set of generalisations relates to decision making, asset protection and information sharing features of the entities.

2.1 Legal entities

The inclusion of a charitable trust recipient is a common feature of many structures,³⁶ perhaps because resource companies perceive charitable trust governance structures to be more rigorous or that the section of the public that must be benefited might be broader than, solely the native title holders, resulting in a wider social licence to operate.³⁷ Charitable trusts also have potential tax advantages that Indigenous communities may wish to access, such as income tax exemption on accumulated income.³⁸ There are some disadvantages to using charitable trusts. In particular, distributions can only be made for limited, charitable, purposes.³⁹ The potential need to

³⁶ See, eg, Miranda Stewart, 'The Income Taxation of Native Title Agreements' (2011) 39(3) *Federal Law Review* 361, 369; Adam Levin, Jim O'Donnell and David Murphy, 'Tax and Native Title' (Paper presented at the Tax Institute National Resources Tax Conference, Perth, 14-15 October 2008) 22; Treasury (Cth), 'Native Title, Indigenous Economic Development and Tax' (Consultation Paper, October 2010) 2, 5-6; Lisa Strelein, 'Taxation of Native Title Agreements' (Native Title Research Monograph No 1/2008, AIATSIS, May 2008) 32.

³⁷ *Murray & Wright*, 106. Indeed, Levin notes that resource companies tend to require that a portion of payments be made to a charitable trust *Levin's Observations*, 245.

³⁸ *Murray & Wright*, 106.

³⁹ Charitable purposes include the relief of poverty and sickness, advancement of education, advancement of religion and other purposes beneficial to the general community. For the disadvantages of using charitable trusts, see generally Miranda Stewart, 'The Income Taxation of Native Title Agreements' (2011) 39(3) *Federal Law Review* 361, 391-2; Lisa Strelein, 'Taxation of Native Title Agreements' (Native Title

benefit a broader section of the community than merely the native title holders or claimants could also be a disadvantage depending on the perspective and the context, although as discussed in Part 4.10, there seems to be increasing acceptance of a native title group as a sufficient section of the community.

The inclusion of a discretionary trust addresses the charitable trust disadvantages to some extent, permitting distributions to Indigenous community members or others without any charitable purpose limit, as well as the ability to distribute assets only to native title holders/claimants, rather than a broader section of the community.⁴⁰ Of course, native title taxation reforms in 2013, mean that land use payments could frequently now be made directly to native title holders in a tax free manner,⁴¹ to be used for economic development or other activities. Discretionary trusts, though, do not permit tax-free accumulation of income and so where used, they are typically used in conjunction with a charitable trust or other type of entity.

Where a BMS involves both a charitable trust and a discretionary trust, there is often a single trustee for both, although the recent Report on Njamal People's Trust has questioned this approach on a fairly strict interpretation of conflict of interest duties.⁴²

Often, a portion of assets will also be provided, directly or indirectly, to an incorporated body, typically where the members comprise the Indigenous community that has entered into the land use agreement (or a subset thereof). The inclusion of an incorporated entity is often because the Indigenous community would like an incorporated entity to act as the 'doer' rather than the 'funder' (ie the trustee) for projects. This provides asset protection by structurally separating the potentially more risky 'doing' activities.⁴³ Where a determination of native title has been made, this incorporated entity may be the PBC or RNTBC (though for convenience, the term PBC will be used in this report to cover both PBCs and RNTBCs),⁴⁴ which holds the native title rights on trust⁴⁵ or as agent⁴⁶ for the common law native title holders. PBCs also have functions and obligations under the NTA including: receiving future act notices; exercising procedural rights under the NTA;

Research Monograph No 1/2008, AIATSIS, May 2008), 33-4. As to the potential breadth of charitable purposes in the context of Indigenous communities, see, eg, Ian Murray, 'Public Benevolent Institutions for Native Title Groups: an Underappreciated Model?' (2015) 43 *Federal Law Review* 424.

⁴⁰ Murray & Wright, 108.

⁴¹ *Tax Laws Amendment (2012 Measures No 6) Act 2013* (Cth); *ibid*.

⁴² Alan Sefton, 'Report on Njamal People's Trust' (Inquiry under Section 20 of the *Charitable Trusts Act 1962* (WA), 1 November 2018) 477-81.

⁴³ See, eg, Adam Levin, 'Observations on the Development of Native Title Trusts in Australia' (Paper presented at the STEP Australasia Conference, Sydney, 28-30 May) 24-5 (Levin also suggests that the structural separation can provide additional accountability and a useful mechanism for consultation and decision making); Ian Murray, 'Public Benevolent Institutions for Native Title Groups: an Underappreciated Model?' (2015) 43 *Federal Law Review* 424, 428.

⁴⁴ Native title groups must nominate a PBC as part of a determination of native title, to hold or manage their native title. A PBC becomes an RNTBC when it is entered onto the National Native Title Register. The terms PBC and RNTBC are defined in the NTA s 253 and *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) and are often used interchangeably, as PBCs and RNTBCs are functionally equivalent. As to the use of prescribed bodies corporate in Benefits Management Structures, see, eg, the example structures described in Andrew Morgan, Plan B, 'Native Title Trusts' (Paper presented at the Legalwise Native Title Conference, Perth, Friday 13 June 2014) 7-10.

⁴⁵ NTA s 56; *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) r 6.

⁴⁶ NTA s 57; *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) r 7.

negotiating, implementing and monitoring native title land use agreements; and bringing native title compensation applications and revised determination applications in the Federal Court.⁴⁷

PBCs are also responsible, under the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth), for: managing the native title holders' native title rights and interests; holding money; investing or applying money as directed by the native title holders; consulting with the native title holders about decisions that would affect native title; and consulting with the relevant representative body about a proposed native title decision.⁴⁸

2.2 Decision making, asset protection and information sharing functions

Fundamentally, the entities that constitute a BMS are private associations, albeit that some, such as PBCs, also have statutory functions or that others, such as charities, may be subject to a degree of public oversight and be expected to produce a public benefit. There is therefore significant flexibility in structuring BMS entities.

For example, decision making can be restricted to members of the Indigenous community, or broadened to include other stakeholders or independent persons (eg the requirement for a certain number of resource proponent or independent board members). Even under a trust, powers can be given to members of an Indigenous community or to smaller groups to make certain decisions, or to render trustee actions subject to consents. The role of non-Indigenous decision makers can also be tailored to determine the weight of their 'vote'. For instance, an independent board or committee member could be given the power to veto decisions, or veto decisions on certain grounds. Alternatively, the role of an independent person or entity may be advisory only. That is typically the case for advisory trustees,⁴⁹ with whom the trustee may be required or permitted to consult on certain matters, although not compelled to follow the advisory trustee's advice. The BMS documents may seek to enhance an advisory trustee's ability to intervene or apply to the court or regulators if the advisory trustee considers that the BMS is not being properly administered.

The following table reflects the extent to which independent or stakeholder involvement might be incorporated into decision making within a BMS and provides some example

⁴⁷ Lisa Strelein and Tran Tran, 'Native Title Representative Bodies and Prescribed Bodies Corporate: Native Title in a Post Determination Environment' (Native Title Research Report 2/2007, Native Title Research Unit, AIATSIS, Canberra, 2007) Appendix 2, 29; Attorney-General's Department, *Structures and Processes of Prescribed Bodies Corporate* (2006), [4.3] - [4.8]; Matthew Storey, 'Dealing in Native Title' (2007) 26 *Australian Resources & Energy Law Journal* 56, 58-60.

⁴⁸ Lisa Strelein and Tran Tran, 'Native Title Representative Bodies and Prescribed Bodies Corporate: Native Title in a Post Determination Environment' (Native Title Research Report 2/2007, Native Title Research Unit, AIATSIS, Canberra, 2007) Appendix 2, 29; Attorney-General's Department, *Structures and Processes of Prescribed Bodies Corporate* (2006), [4.3] - [4.8].

⁴⁹ As to the role of advisory trustees, see, eg, *Trustees Act 1962* (WA) s14; *Levin's Observations*, 251.

structures that adopt some of the alternatives.⁵⁰ Note that a BMS may contemplate moving down and to the right of the table such that greater autonomy in decision making could be provided to Indigenous communities over time.

Table 2.1 – Approaches to Indigenous community decision making autonomy

Independent or stakeholder decision making	Indigenous community decision making
<p><i>Independent trustee (eg professional trustee) holds and makes decisions about BMS assets.</i></p>	<p><i>Indigenous community or representatives can make decisions on particular matters, potentially with different rules for different classes of decisions, subject only to professional trustee veto for non-compliance with the constituent documents and the law.</i></p> <p>For instance, the pilot BMS Charitable Trust requires the trustee to be a professional trustee company, but also permits, amongst other things:</p> <ul style="list-style-type: none"> • The Aboriginal community to change the trustee (to another professional trustee). • The Decision Making Committee (a representative body of the Aboriginal community) to issue binding directions to the trustee in relation to specified matters such as distributions of trust property.
<p><i>Independent/stakeholder directors on Indigenous trustee company/Indigenous corporation or independent/stakeholder committee members on certain decision making committees.</i></p> <p>Independent/stakeholder directors/committee members might have:</p> <ul style="list-style-type: none"> • Veto over all decisions. For instance, this is the effect of majority voting with a casting vote for the (independent director) chair in the case of the Gumala trustee (GIPL), since there are three independent and three traditional owner directors.⁵¹ • Veto only in particular circumstances. For instance, a compliance veto for the independent directors of the Indigenous-controlled trustee company that is envisaged under the Nyiyaparli BMS.⁵² 	<p><i>Indigenous trustee company / Indigenous corporation</i></p> <p>Different rules may apply to different classes of decisions. For instance, under the Gumala Foundation (case example discussed in Chapter 4), different mechanisms are adopted for fundamental issues such as amending the trust deed (special resolution of the traditional owners, with the prior consent of the manager and the trustee), with strategic and day-to-day administrative decisions then largely taken by the trustee (GIPL) and manager (GAC), albeit in some cases after consultation with traditional owners.⁵⁴</p> <p>Alternatively, provision might be made for different groupings to appoint representatives to boards or committees.</p>

⁵⁰ See also Sarah Prout Quicke, Alfred Michael Dockery, Aileen Hoath, 'Aboriginal Assets? The Impact of Major Agreements Associated with Native Title in Western Australia' (Report, 2017) 30-2.

⁵¹ Gumala General Foundation, *Consolidated Trust Deed* (14 February 2012) cl 28.1(2)(b).

⁵² Nyiyaparli Charitable Trust Deed S9.2.7(b).

⁵⁴ See, especially, Gumala General Foundation, *Consolidated Trust Deed* (14 February 2012) cl 7, 26.

<ul style="list-style-type: none"> • Equal vote to all other directors, which could mean that independent directors can be outvoted. For instance, this appears to be the case for the independent member with finance expertise and the member nominated by mining company MMG Century to the board of the trustee of the Aboriginal Development Benefits Trust under the trustee constitution.⁵³ 	<p>For instance, the Gumala BMS relates to three language groups (and now three separate native title holder or claim groups) and so some Gumala BMS entities, such as the trustee (GIPL) and the manager (GAC) have boards with a set number or proportion of directors from each language group.⁵⁵</p>
<p><i>Advisory trustee or other adviser that can or must be consulted by the Indigenous trustee company / Indigenous corporation.</i></p> <p>The advisory trustee may have the power to take actions to enforce the trust deed.</p> <p>For instance, the Gumala BMS (see Chapter 4) involves a charitable trust (Gumala General Foundation) with an Indigenous controlled trustee (GIPL), an Indigenous controlled manager (GAC) and, until the 10 year 'Advisory Period' ended in 2007, there was also an 'Advisory Trustee'.⁵⁶ The Advisory Trustee was part owned by the resource company, Hamersley, and by GAC and had two directors nominated by each of them.⁵⁷ The Advisory Trustee's functions were to 'provide advice to the Trustee on significant investment and other decisions... and to make general policy recommendations regarding the administration of the Foundation',⁵⁸ including providing advice on funding proposals received from the manager.⁵⁹ The advice was not binding on the trustee.⁶⁰</p> <p>However, the Foundation trust deed also sought to enhance the Advisory Trustee's standing to 'enforce the terms of this Deed',⁶¹ as well as providing the Advisory Trustee with the ability to call for a trust review of the Foundation, involving meetings and consultation between the traditional owner groups, the trustee, the manager and the Advisory Trustee.⁶²</p>	<p><i>Indigenous trustee company / Indigenous corporation</i></p> <p>As above.</p>

⁵³ Aboriginal Development Benefits Trust, 'Empowerment Through Business: ADBT' (accessed 25 October 2016) <<http://www.adbt.com.au/wp-content/uploads/2014/02/strategic-plan-in-3-pages.pdf>>. There are also 12 Indigenous community representative directors.

⁵⁵ Ibid cl 2; GAC Rule Book r8.2.3

⁵⁶ Gumala General Foundation, *Consolidated Trust Deed* (14 February 2012) cl 15.

⁵⁷ Ibid cl 15.2.

⁵⁸ Ibid cl 15.3.

⁵⁹ Ibid cl 15.6.

⁶⁰ Ibid cl 6.1, 15.7.

⁶¹ Ibid cl 15.12. Given open standing under s21(1) *Charitable Trusts Act 1962* (WA), the impact of cl 15.12 is unclear.

⁶² Gumala General Foundation, *Consolidated Trust Deed* (14 February 2012) GAC <<http://www.gumala.com.au/assets/consolidated-trust-deed.pdf>> cl 15.11, 33.

Further, different approaches can be adopted for different classes of decisions. Decisions could be classed according to significance, eg O’Faircheallaigh’s ‘fundamental’, ‘strategic’ and ‘day to day administrative’ decisions,⁶³ which are reflected in the pilot project structures to some degree; or according to principles which reflect the localism of the relevant Indigenous community, such as giving different family groupings or individuals more say in matters that relate more directly to them or to benefits arising from activities that more directly affect their native title rights and interests.⁶⁴ It is likely that one consequence of the decision making models reflected in the table above is that models toward the top involve greater focus of Indigenous community members on fundamental and strategic issues, while those toward the bottom expand Indigenous community focus on day-to-day administration also. This may have capacity implications.

In addition, it is possible to carve out asset holding and protection obligations to some extent from the obligations that would otherwise apply to BMS decision makers. For instance, an external custodian trustee could be appointed.⁶⁵ The role of a custodian trustee is to hold legal title to trust assets and to release those assets to the trustee in accordance with the terms of the trust deed. A custodian trustee might therefore be contemplated in circumstances where a BMS trustee is an Indigenous community-controlled entity. Of course, while a custodian trustee may bring asset protection advantages,⁶⁶ it can also be seen as involving another layer of administration along with some loss of decision making ability.⁶⁷ In cases where a professional trustee company has been used, then non-Indigenous community asset-holding is already achieved without the need for a custodian trustee.

As an example of the use of a custodian trustee,⁶⁸ the Ngarluma BMS (case example discussed in Chapter 4) provided for a charitable trust and a discretionary trust, the deeds of which required the use of a custodian trustee, given that the trustee of each trust was a Ngarluma controlled entity, NTKML.⁶⁹ The terms of all the NTKML board members expired such that there was no-one authorised to instruct the custodian trustee to release trust property (until NTKML was replaced or new board members appointed). This resulted in the money of the charitable trust being effectively tied up, causing financial difficulties.⁷⁰ On the other hand, the expiration of board member terms arose from a dispute between NTKML and NAC. NAC was the sole member of NTKML and the PBC for the Ngarluma people and the members of NAC were the Ngarluma people. NAC sought to replace the board members of NTKML without following the required

⁶³ Ciaran O’Faircheallaigh, ‘Registered Native Title Bodies Corporate and mining agreements: capacities and structures’ in *Bauman, Strelein and Weir’s Living with Native Title* 283-8. The categories were proposed in the context of RNTBCs.

⁶⁴ For instance, see the Banjima BMS Charitable Trust referred to in Chapter 6.

⁶⁵ As to the role of custodian trustees, see, eg, *Trustees Act 1962 (WA)* s15; *Levin’s Observations*, 255.

⁶⁶ *Levin’s Observations*, 255.

⁶⁷ Marcia Langton and Judy Longbottom, *Community Futures, Legal Architecture: Foundations for Indigenous Peoples in the Global Mining Boom* (A Glasshouse Book, 2012) 186.

⁶⁸ The *Gumala General Foundation Consolidated Trust Deed* ((14 February 2012) GAC <<http://www.gumala.com.au/assets/consolidated-trust-deed.pdf>>) also provides for a custodian trustee at the election of the trustee, in circumstances where the trustee is not a professional trustee company: cl 14.

⁶⁹ *Ngarluma Aboriginal Corporation RNTBC v Attorney-General (WA)* [2014] WASC 245 [9]-[10].

⁷⁰ *Ibid* [27]-[28]

consultation and consent processes with the Ngarluma people.⁷¹ Accordingly, the inability to access the trust assets until the dispute was resolved could be seen as a desirable asset protection feature.

A capital (and potentially income) protected endowment fund, or 'future fund', is another asset protection device.⁷² It essentially provides an asset lock for a portion of BMS funds by restricting the use of those funds and a proportion of income earned on those funds, with the intent that a certain capital base⁷³ be built up and then preserved so as to provide income in perpetuity. The pilot BMS Charitable Trust considered in Chapter 6 provides for a future fund.

Different approaches are also possible to information flows and accountability between decision makers and the Indigenous community, as well as other stakeholders. Some models are premised largely on annual or several times per year reporting to and feedback from an Indigenous community by way of general meetings as the formal means of information flows. For instance, this appears to largely be the case for the Gumala Foundation discussed as a case example in Chapter 4. Although the Gumala Foundation trust deed contains accountability mechanisms for GIPL, these are focussed on reporting to a limited range of entities. For instance, there is an annual report and external audit of GIPL, GAC and the Gumala Foundation⁷⁴ and the requirement for an annual general meeting held by GIPL and for thrice annual meetings by GAC.⁷⁵ It also appears that internal audit and risk committees have been established.⁷⁶ There are also a range of provisions requiring consultation or consents between GIPL as trustee and GAC as manager.⁷⁷

The trust deed does contemplate in very general terms that the trustee and manager will provide information to and seek information from the traditional owners in other ways,⁷⁸ and that there must be consultation with the traditional owners for cash distributions⁷⁹ and for fundamental matters such as a trust winding up,⁸⁰ or a trust review.⁸¹ However, there seem to be limited internal direct accountability provisions to the traditional owners in relation to strategic or day-to-day administrative matters except for the general meetings. Indeed, the first review of the trust structures,⁸² noted GIPL's 'significant'

⁷¹ *Ngarmula Tharndu Karrungu Maya Ltd v Ngarluma Aboriginal Corporation RNTBC* [2014] WASC 79.

⁷² See, eg, *Levin's Observations*, 255-6.

⁷³ For instance, the 'Target Capital Base' referred to in Part 6.3.11.

⁷⁴ Gumala General Foundation, *Consolidated Trust Deed* (14 February 2012) GAC <<http://www.gumala.com.au/assets/consolidated-trust-deed.pdf>> cl 25.

⁷⁵ *Ibid* cl 7.1, 16.1.

⁷⁶ Gumala General Foundation, *Gumala Group Annual Report 2013-14* (2014) GAC <<http://www.gumala.com.au/documents/GUMALA%20ANNUAL%20REPORT%202014%20web.pdf>> 109.

⁷⁷ See, eg, Gumala General Foundation, *Consolidated Trust Deed* (14 February 2012) GAC <<http://www.gumala.com.au/assets/consolidated-trust-deed.pdf>> cl 4 (funding applications made by manager to trustee and support by trustee for manager's functions), 18.2 (certain investments), 24.2 (reporting by manager to trustee).

⁷⁸ *Ibid* cl 7.1, 16.1.

⁷⁹ *Ibid* cl 11.2.

⁸⁰ *Ibid* cl 32.

⁸¹ *Ibid* cl 33.

⁸² *Scambary's My Country* 141, 154, citing C Hoffmeister, 'Review of the Gumala Foundations' (Final Report to the Trustee GIPL, 2002).

transparency deficiency in its decision making processes.⁸³ The perceived lack of opportunities for feedback on GIPL's decisions, particularly relating to distributions of trust monies, also appears prominent amongst the native title holders/claimants.⁸⁴ These findings also suggest that traditional owners cannot rely on receiving information through GAC by way of the consultation expected of GAC as manager. In addition, even as members of GAC, there are limited internal member accountability mechanisms except for the annual general meeting⁸⁵ and the election and removal of directors.⁸⁶ The lack of internal accountability by GAC to the traditional owners has been noted by Edmunds and also by Chaney and Lennon.⁸⁷

2.3 The purpose of a BMS

The above discussion highlights certain functions that a typical BMS would incorporate: Indigenous community decision making, some asset protection and a degree of accountability to the Indigenous community through information flows. However, these functions go to the way in which a BMS operates, rather than to any fundamental goals or purposes that BMSs are intended to achieve. In some ways that is understandable: BMSs can exist in many different forms and will be set up in varied circumstances by communities with very different needs and aspirations. As well, in the Australian context BMSs almost invariably do not represent a comprehensive political settlement as they do in some other jurisdictions where treaties are used more commonly and so it is unreasonable to expect comprehensive political purposes of BMSs. Nevertheless, BMSs typically comprise common entities that have particular purposes, such as PBCs (statutory purpose of holding and/or managing native title rights and interests for the benefit of native title holders)⁸⁸ and charitable trusts (charitable purposes include the relief of poverty and sickness, advancement of education and advancement of religion).⁸⁹ In addition, some of the literature in Chapter 3 is premised on certain assumptions about what an Indigenous organisation or BMS is intended to achieve. For example, the Harvard Project on Indian Economic Development examines how governance should be constructed so as to achieve economic development.⁹⁰

It also became apparent during interviews and focus groups with stakeholders that they held stated and unstated assumptions about the goals that a BMS was intended to

⁸³ Sarah Holcombe, 'Indigenous entrepreneurialism and mining land use agreements' in *Altman and Martin's Power, Culture, Economy* 149, 159.

⁸⁴ Mary Edmunds, 'Harnessing the cyclone – Gumala Aboriginal Corporation: a case study' in Bruce Walker (ed), *The Challenge, Conversation, Commissioned Papers and Regional Studies of Remote Australia* (Desert Knowledge Australia, 2012) 181, 194.

⁸⁵ GAC Rule Book r 7.16.

⁸⁶ GAC Rule Book r 8.6.1 and r 8.10.1.

⁸⁷ Mary Edmunds, 'Harnessing the cyclone – Gumala Aboriginal Corporation: a case study' in Bruce Walker (ed), *The Challenge, Conversation, Commissioned Papers and Regional Studies of Remote Australia* (Desert Knowledge Australia, 2012) 181, 210; Fred Chaney and Paul Lennon, *2013 YLUA Review* (10 October 2013) <www.gumala.com.au/assets/final-report-ylua-review.pdf> 12 (in relation to transparency over CEO discretionary payments).

⁸⁸ See n 696 and accompanying text.

⁸⁹ See above n 39.

⁹⁰ See further Parts 3.4 and 3.5.2.

achieve. Accordingly, we asked stakeholders: ‘what do you think a BMS should achieve (for you/your organisation and in its own right)?’. The responses demonstrated substantially consistent themes, but with different levels of emphasis on certain purposes by different groups of stakeholders.

All groups of stakeholders emphasised,⁹¹ or partially supported,⁹² the view that BMSs should not be expected to address all issues or pursue all goals of an Indigenous community. There is still a role for other actors, from individual members of the community to government. A common example provided was that community members might prefer to seek funding from their BMS for medical travel, rather than applying for government funding under the Patient Assist Travel Scheme.⁹³ The need to avoid a silo mentality is expanded upon in Part 4.19.

All groups of stakeholders also indicated that for a specific BMS with which they had been involved it was common for there to have been instances of either different views about the primary purposes the BMS was intended to achieve or else inadequate engagement by the Indigenous community (as opposed to community members sitting on boards/committees) with the purpose of a specific BMS.⁹⁴ However, some trustee officers indicated that community members for trusts of which they were trustee had a better sense of understanding, albeit acknowledging that there might be a lack of information in the way that broader BMS goals link back to individuals.⁹⁵

Aboriginal community and corporation representatives and their professional advisers tended to focus first on BMSs as vehicles to build capability of community members in support of autonomy for individual members and self-determination for the community.⁹⁶ As one Pilbara Aboriginal Corporation CEO noted:⁹⁷

[BMSs] should give a voice to the native title community in terms of selecting decision makers and in approving key policies and strategies... [Building a] framework in terms of

⁹¹ See, eg, Professional Adviser 31 January 2018; Aboriginal Community Representatives 3 May 2018; Trustee Officer May and June 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Executive 5 July 2018; Pilbara Aboriginal Corporation Director 21 June 2018; Pilbara Aboriginal Corporation Officer 12 March 2019.

⁹² See, eg, Resource Proponent Social Investment Manager 22 February 2017; Resource Proponent Manager 10 August 2017; Pilbara Aboriginal Corporation Director 20 June 2018; Pilbara Aboriginal Corporation Executive 4 July 2018.

⁹³ Trustee Officer May and June 2018; Pilbara Aboriginal Corporation Director 21 June 2018; Pilbara Aboriginal Corporation Executive 5 July 2018.

⁹⁴ Independent BMS Facilitator 21 March 2018; Aboriginal Community Representatives 3 May 2018; Resource Proponent Manager 24 January 2017; Trustee Officer 18 May 2017. Cf Professional Adviser 16 November 2017; Professional Adviser 31 January 2018; Resource Proponent Social Investment Manager 22 February 2017; Resource Proponent Manager 10 August 2017; Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Director 20 June 2018; Pilbara Aboriginal Corporation Executive 5 July 2018.

⁹⁵ Trustee Officer 19 July 2018.

⁹⁶ Aboriginal Community Representatives 3 May 2018; Pilbara Aboriginal Corporation Executive 10 May 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Director 20 June 2018; Pilbara Aboriginal Corporation Director 21 June 2018; Pilbara Aboriginal Corporation Executive 4 July 2018; Professional Adviser 31 January 2018. Cf Independent BMS Facilitator 21 March 2018.

⁹⁷ Pilbara Aboriginal Corporation Executive 21 May 2018.

providing agency and self-determination capacity-building for the community is absolutely key. If this does not work well, then you won't get the outcomes.

Second, they also strongly emphasised the role of BMSs in social, economic and cultural development for an Indigenous community.⁹⁸ A key element of this second goal was that benefits should accrue to future generations.⁹⁹ As several focus group interviewees put it, BMSs should:¹⁰⁰

[h]elp improve the future, especially for the children of community members.

Further, the position of cultural development within this goal was stressed by a number of interviewees:¹⁰¹

Benefits Management Structures should keep knowledge and culture alive and advocate for that... My major concern, not only for our people, but for the wider community up in the Pilbara [is that] if there are not strong leaders who are driving culture through these structures then we will be lost as well. We'll end up losing our identities.

Unsurprisingly in relation to autonomy, but also in relation to social, economic and cultural development, a number of interviewees suggested that these goals needed to exist or be implemented at the level of each individual community member, in large measure because different community members may have different needs and different capacity to pursue opportunities.¹⁰²

Several Aboriginal community members also identified a third goal, that BMSs ought to be a source of pride or accomplishment for a community, that they can 'show what the Ngarlawangga People have accomplished – put our name to something'.¹⁰³

Aboriginal corporation executives and their professional advisers also identified several additional aims of BMSs:

- the role of BMSs in providing transparent and robust systems for Indigenous communities to manage funds;¹⁰⁴ and

⁹⁸ Aboriginal Community Representatives 3 May 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Corporation Executive 7 June 2018; Pilbara Aboriginal Corporation Director 20 June 2018; Pilbara Aboriginal Corporation Director 21 June 2018; Pilbara Aboriginal Corporation Executive 5 July 2018. Cf Independent BMS Facilitator 21 March 2018.

⁹⁹ Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Executive 5 July 2018. Cf Pilbara Aboriginal Corporation Director 21 June 2018; Independent BMS Facilitator 21 March 2018. Some interviewees emphasised that this might not mean accruing money for future generations. See, especially, Pilbara Aboriginal Corporation Director 21 June 2018; Pilbara Aboriginal Corporation Executive 10 May 2018; Pilbara Aboriginal Corporation Executive 4 July 2018.

¹⁰⁰ Aboriginal Community Representatives 3 May 2018.

¹⁰¹ Pilbara Aboriginal Corporation Director 20 June 2018. See also Pilbara Aboriginal Corporation Director 21 June 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Executive 4 July 2018.

¹⁰² Pilbara Aboriginal Corporation Director 20 June 2018; Pilbara Aboriginal Corporation Director 21 June 2018. Cf Pilbara Corporation Executive 7 June 2018; Pilbara Aboriginal Corporation Executive 5 July 2018.

¹⁰³ Aboriginal Community Representatives 3 May 2018.

¹⁰⁴ Pilbara Aboriginal Corporation Executive 2 May 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Executive 4 July 2018; Professional Adviser 31 January 2018.

- the need for BMSs – including the interviewee’s own corporation – and communities to become self-sustaining (economically, rather than continuing to rely on receiving land use agreement funding; and from a human capacity perspective, ensuring that there is a critical mass of future leaders).¹⁰⁵

However, the need for BMSs to become self-sustaining was not universally endorsed. One Aboriginal corporation officer emphasised that enhancing autonomy and social, economic and cultural development for an Indigenous community should result in a BMS putting itself out of business or materially changing focus:¹⁰⁶

Once set up the idea of the BMS is rather entrenched and the possibility of the BMS only being temporary is not talked about. The ideal is for the members of a group to finally be in a position where they no longer need to access the BMS so in its current form it becomes irrelevant. The BMS is set up to deal with certain circumstances and this could change. For example – if the overarching goal of the BMS was the total financial freedom of all members (which there is an argument that it should be at least one of the goals), then if successful a time would come when every member was financially independent (owned their own home, money in super for retirement, money in the bank or a personal trust etc). The members would no longer need distributions from the Trust. The nature of the BMS may then change.

Resource proponent representatives and their professional advisers, while also noting the importance of autonomy and self-determination,¹⁰⁷ tended to place greater emphasis on:

- the role of BMSs in maintaining a long-term relationship between a resource proponent and an Indigenous community and the role of BMSs in receiving and managing compensation and other payments in support of that relationship;¹⁰⁸ and
- contributing to socio-economic development for the relevant Indigenous community, with several interviewees noting the importance of BMS governance systems in achieving this.¹⁰⁹

Resource proponent representatives also identified the critical importance of achieving good governance within a BMS so as to safeguard corporate reputation and aid compliance with international best practice and with anti-corruption legislative regimes around the world.¹¹⁰ Indeed, a professional adviser noted that such compliance has

¹⁰⁵ Pilbara Aboriginal Corporation Executive 10 May 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Executive 5 July 2018.

¹⁰⁶ Pilbara Aboriginal Corporation Officer 12 March 2019.

¹⁰⁷ Resource Proponent Manager 24 January 2017; Resource Proponent Manager 10 August 2017; Resource Proponent Implementation Adviser 10 August 2017; Professional Adviser 16 November 2017.

¹⁰⁸ Resource Proponent Manager 24 January 2017; Resource Proponent Manager 10 August 2017; Professional Adviser 16 November 2017.

¹⁰⁹ Resource Proponent Manager 24 January 2017; Resource Proponent Social Investment Manager 22 February 2017; Resource Proponent Manager 10 August 2017; Resource Proponent Implementation Adviser 10 August 2017.

¹¹⁰ Resource Proponent Manager 24 January 2017; Professional Adviser 16 November 2017. Cf Resource Proponent Manager 10 August 2017. International best practice, for instance, is reflected in: International

increased in importance over the last few years and is now seen by resource proponents as one of the most significant areas for legal sign-off.¹¹¹

Trustee officers identified both the autonomy and self-determination goal and the social, economic and cultural development goal.¹¹² However, trustees tended to treat autonomy and self-determination as instrumental means to achieve social, economic and cultural development.¹¹³ Further, achieving development was conceived by some trustee officers in the form of service delivery or distribution of funds by the trustee to community members.¹¹⁴

Some trustee officers also indicated additional objectives of BMSs:

- the role of BMS in providing transparent, effective and well-governed systems for Indigenous communities to manage and protect assets;¹¹⁵ and
- the need for BMS to be self-sustaining.¹¹⁶

Several trustee officers also noted frustration that trust objects (relevant to BMS objectives) had been framed and trust documents largely settled before being seen by a trustee company, such that there had been limited ability to provide input about the practical administration of the trusts and pursuit of their objects.¹¹⁷

Council on Mining & Metals, 'Indigenous Peoples and Mining' (Good Practice Guide, 2nd ed, 2015); International Council on Mining & Metals, 'Position Statement on Indigenous Peoples and Mining' (May 2013).

¹¹¹ Professional Adviser 3 May 2019.

¹¹² Trustee Officer 28 June 2018.

¹¹³ See, especially, Trustee Officer 19 July 2018; Trustee Officer May and June 2018.

¹¹⁴ Cf Trustee Officer 28 June 2018.

¹¹⁵ Trustee Officer 28 June 2018.

¹¹⁶ Trustee Officer 28 June 2018; Trustee Officer May and June 2018.

¹¹⁷ Trustee Officer 19 July 2018; Trustee Officer 18 May 2017.

3. General Research on the Structure and Operation of Indigenous Organisations that May form Part of a BMS

There has been little research undertaken specifically on BMS design in Australia. There are, however, bodies of literature of general relevance to the structure and operation of Indigenous organisations that may form part of a BMS. This literature is primarily drawn from five disciplines: law, anthropology, sociology, political science and economics. Within that literature there are several key topics that are pertinent to the design of BMSs. Those topics consist of research into legal structures used by Indigenous communities, the impact of agreement making on those legal structures, the impact of Indigenous law and culture on those structures and general governance principles for Indigenous organisations and Indigenous communities. Some brief comparative comments are also provided on structures used to manage assets deriving from Indigenous titles in Canada, the United States and New Zealand.

There is also a significant body of literature concerning the taxation implications for BMSs, including the taxation impact of the particular legal structures selected.¹¹⁸ This monograph does not examine that issue, other than to touch on the potential difficulties arising from selecting a tax-preferred structure, such as a charitable trust, as a component of a BMS (Parts 4.10 and 4.12).

3.1 Legal structures

Research tends to focus on particular legal structures within a BMS, rather than the BMS as a whole. Only a small number of authors have considered BMSs as a whole. For example, while not expressly using the term 'Benefits Management Structure', Scamby gives an account of a significant internal dispute between entities under the Gumala BMS.¹¹⁹ Scamby suggests that membership overlap¹²⁰ and disunity of interests¹²¹ can cause inter-group disputes between corporations under a BMS. The Heferen Report also considered existing arrangements for holding, managing and distributing native title payments relatively holistically and recommended the introduction of a new tax concession entity, the 'Indigenous Community Development Corporation', with a tailored

¹¹⁸ See, eg, Ian Murray, 'Public Benevolent Institutions for Native Title Groups: an Underappreciated Model?' (2015) 43 *Federal Law Review* 424; Lisa Strelein, 'Taxation of Native Title Agreements' (Native Title Research Monograph No 1/2008, AIATSIS, May 2008); Marcia Langton and Judy Longbottom, *Community Futures, Legal Architecture: Foundations for Indigenous Peoples in the Global Mining Boom* (A Glasshouse Book, 2012); Miranda Stewart, 'Native Title and Tax: Understanding the Issues' (2010) 7(21) *Indigenous Law Bulletin* 7; Fiona Martin, 'Prescribed Bodies Corporate Under the Native Title Act 1993 (Cth): Can They Be Exempt from Income Tax as Charitable Trusts?' (2007) 30 *University of New South Wales Law Journal* 713. Some of the tax research also focuses on the broader BMS structures. See eg, Murray & Wright; Rob Heferen et al, 'Taxation of Native Title and Traditional Owner Benefits and Governance Working Group: Report to Government' (Report, 1 July 2013).

¹¹⁹ Scamby's *My Country* 141, 170-179.

¹²⁰ Ibid 150-157.

¹²¹ Ibid 154, 158-169.

(and yet to be defined) governance framework.¹²² Murray and Wright have also examined BMSs in canvassing current practical issues in the tax treatment of native title payments.¹²³ Nevertheless, Langton and Mazel emphasise both the importance of Indigenous enabling institutions, such as BMSs and the need for 'further consideration of models for managing subsequent benefits distribution and associated procedures'.¹²⁴

3.1.1 Indigenous Corporations

Indigenous communities seeking to establish an incorporated entity are generally free to choose between the various applicable state/territory and federal incorporation regimes, provided they meet any required criteria for their use.¹²⁵ The term Indigenous corporation may refer to any Indigenous-controlled incorporated entity, though the focus here is on CATSI Act corporations. The first part of this section considers the evolution and nature of the CATSI Act and CATSI Act corporations. PBCs will be addressed second and separately because a significant proportion of the relevant research focuses more narrowly on PBCs, which must be CATSI Act corporations.¹²⁶

CATSI Act Corporations

The CATSI Act establishes a framework balancing 'mainstream' corporations law with the 'flexibility for Indigenous communities to design corporations to suit their needs.'¹²⁷ This is achieved by allowing for commingling of, or 'compromise' between, Indigenous and Western laws and concepts to allow the corporation to become 'an intermediate system acting as a conduit between the Indigenous and Western European cultures.'¹²⁸

¹²² Rob Heferen et al, 'Taxation of Native Title and Traditional Owner Benefits and Governance Working Group: Report to Government' (Report, 1 July 2013) 5, 25-32. Again, this Report did not expressly use the phrase 'Benefits Management Structure'.

¹²³ Murray & Wright, 107-8. See also Ian Murray, 'Native Title Tax Reforms: Bull's Eye or Wide of the Mark?' (2013) 41(3) *Federal Law Review* 497.

¹²⁴ Marcia Langton and Odette Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the Resource Curse and the Mining Boom' (2008) 26(1) *Journal of Energy & Natural Resources Law* 31, 60-1. See also Jason Switzer, 'Armed Conflict and Natural resources: The cases of the minerals sector' (2001) *Mining, Minerals and Sustainable Development Work Report No 12*, 8, International Institute for Environment and Development.

¹²⁵ McCrae, *Nettheim & Beacroft's Indigenous Legal Issues* 175.

¹²⁶ See, eg, Lisa Strelein and Tran Tran, 'Native Title Representative Bodies and Prescribed Bodies Corporate: Native Title in a Post Determination Environment' (Native Title Research Report 2/2007, Native Title Research Unit, AIATSIS, Canberra, 2007); Jessica Weir, 'Native Title and Governance: The Emerging Corporate Sector Prescribed for Native Title Holders' (Volume 3, Issue Paper No 9, July 2007); *Mantziaris and Martin's Native Title Corporations*; ORIC, 'Analysing Key Characteristics in Indigenous Corporate Failure' (Research Paper, March 2010); Paul Memmott and Scott MacDougall, *Holding Title and Managing Land in Cape York: Indigenous Land Management and Native Title*, (National Native Title Tribunal, Perth, 2003); David Ritter, 'So, what's new? Native Title Representative Bodies and Prescribed Bodies Corporate after Ward', (2002) 21 *Australian Mining and Petroleum Law Journal*, 303; Alison Murphy, 'Prescribed Bodies Corporate in the post determination landscape' (2002) 5 *Balay: Culture, Law and Colonisation* 162.

¹²⁷ McCrae, *Nettheim & Beacroft's Indigenous Legal Issues* 174.

¹²⁸ Marina Nehme and John Jurians, 'The Evolution of Indigenous Corporations: Where to Now?' (2012) 33 *Adelaide Law Review* 101, 129.

In connection with these objectives the CATSI Act codifies common law directors' duties, includes anti-nepotism measures, provides for differential reporting requirements and allows for the appointment of a special administrator in certain circumstances.¹²⁹

CATSI Act corporations continue to experience problems, as demonstrated by the issues concerning PBCs discussed below. However, the process of developing the CATSI Act and reviews of precursor legislation can provide useful general guidance in the design of BMSs. The CATSI Act arose from and replaced, the earlier ACA Act, following a 2002 review which emphasised the need for 'context-sensitive design' of Indigenous corporations, to better acknowledge Indigenous cultural views and practices and their relevance to corporate governance.¹³⁰ The broader literature also suggested that the ACA Act did not provide for corporations that were legally recognisable yet could also act as inter-cultural windows between the culture of the relevant Indigenous community and that of the broader Australian society.¹³¹ In part, this was due to the level of reporting, audit and other corporate governance standards and their assimilation to prevailing Corporations Act requirements,¹³² including directors' duties and replaceable rules.¹³³ Other identified shortcomings of the ACA Act included 'inadequate protection for members, rigidity of corporate design and insufficient third-party protection, including protection for funding agencies'.¹³⁴

To respond to these shortcomings, the newer CATSI Act implements a novel process to reduce the administrative burden for Indigenous corporations by ensuring that the reporting requirements it enshrines match the size and nature of subject corporations.¹³⁵ The CATSI Act also provides the opportunity for customisation using multiple streams with different compliance obligations. Compare for example the distinction between small or large proprietary and public Corporations Act companies and CATSI Act small, medium and large corporations.¹³⁶ Another measure adopted in the CATSI Act is the adoption of modified rules for meetings, members and officers to recognise the 'special circumstances of Indigenous corporations'.¹³⁷ Further, the regulatory office established by the CATSI Act (ORIC) can provide a comparatively high level of assistance to the

¹²⁹ McCrae, *Nettheim & Beacroft's Indigenous Legal Issues* 174.

¹³⁰ Corrs Chambers Westgarth et al, *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal Councils and Associations Act* (Review of the Aboriginal Councils and Associations Act, Final Report, 2002) 10.

¹³¹ See, eg, *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 328-9; Christos Mantziaris, 'The Dual View Theory of the Corporation and the Aboriginal Corporation' (1999) 27 *Federal Law Review* 283, 284-5, 307-9.

¹³² See, eg, Corrs Chambers Westgarth et al, *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal Councils and Associations Act* (Review of the Aboriginal Councils and Associations Act, Final Report, 2002) 10; Christos Mantziaris, 'The Dual View Theory of the Corporation and the Aboriginal Corporation' (1999) 27 *Federal Law Review* 283, 284-5, 307-9.

¹³³ Laura Beacroft, 'A New Law for Indigenous Corporations' (2007) 77 *In the black* 6, 60. See also Corrs Chambers Westgarth et al, *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal Councils and Associations Act* (Review of the Aboriginal Councils and Associations Act, Final Report, 2002) 2.

¹³⁴ Laura Beacroft, 'A New Law for Indigenous Corporations' (2007) 77 *In the black* 6, 60.

¹³⁵ Explanatory Memorandum, Corporations (Aboriginal and Torres Strait Islander) Bill 2006 (Cth) [1.20].

¹³⁶ *Ibid.*

¹³⁷ *Ibid.* For more detail see Office of the Registrar of Indigenous Corporations, 'The CATSI Act and the Corporations Act – Some Key Differences' (Fact Sheet, Australian Government).

corporations for which it is responsible, in the form of assistance with the drafting of rules and through the provision of information and training about corporate governance.¹³⁸

The existence of replaceable rules in the CATSI Act allows further customisation, by allowing members to ‘incorporate their own concepts of membership, leadership and decision making into the corporation’.¹³⁹

Despite the broad freedom of customisation, one commentator has noted that the CATSI Act provisions relating to decision making by majority vote, nonetheless, ‘may not be culturally appropriate’.¹⁴⁰

The similarities and differences between the CATSI Act and Corporations Act are indicators of a deeper policy issue: the accountability/autonomy dichotomy. Since the enactment of the ACA Act in 1976 relevant government policy has changed ‘dramatically’.¹⁴¹ On the one hand, government structures have evolved so as to allow greater Indigenous agency in public policy development. Yet, altered government service provision and funding patterns have created the need ‘for more corporations tailored to the needs of Indigenous people’.¹⁴² Moreover, ‘greater emphasis has been placed upon the need for greater “accountability” of Indigenous corporations for public monies’.¹⁴³

Unsurprisingly in this context, there are proposed amendments to the CATSI Act that would increase accountability and transparency, yet simultaneously ‘reduc[e] regulatory burden’ and hence enhance flexibility and autonomy.¹⁴⁴ This felicitous outcome is to be achieved largely by reducing the regulatory obligations and creating more flexibility for most small corporations. For example, permitting small corporations to hold AGMs more infrequently, up to three years apart, and also loosening small corporation related party benefit rules; while requiring medium and large corporations to provide copies of financial and/or directors’ reports at general meetings and to disclose senior executive and director remuneration.¹⁴⁵ Other measures to improve communications with members would apply to all corporations. For instance, providing for the recording and use of

¹³⁸ Explanatory Memorandum, Corporations (Aboriginal and Torres Strait Islander) Bill 2006 (Cth) [1.20]. For more detail see Office of the Registrar of Indigenous Corporations, ‘The CATSI Act and the Corporations Act – Some Key Differences’ (Fact Sheet, Australian Government).

¹³⁹ Marina Nehme and John Jurians, ‘The Evolution of Indigenous Corporations: Where to Now?’ (2012) 33 *Adelaide Law Review* 101, 135.

¹⁴⁰ Marina Nehme, ‘A Comparison of the Internal Governance Rules of Indigenous Corporations: Before and After the Introduction of the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (2014) 29 *Australian Journal of Corporate Law* 71, 85.

¹⁴¹ Corrs Chambers Westgarth et al, *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal Councils and Associations Act* (Review of the Aboriginal Councils and Associations Act, Final Report, 2002) 1 [3].

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018 (Cth) (lapsed due to proroguing of Parliament for the 2019 election); ORIC, ‘Proposed Amendments to the CATSI Act’ (Discussion Paper, August 2018).

¹⁴⁵ Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018 (Cth) pt 5, 7, 8; ORIC, ‘Proposed Amendments to the CATSI Act’ (Discussion Paper, August 2018) 16-19.

alternative contact details for members.¹⁴⁶ Some measures would also improve recognition of cultural and geographic circumstances. For example, providing one-off extensions of time to hold an AGM for matters such as a death in the community, an important cultural activity, or a natural disaster.¹⁴⁷ Other measures increase accountability. For example, the proposed reversal of position on independent directors, such that a corporation could choose to appoint independents as the default option under the CATSI Act, along with providing ORIC with greater investigation and compliance powers to deal with lower-level compliance issues. While the latter may result in greater regulatory action, the action that does occur is likely to be more appropriate. The former measure represents an attempt to ‘nudge’ behaviour, without imposing a material limit on autonomy.

Returning to what we can learn from the ACA Act, a review led by Dr Jim Fingleton with a Review report completed in August 1996,¹⁴⁸ specifically identified issues around the ability to import custom into (a) group membership rules and (b) decision making by Indigenous communities, under the ACA Act.¹⁴⁹ In terms of accountability, the review also identified an over-reliance on prescriptive standards and filing requirements policed by a government regulator and instead recommended a ‘multi-dimensional’ approach.¹⁵⁰ That multi-dimensional approach involved one or more of the following elements’:

- political, social and economic responsibilities to a local group membership (but with flexibility for different Indigenous communities to determine culturally appropriate accountability mechanisms);¹⁵¹ and
- responsibilities to a broader range of stakeholders – such as to provide a particular service fairly and efficiently. Different and potentially flexible mechanisms could then be adopted for such stakeholder accountability, including external accountability mechanisms, where appropriate.¹⁵²

The Fingleton review went on to recommend that there be a new Act that focused on accountability to members (which, in the case of a PBC, would be based on native title holders), with flexibility for groups to determine how to be accountable in accordance with the rules that they choose to adopt as informed by their local customs.¹⁵³ External accountability could then be incorporated in service agreements where the accountability

¹⁴⁶ Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018 (Cth) pt 6.

¹⁴⁷ Ibid pt 5; ORIC, ‘Proposed Amendments to the CATSI Act’ (Discussion Paper, August 2018) 12-13.

¹⁴⁸ Not publicly available.

¹⁴⁹ *Nettheim, Myers and Craig’s Indigenous Peoples and Governance Structures* 332, referring to Chapters 2 and 5 of the Fingleton review. See also Marina Nehme and John Jurians, ‘The Evolution of Indigenous Corporations: Where to Now?’ (2012) 33 *Adelaide Law Review* 101, 116.

¹⁵⁰ *Nettheim, Myers and Craig’s Indigenous Peoples and Governance Structures* 336-7, referring to Chapter 6 of the Fingleton review.

¹⁵¹ *Nettheim, Myers and Craig’s Indigenous Peoples and Governance Structures* 336-7, referring to Chapter 6 of the Fingleton review.

¹⁵² External accountability might be required, for instance, where public funds are received for certain purposes, or where services are to be provided to the general public: *Nettheim, Myers and Craig’s Indigenous Peoples and Governance Structures* 336-8, referring to Chapters 6 and 8 of the Fingleton review.

¹⁵³ *Nettheim, Myers and Craig’s Indigenous Peoples and Governance Structures* 337-8, referring to Chapter 8 of the Fingleton review.

relates to the receipt of funds to provide community services, in the rules of the body itself or, possibly in a special part of the new Act or in another Act where the functions are set out in that other Act.¹⁵⁴

The ACA Act itself arose out of the 1973 and 1974 Woodward Reports.¹⁵⁵ Woodward foresaw that Indigenous people would need to establish additional structures for such purposes as receiving and administering royalty-equivalent monies from mining and other developments on Aboriginal land. The ensuing ACA Act intended to provide for culturally appropriate corporations for a variety of purposes and for culturally appropriate councils to exercise powers of community government.¹⁵⁶ The Woodward Reports also brought about the enactment of the ALRA. The ALRA provided for the establishment of Land Trusts to hold title and Land Councils to manage land and claims to land, and is 'generally accepted as representing a high water mark in the design of culturally appropriate governance structures with respect to the land rights of Aboriginal Australians'.¹⁵⁷

PBCs

The literature on PBCs examines the statutory context¹⁵⁸ and the problems commonly experienced by PBCs. Recurring issues identified in the literature include governance capacity,¹⁵⁹ inter-group and intra-group disputes,¹⁶⁰ resourcing deficiencies,¹⁶¹ fraud or mismanagement,¹⁶² and lack of 'diligence'.¹⁶³ A lack of diligence means poor managerial oversight by directors and staff, and seems to include corporate governance deficiencies.¹⁶⁴ There is general consensus among commentators that there are systemic deficiencies associated with PBCs, in relation to which ORIC has created

¹⁵⁴ See Mantziaris and Fingleton debating Review proposals in the *Indigenous Law Bulletin* (1997) 4(5) 10-14 and 4(6) 7-13, 4(6) 14-15 and 16.

¹⁵⁵ *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 321, referring to the *First report*, AGPS, 1973 and *Second report*, AGPS, 1974.

¹⁵⁶ <http://www.oric.gov.au/catsi-act/about-catsi-act>

¹⁵⁷ *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 320.

¹⁵⁸ See for example: Marina Nehme and John Juriansz, 'The Evolution of Indigenous Corporations: Where to Now?' (2012) 33 *Adelaide Law Review* 101; Marina Nehme, 'Indigenous Corporate Governance in Australia and Beyond' in David Frenkel, *Economy and Commercial Law – Selected Issues* (Athens Institute for Education and Research, 2013) 93-109; *Mantziaris and Martin's Native Title Corporations*; Christos Mantziaris, 'The Dual View Theory of the Corporation and the Aboriginal Corporation' (1999) 27 *Federal Law Review* 283.

¹⁵⁹ Marcia Langton and Odette Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the Resource Curse and the Mining Boom' (2008) 26(1) *Journal of Energy & Natural Resources Law* 31; Marcia Langton and Angus Frith, 'Legal Personality and Native Title Corporations: The Problem of Perpetual Succession' in Lisa Strelein (ed) *Dialogue about Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 14 May 2014) 170–82.

¹⁶⁰ *Levin's Observations*, 250; see, eg, the Gumala and Ngarluma case studies.

¹⁶¹ Marcia Langton and Odette Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the Resource Curse and the Mining Boom' (2008) 26(1) *Journal of Energy & Natural Resources Law* 31;

¹⁶² ORIC, 'Analysing Key Characteristics in Indigenous Corporate Failure' (Research Paper, March 2010); Fred Chaney and Paul Lennon, '2013 YLUA Review' (10 October 2013) <www.gumala.com.au/assets/final-report-ylua-review.pdf> 41; *GEAT v Deloitte, Touche Tohmatsu & Ors* [2016] NTSC 39.

¹⁶³ ORIC, 'Analysing Key Characteristics in Indigenous Corporate Failure' (Research Paper, March 2010) 47.

¹⁶⁴ *Ibid* 47, 60. According to ORIC, lack of diligence represents 42% of indigenous corporate failure: 46.

numerous publications.¹⁶⁵ It is important to acknowledge that some of this literature borders on deficit discourse, rather than a strengths-based perspective and so should be approached with that caveat.

PBCs have statutory functions relating to holding and/or managing native title rights and interests¹⁶⁶ and their activities and objects typically include:¹⁶⁷

- Management of native title rights and of matters resulting from those rights. This could include monitoring and implementation of land access agreements, as well as the more central role of exercising rights in relation to future acts under the NTA, such as the grant of tenements and permits.
- Linked to their statutory obligation to manage native title rights is the function of managing and distributing assets received as a result of acts that affect native title rights and interests or under agreements relating to land access. That is because PBCs hold money received by way of compensation or otherwise related to native title rights and interests on trust and must deal with it as directed by the native title holders.¹⁶⁸
- Land and environmental management activities.
- Cultural heritage management.
- Consultation with and advocacy activities on behalf of the native title claim group or native title holders.
- Economic development, including such diverse matters as tourism, mining services and civil contracting, agriculture and general business development. Some activities may be carried out under other heads identified above. For instance, the provision of ranger services or cultural awareness training on a commercial fee basis. Other activities are less directly linked to pursuit of another core purpose and instead focus on building native title group economic capacity or on generating alternative funding sources.

¹⁶⁵ See, for example: ORIC, 'A Guide to Writing Good Governance Rules for PBCs and RNTBCs' (May 2008); ORIC, 'Analysing Key Characteristics in Indigenous Corporate Failure' (Research Paper, March 2010); ORIC, 'Healthy Corporations Checklist' (Version 3, May 2013).

¹⁶⁶ See generally NTA ss 56, 57, 58; *Native Title (Prescribed Body Corporate) Regulations 1999* (Cth) rr 6, 7.

¹⁶⁷ The examples are drawn from (1) reports and articles on PBC/RNTBC activities; and (2) rule books for the WA, NSW, SA and Vic PBCs referred to in Murray, above n 190. As to (1), see, eg, Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations* (March 2014) <<http://www.deloitteaccesseconomics.com.au/uploads/File/DAE%20Review%20of%20Native%20Title%20Organisations%20-%20Final%20Report%20reissued.pdf>>; Raelene Webb, 'Governance Challenges in the Implementation of Mining Agreements' (Paper presented at the AMPLA Fortieth Annual Conference, Brisbane, 12-14 October 2016) 3-6; Ciaran O'Faircheallaigh, 'Registered Native Title Bodies Corporate and Mining Agreements: Capacities and Structures' in: Bauman, Strelein and Weir (eds), below n 236, 275-6. As to (2), see, eg, The Constitution of Ngarluma Aboriginal Corporation RNTBC r 3 (obtained from ORIC in May 2018: <<http://register.oric.gov.au/document.aspx?concernID=104511>>).

¹⁶⁸ See *Native Title (Prescribed Body Corporate) Regulations 1999* (Cth) rr 6, 7.

Some, but not all, PBCs also engage in the development and delivery of community welfare projects and services.¹⁶⁹

The National Native Title Tribunal commissioned major research into the NTA PBC regime at the turn of the century.¹⁷⁰ In particular, Mantziaris and Martin considered the institutional design of PBCs.¹⁷¹ Mantziaris and Martin looked at PBCs as 'native title institutions', being entities that serve as the focus for legal relations addressing the control and management of native title.¹⁷² Their approach identified three overarching organisational design requirements in addition to tax considerations.¹⁷³ First, the organisation must fit with the needs and circumstances of the relevant Indigenous community. Second, the organisation must possess the minimum legal facilities required for the organisation to exist under the Australian legal system and so act as an intercultural institution (ie 'legal adequacy'). Legal adequacy is unpacked to comprise: legal capacity of the entity to hold and manage property; the existence of a means by which legal authority (of the entity or a representative) is established; a method for identification of members of the Indigenous community affected by proposed dealings in native title; a method for identifying the nature and extent of the relevant native title rights and interests; clearly stated formal decision making procedures; the presence of dispute resolution mechanisms; a system of internal and external accountability; and a means by which liability for PBC decisions is allocated between members of the Indigenous community, board and the PBC itself, as well as between those entities and third parties. In relation to dispute resolution, a package of reforms to the native title system proposed by the Australian Government at the time of writing would, amongst other things, amend the CATSI Act to require RNTBC constitutions to include dispute resolution pathways for common law holders (who are non-members of the corporation).¹⁷⁴ The reforms will potentially reduce membership disputes too, by requiring all common law holders to be directly or indirectly represented in the membership and by making it harder for directors

¹⁶⁹ See, eg, Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations* (March 2014) 82.

¹⁷⁰ Each of the reports were Pre-CATSI Act, but are nonetheless useful in their statement of general principles.

¹⁷¹ *Mantziaris and Martin's Native Title Corporations*. Memmott and McDougall also undertook commissioned research into PBCs, but their focus was narrower, looking at the role of PBCs in protecting native title in Cape York, as a land and sea management function: Paul Memmott and Scott McDougall, *Holding Title and Managing Land in Cape York Indigenous Land Management and Native Title*, (National Native Title Tribunal, Perth, 2003). Their focus did not extensively reconsider Mantziaris and Martin's design principles. Note that for the PBCs considered by Mantziaris and Martin, the principal statute was the ACA Act, which was subsequently replaced by the CATSI Act.

¹⁷² *Mantziaris and Martin's Native Title Corporations* 258.

¹⁷³ Memmott and McDougall did not extensively or explicitly reconsider Mantziaris and Martin's design principles, but had regard to similar principles: Paul Memmott and Scott McDougall, *Holding Title and Managing Land in Cape York Indigenous Land Management and Native Title*, (National Native Title Tribunal, Perth, 2003) 79-90.

¹⁷⁴ Native Title Legislation Amendment Bill 2019 (Cth) sch 8 (the Bill lapsed with the proroguing of Parliament for the 2019 election); Attorney-General's Department (Cth), 'Exposure Draft Native Title Legislation Amendment Bill 2018 and Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018' (Public Consultation Paper, October 2018).

to arbitrarily refuse the membership application of a common law holder and harder for their membership to be cancelled.¹⁷⁵

Third, the organisation should be developed in accordance with broader organisational/institutional design principles drawn from the specific requirements of the NTA and general principles of organisational design. These being: the need for certainty in dealings relating to native title interests; the capacity to attract the allegiance of the Indigenous community represented by the PBC; sensitivity to the systems of traditional law and custom of the relevant Indigenous community; sensitivity of processes within the PBC to the motivational complexity of members of the Indigenous community;¹⁷⁶ the revisability and robustness of the structure; and the desirability of simplicity and efficiency.¹⁷⁷

Martin has subsequently argued that the design of Indigenous institutions should occur through a process of 'strategic engagement' by empowering Indigenous individuals to contribute in a considered and informed manner.¹⁷⁸ Surprisingly, given the extensive and thoughtful treatment of PBC design including resort to bodies of learning in anthropology, sociology and political science, there does not appear to be detailed subsequent treatment of the Mantziaris and Martin principles in the literature.

3.1.2 Trusts

The literature on trusts that receive, manage and distribute assets in relation to native title groups is sparse. Levin refers to a common structure he terms the 'two-trust' system, comprised of a discretionary trust and a charitable trust.¹⁷⁹ He has observed some problems associated with trusts in BMSs such as the failure to incorporate traditional decision making processes¹⁸⁰ and government paternalism.¹⁸¹ Levin lists common features of successful native title trusts, namely: distribution policies; the ability to make cash payments to native title holders; community programmes (as a means of pursuing purposes); business development initiatives; investment policies; custodian trustees; future funds; and 'sub-funds' – which support an omnibus approach under which a trust receives payments from multiple resource proponent or government parties.¹⁸² Levin

¹⁷⁵ Native Title Legislation Amendment Bill 2019 (Cth) sch 8; Explanatory Memorandum, Native Title Legislation Amendment Bill 2019 (Cth) 64-73.

¹⁷⁶ The insight being that members of Indigenous communities will potentially have a range of motives for acting. For instance, members may be motivated at different times and to different degrees to act in self-regarding or other-regarding ways. The structure of the organisation and its processes must thus seek to accommodate the range of motives.

¹⁷⁷ *Mantziaris and Martin's Native Title Corporations* 322-328; Christos Mantziaris and David Martin, *Guide to the Design of Native Title Corporations* (Commonwealth of Australia, National Native Title Tribunal, September 1999) 47.

¹⁷⁸ David Martin, 'Rethinking the Design of Indigenous Organisations: The Need for Strategic Engagement' (Discussion Paper No 248, CAEPR, 2003) 8.

¹⁷⁹ *Levin's Observations*, 251-253.

¹⁸⁰ *Ibid* 248,

¹⁸¹ *Ibid* 246.

¹⁸² *Ibid* 253-256.

also notes the respective advantages and disadvantages of professional trustees and traditional owner trustees.¹⁸³

More generally, the literature notes the widespread use of charitable trusts, which support the pursuit of purposes and bring tax benefits and a level of durability, but that also have disadvantages. For instance, charitable trusts are potentially less flexible than private trusts, are subject to greater regulation and have various limitations, such as greater difficulty in supporting economic development. Those sources include the Heferen Report,¹⁸⁴ Treasury (Cth) Consultation Paper (2010),¹⁸⁵ Stewart,¹⁸⁶ Murray and Wright,¹⁸⁷ and Strelein.¹⁸⁸ However, Martin has suggested that charitable structures do have some flexibility in their size and operational structure, accommodating social and cultural factors.¹⁸⁹ In addition, Murray has indicated that there may still be a relatively wide scope of purposes (including economic development purposes) that may be pursued by a charitable trust intended to benefit Indigenous people.¹⁹⁰ The issue of pursuing economic development through a BMS is elaborated in Part 4.12.

3.1.3 Land Councils

Land councils are land holding and governance structures established pursuant to the Aboriginal land rights regimes established in the Northern Territory,¹⁹¹ New South Wales¹⁹² and Tasmania.¹⁹³

In the Northern Territory there is a long history of royalty payments to Indigenous communities, relative to the rest of Australia. Royalties were already being paid when the Aboriginal Land Rights Commission (whose work ultimately led to the enactment of the ALRA) was established in that jurisdiction.¹⁹⁴ The ALRA requires that mining-affected Indigenous landowners receive a portion of the mining royalties that would otherwise be

¹⁸³ Ibid 249-51.

¹⁸⁴ Rob Heferen et al, 'Taxation of Native Title and Traditional Owner Benefits and Governance Working Group: Report to Government' (Report, 1 July 2013) 15.

¹⁸⁵ Treasury (Cth), 'Native Title, Indigenous Economic Development and Tax' (Consultation Paper, October 2010) 6-7.

¹⁸⁶ Miranda Stewart, 'The Income Taxation of Native Title Agreements' (2011) 39(3) *Federal Law Review* 361, 391-392.

¹⁸⁷ *Murray & Wright*, 106.

¹⁸⁸ Lisa Strelein, 'Taxation of Native Title Agreements' (Native Title Research Monograph No 1/2008, AIATSIS, May 2008) 33-34.

¹⁸⁹ Fiona Martin, 'Aboriginal and Torres Strait Islander Peoples' Use of Charities as a Structure to Receive Mining Payments' (2013) 22(1) *Griffith Law Review* 206.

¹⁹⁰ Ian Murray, 'Public Benevolent Institutions for Native Title Groups: an Underappreciated Model?' (2015) 43 *Federal Law Review* 424 (public benevolent institutions are typically regarded as a sub-set of charities).

¹⁹¹ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

¹⁹² *Aboriginal Land Rights Act 1983* (NSW).

¹⁹³ *Aboriginal Lands Act 1995* (Tas).

¹⁹⁴ Jon Altman, *Aborigines and Mining Royalties in the Northern Territory* (Australian Institute of Aboriginal Studies, 1983) v.

paid to the government, as well as any private royalty they may negotiate.¹⁹⁵ The ALRA does not specify a general purpose, other than that:¹⁹⁶

royalties are 'for the benefit of Aboriginals'. The legislation hints at what the terms of reference given to [the Aboriginal Land Rights Commission] state more explicitly: that these moneys are for the benefit of groups and communities, rather than individuals.

In this context, land councils in the Northern Territory are funded from consolidated revenue, in an amount based on mining royalties derived from Aboriginal land.¹⁹⁷ Land councils also administer and distribute additional amounts negotiated for the use of Aboriginal land, such as the private royalties mentioned above or rent payments from resource companies or pastoralists.¹⁹⁸ This provides an additional reason to consider whether the land council experience can inform the design of BMSs. In this regard, one Northern Territory land council, the Central Land Council, has sought to engage with the complexities of administering the royalties derived from mining on Aboriginal land by instituting a 'community development approach' to land use agreement incomes'.¹⁹⁹ The CLC established a so-called Community Development Unit in 2005 to implement the community development program which involved a variety of measures: development of an organisational community development framework, implementing specific community development processes with interested Indigenous communities, and promotion of the CLC's community development approach to other Indigenous communities, industry and government.²⁰⁰ Examples of specific initiatives include participatory planning sessions with Indigenous communities to identify priority aspirations, education and training initiatives, and medical initiatives.²⁰¹ These initiatives are important as successive reviews of Northern Territory land councils have emphasised the need for devolution of some autonomy to the local community level.²⁰²

Specific statements of the goals and methods for the use and management of royalties accruing to Northern Territory Indigenous communities are nonetheless hard to find, as distinct from analyses of the ability of Northern Territory Indigenous communities (or their representatives) to secure royalties.²⁰³ The literature appears to confirm that this problem

¹⁹⁵ Ciaran O'Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (Taylor and Francis, 2015) 52.

¹⁹⁶ Jon Altman, *Aborigines and Mining Royalties in the Northern Territory* (Australian Institute of Aboriginal Studies, 1983) v.

¹⁹⁷ Nettheim, *Myers and Craig's Indigenous Peoples and Governance Structures* 243.

¹⁹⁸ See, eg, Jon Altman, *Aborigines and Mining Royalties in the Northern Territory* (Australian Institute of Aboriginal Studies, 1983) 142.

¹⁹⁹ Danielle Campbell and Janet Hunt, 'Making Use of Payments: A Community Development Model', in Brennan et al (eds) *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 231.

²⁰⁰ Ibid 235.

²⁰¹ Ibid 235-6.

²⁰² Cf Nettheim, *Myers and Craig's Indigenous Peoples and Governance Structures* 246-8. See also Revised Explanatory Memorandum to the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006, [3].

²⁰³ See, eg, Ciaran O'Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (Taylor and Francis, 2015) 94 for a discussion of the characteristics of the Northern Land Council which position it well to secure 'strong' agreements.

is widespread. Altman states that an ‘economic takeoff by the [I]ndigenous sector’ is the goal of royalties,²⁰⁴ but does not specify what this might mean in practice. A more specific description of goals and purposes arises in an early article by Cullen, which states that land councils seek to use royalties and other revenues to maximise long term benefits.²⁰⁵ The Central Land Council, at the time of Cullen’s analysis, accordingly placed the largest share of dispersed funds into a managed investment fund, with smaller amounts allocated to community projects and a land fund.

Contemporary land councils also have strategic plans, such as the following statement from the Northern Land Council, which has some responsibility for royalty payments:²⁰⁶

The Northern Land Council assists Aboriginal people to:

- Obtain secure recognition of their interests in land and sea country
- Negotiate with third parties about the use of land and sea country
- Conserve, manage and develop their land and sea resources
- Resolve disputes between Aboriginal people about land
- Protect sacred sites

We also:

- Consult with and represent the views of the Aboriginal people within our region
- Advocate on behalf of Aboriginal people in relation to laws, policies and procedures that affect them
- Develop innovative land and sea management, employment, training and other programs that enhance Aboriginal self-determination and cultural survival.

While this is a partial exposition of goals, it explains neither the means that will be used to achieve them nor the measures of success that will be used to evaluate them. This may partially explain why, despite efforts to better coordinate with local Indigenous communities and their corporations, the relationship between land councils and community corporations can be fraught.²⁰⁷

Respective reviews of the ALRA identified issues with representation²⁰⁸ (namely, that representation was insufficiently based on traditional ‘estate’ boundaries) and autonomy²⁰⁹ (leading to criticism by one commentator that the reviewer in this case sought to reduce Indigenous autonomy),²¹⁰ among other things. The significance of autonomy is noted even in early literature on the Northern Territory. Altman noted in

²⁰⁴ Jon Altman, ‘Land Rights and Aboriginal Economic Development: Lessons from the Northern Territory’ (1995) 2(3) *Agenda: A Journal of Policy Analysis and Reform* 291, 298.

²⁰⁵ Richard Cullen, ‘Mineral Revenues and Australian Aboriginal Self Determination’ (1991) 25 *University of British Columbia Law Review* 153, 166.

²⁰⁶ Northern Land Council, ‘Strategic Plan 2016-2020’ (2016).

²⁰⁷ See, eg, Rachael Hocking, ‘Kenbi Land Claim Marred by Protests and Claims of “Fraudulent Process”’, *NITV* (online) 22 June 2016; *Rirratjingu Aboriginal Corporation v Northern Land Council* [2016] FCA 1017 (24 August 2016); *Rirratjingu Aboriginal Corporation v Northern Land Council* [2015] FCA 36 (4 February 2015).

²⁰⁸ *Nettheim, Myers and Craig’s Indigenous Peoples and Governance Structures* 346.

²⁰⁹ *Ibid* 347.

²¹⁰ M Mowbray, ‘Redefining land rights: The review of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)’ (1999) 4(18) *Indigenous Law Bulletin* 9.

1983 that there is a need to grant decision making autonomy to Indigenous communities, not just because it is fair, or even because it is their money, but because of the 'crucially important role played by the process of negotiation.'²¹¹ Participating in negotiations, according to Altman, gives Indigenous communities practical insight into the broader economic and societal context.

This 'self-awareness' generated some success in an early example of a Northern Territory trust, the Groote Eylandt Aboriginal Trust. Altman observed that even before the enactment of the ALRA, GEAT 'demonstrated a degree of conservatism and future orientation in its disbursement of royalties.' Altman attributed this orientation to several factors, including the presence of government officials on the GEAT Committee, the constitution of the Trust, and the Groote Eylandters' sensitivity to the need for intergenerational equity in the context of mining a finite resource. Over time Groote Eylandters assumed more control over the management of GEAT and pursued means to accumulate wealth, while at the same time exercising a degree of autonomy in making decisions about spending.²¹²

At the time Altman wrote this in 1983, GEAT was 13 years old and thus much more mature than most BMSs. However, autonomy over spending has come with some risks as demonstrated by the GEAT case example of fund losses due to inadequate expenditure acquittals, set out in Chapter 4.

In New South Wales, the *Aboriginal Land Rights Act 1983* (NSW) provides for different tiers of land councils: local Aboriginal land councils, regional Aboriginal land councils and a state-wide Aboriginal land council. LALCs not only acquire and manage land, but also provide community services, especially housing. They provide a community forum as well as employment opportunities, training programs and, in many cases, conduct businesses.²¹³ A NSW ICAC inquiry into Indigenous land councils in NSW resulted in a report which flagged a risk of corruption due to a number of material 'governance challenges faced by LALCs in NSW'.²¹⁴ This reflected an earlier ICAC report in which NSW ICAC noted that, from a structural context, to address corruption there needed to be:²¹⁵

- 'Increased accountability' through 'appropriate community decision making processes'. With accountability involving internal and external dimensions.
- 'Improved decision making' through 'meaningful political participation', 'transparent decision making by LALCs', 'proper corporate governance by the [state-wide council]' and 'effective responses to misconduct and disputes'.

²¹¹ Jon Altman, *Aborigines and Mining Royalties in the Northern Territory* (Australian Institute of Aboriginal Studies, 1983) vii.

²¹² *Ibid* 113.

²¹³ Independent Commission Against Corruption (NSW), 'Governance and Regulation in the NSW Aboriginal Land Council Network' (Report, May 2017) 8-9.

²¹⁴ *Ibid* 5.

²¹⁵ Independent Commission Against Corruption (NSW), 'Report on Investigation into Aboriginal Land Councils in New South Wales' (Corruption Prevention and Research Volume, 1998) 6-7.

- ‘Proper management of resources’ through ‘best practice management of LALCs’, ‘increased support for LALCs’, ‘clearer accountability relationships between LALCs and the [state-wide council]’.
- ‘Ongoing strengthening of the Aboriginal land council system’ through ‘training for members, office-bearers and staff in their roles, responsibilities, rights and relationships’ and ‘ongoing ICAC support for the reform process’

To respond to a range of these matters, a corporate governance model was adopted in 2006 based on elected board representatives for a community and the appointment of a CEO to undertake day-to-day management, along with the requirement for development of Community Land and Business Plans (which establish short and long-term LALC goals and activities).²¹⁶ The plans were intended to ensure broad community participation in setting LALC goals and also accountability of elected board members to the community as they could be held accountable against the plan.²¹⁷ Subsequent amendments were also made to streamline regulation, improve reporting and introduce better processes for wrongdoing such as flexible intervention mechanisms.²¹⁸ Despite these changes, the 2017 ICAC report still found that:²¹⁹

- LALC member participation rates in meetings were very low, in many cases below 25%.
- Community Land and Business Plans were ‘not always fulfilling their potential as an avenue for member participation and the monitoring of the decisions of the leadership’. This was due to a range of reasons, including preparation of plans by consultants who were disengaged from the relevant community, the setting of goals without an understanding of business and social impact principles and a lack of feedback to community members on progress against plans.²²⁰
- While board members might understand their role and duties, institutional mechanisms to follow duties could be improved, most especially in relation to conflicts of interest.²²¹ For instance, greater board diversity and transparency in decision making.²²²
- Capacity building needs extended beyond governance matters to business activities.²²³

²¹⁶ Explanatory Note, Aboriginal Land Rights Amendment Bill 2006 (NSW); *Aboriginal Land Rights Act 1983* (NSW) pt 5 div 6.

²¹⁷ Independent Commission Against Corruption (NSW), ‘Governance and Regulation in the NSW Aboriginal Land Council Network’ (Report, May 2017) 17.

²¹⁸ See, eg, Department of Aboriginal Affairs (NSW), ‘Statutory Review of the *Aboriginal Land Rights Act 1983*’ (Report, November 2017).

²¹⁹ Independent Commission Against Corruption (NSW), ‘Governance and Regulation in the NSW Aboriginal Land Council Network’ (Report, May 2017) 5.

²²⁰ *Ibid* 17-18.

²²¹ *Ibid* 5-6.

²²² *Ibid* 24-5.

²²³ *Ibid* 6.

- Board members were often elected due to ‘popularity’ rather than through a ‘merits-based appointment process’, impeding their ability to hold the CEO to account.²²⁴

As to best practice, the earlier NSW ICAC Report recommended that this arose from effective corporate governance and that 5 principles of effective corporate governance, as ‘adapted to the situation of local Aboriginal land councils’, are:²²⁵

- ‘governance should be clearly defined and understood’;
- ‘the governance model should be simple, clear and consistent’;
- ‘the roles, powers, responsibilities and accountabilities of elected officials should be spelt out in the legislation’;
- ‘appointment of officers should be made according to objective selection criteria which are clearly stated beforehand’; and
- ‘the separation of the roles and functions of elected officials and appointed staff is of particular relevance in Aboriginal land councils. The small size and close knit nature of many Aboriginal communities makes them vulnerable to overlapping responsibilities and conflicting priorities’.

The 2017 ICAC report picks up on these themes by recommending that LALCs should:²²⁶

- ‘consider motivators for stronger member engagement’ such as demonstrating their ability to achieve goals, ‘fostering community pride’ and ‘promoting informal and formal opportunities for communication’.
- ‘strengthen member ownership of the [Community Land and Business Plan]’, for example by ensuring that it is developed through a participatory process, ‘contains clearly stated and measurable goals’ and is implemented in such a way as to provide regular information to members about its implementation.
- ‘strengthen member ownership of their governance rules’, for instance by developing rules and codes of conduct adapted to their specific circumstances, making ‘existing rules and codes of conduct more accessible to members’.
- ‘adopt local strategies that will enhance their ability to manage conflicts of interest’, such as by enhancing board diversity, ‘adopting local processes to improve transparency in decision making’, adopting mechanisms to remind board members of conflicts and ‘delegating certain board decisions to an impartial decision maker’.
- ‘enhance the confidence and capability of board members’, for instance by using tools such as risk assessment processes to monitor the CEO, ensuring that the CEO presents information in a way that is readily understood by board members, ‘using external providers and volunteers to supplement board members’ skills’.

²²⁴ Ibid 6.

²²⁵ Independent Commission Against Corruption (NSW), ‘Report on Investigation into Aboriginal Land Councils in New South Wales’ (Corruption Prevention and Research Volume, 1998) 14.

²²⁶ Independent Commission Against Corruption (NSW), ‘Governance and Regulation in the NSW Aboriginal Land Council Network’ (Report, May 2017) 6-7.

making skills-based appointments to the board, using sub-committees to build expertise and undertaking succession planning.

While couched in the context of corruption risks, the matters set out above relate generally to the operation of entities managing assets and providing services and assets to Indigenous communities. This also reflects the 2017 Statutory Review's identification of amendments to the *Aboriginal Land Rights Act 1983* (NSW) between 2014 and 2017 as focussing the Act to a greater extent on councils' roles in 'agreement making, economic enterprise and self-determination'.²²⁷

3.2 Impact of agreement making on structure

Agreement making has received significant industry, academic and government attention.²²⁸ The literature underscores the value in cooperation and in seeking mutually beneficial outcomes. Common themes include sustainability, participation and engagement, as well as the role of native title representative bodies acting on behalf of native title groups in the agreement making process.

A subset of that literature identifies that there is not a level playing field between native title parties and development proponents,²²⁹ and that native title parties are therefore at a relative disadvantage in negotiations.²³⁰ This imbalance is due in part to historic and ongoing impacts of colonialism,²³¹ as well as resource constraints on native title

²²⁷ Department of Aboriginal Affairs (NSW), 'Statutory Review of the *Aboriginal Land Rights Act 1983*' (Report, November 2017) 5.

²²⁸ See, eg, Ciaran O'Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (Taylor and Francis, 2015); Limerick et al, *Agreement-making with Indigenous Groups: Oil and Gas Development in Australia* (Centre for Social Responsibility in Mining, University of Queensland, 2012); Marcia Langton, 'From Conflict to Cooperation' (Minerals Council of Australia, 2015); Rio Tinto, 'Why Agreements Matter A Resource Guide for Integrating Agreements into Communities and Social Performance work at Rio Tinto' (Resource Guide, March 2016) <http://www.riotinto.com/documents/Rio_Tinto_Why_Agreements_Matter.pdf>; Marcia Langton and Odette Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the Resource Curse and the Mining Boom' (2008) 26(1) *Journal of Energy & Natural Resources Law* 31; *Altman and Martin's Power, Culture, Economy*; Ben Wyatt, Aboriginal Affairs Minister, 'All Six South West Native Title Settlement Agreements Registered' (Media Statement, 17 October 2018).

²²⁹ Ciaran O'Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (Taylor and Francis, 2015) 38; Deirdre Howard-Wagner, 'Scrutinising ILUAs in the Context of Agreement Making as a Panacea for Poverty and Welfare Dependency in Indigenous Communities' (2010) 14(2) *Australian Indigenous Law Review* 100, 112; Jon Altman, 'Native Title Act 1993: Implementation Issues for Resource Developers' (Discussion Paper Number 88, CAEPR, 1996) 13

²³⁰ Deirdre Howard-Wagner, 'Scrutinising ILUAs in the Context of Agreement Making as a Panacea for Poverty and Welfare Dependency in Indigenous Communities' (2010) 14(2) *Australian Indigenous Law Review* 100, 109; *Altman and Martin's Power, Culture, Economy*; Ken Caine and Naomi Krogman, 'Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada's North' (2010) 23(1) *Organization and Environment* 76-98; Jon Altman, 'Native Title Act 1993: Implementation Issues for Resource Developers' (Discussion Paper Number 88, CAEPR, 1996); Larissa Behrendt, *Aboriginal Dispute Resolution: A Step Towards Self-Determination and Community Autonomy* (The Federation Press, Sydney, 1995) 58-9.

²³¹ Ciaran O'Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (Taylor and Francis, 2015) 37-40.

parties,²³² and is often entrenched.²³³ It can impact on the design of BMSs to the extent that BMS features are specified in the relevant land access agreement. For instance, resource proponents may insist on the inclusion of a charitable trust in the BMS because they perceive charitable trust governance structures to be more rigorous or because the section of the public that must be benefited would typically be broader than the native title holders, resulting in a wider social licence to operate.²³⁴ As examined in Parts 4.4 and 4.11, it can also potentially result in the imposition of obligations and the provision of BMS options, for which an Indigenous community does not hold the necessary capacity until some time after the creation of the BMS.²³⁵

3.3 Impact of law and culture on structure

Meaningful analysis of BMS legal structures, and of the agreement making processes giving rise to BMS assets, necessitates consideration of Indigenous law and culture. In that regard, Bauman provides an anthropological examination of the relationship between Indigenous communities, government and resource proponents.²³⁶ Smith has comprehensively analysed the relations between Indigenous communities and the state.²³⁷ Bauman and Williams also investigate Indigenous decision making processes, and Indigenous consensus building and dispute management processes.²³⁸ Further aspects of law and culture are canvassed in Part 3.4 and in Chapter 5. This research is thus relevant to the fact that Indigenous organisations such as BMSs operate in a plural legal and intercultural space.

3.4 Operation and governance of Indigenous organisations

There has not been much work on the design of Indigenous organisations in addition to that of Mantziaris and Martin in the context of PBCs.²³⁹ However, in 2002, the National Native Title Tribunal supported a research project led by Nettheim, Meyers and Craig,

²³² David Martin, 'The governance of agreements between Aboriginal people and resource developers: Principles for sustainability' in *Altman and Martin's Power, Culture, Economy* 100, 109, 128-129.

²³³ Jon Altman, 'Contestations over development' in *Altman and Martin's Power, Culture, Economy* 5.

²³⁴ *Murray & Wright*, 106. Indeed, Levin notes that resource companies tend to require that a portion of payments be made to a charitable trust: *Levin's Observations*, 245.

²³⁵ Cf Ciaran O'Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (Taylor and Francis, 2015) 38.

²³⁶ Toni Bauman, 'Whose Benefits Whose Rights Negotiating Rights And Interests Amongst Native Title Parties' (Vol 3 Issues Paper No 2, 2005). See also, *Bauman, Strelein and Weir's Living with Native Title*; Toni Bauman and Rhian Williams, 'The Business of Process: Research Issues in Managing Indigenous Decision-Making and Disputes in Land' (Report, Indigenous Facilitation and Mediation Project, AIATSIS, 2004).

²³⁷ Diane Smith, *Cultures of Governance and the Governance of Culture: Indigenous Australians and the State* (PhD Thesis, ANU, 2011).

²³⁸ Toni Bauman and Rhian Williams, 'The Business of Process: Research Issues in Managing Indigenous Decision-Making and Disputes in Land' (Report, Indigenous Facilitation and Mediation Project, AIATSIS, 2004).

²³⁹ Note that Frith has examined PBC design as part of his PhD research: Angus Frith, *Getting it Right for the Future: Aboriginal Law, Australian Law and Native Title Corporations* (PhD Thesis, University of Melbourne, 2013).

which examined a range of governance structures for Indigenous peoples, both in Australia and overseas.²⁴⁰ That project identified a number of pertinent examples of governance structures and emphasised two key points. First, that the structure 'be appropriate to the needs of Indigenous peoples as well as to the requirements of non-Indigenous interests'.²⁴¹ Second, that to be appropriate in this way, Indigenous peoples must participate in the choice and design of the relevant structure and must participate in the on-going operation of the structure, for instance by means of internal accountability.²⁴² This second point is broader than the 'allegiance' to which Mantziaris and Martin refer and we consider this emphasis on participation and engagement to be a desire for autonomy, being 'self-determining exercises of [a person's] will' which are usually in the form of choices.²⁴³

The design of effective Indigenous organisations has also been considered by McCrae, Nettheim and Beacroft.²⁴⁴ McCrae, Nettheim and Beacroft observe that what happens for an Indigenous community once they prove their claim has been treated almost as an 'afterthought'.²⁴⁵ However, they note that, 'tax-effective arrangements and secure inter-generational governance structures (whether they be trusts, corporations or other vehicles) are increasingly essential'.²⁴⁶ McCrae, Nettheim and Beacroft refer to the importance of incorporating traditional law and custom in governance, provided this is balanced against the fact that, since corporations are a construct of Australian law, there must be minimum standards of governance and public accountability.²⁴⁷ In relation to institutional design, McCrae, Nettheim and Beacroft refer to the Organising for Success policy report of the Australian Collaboration and AIATSIS.²⁴⁸ The Organising for Success report suggests that successful Indigenous organisations exhibit certain features, which comprise a mix of design features and of operational matters (such as strong leadership). Design features include:²⁴⁹

- the need for good corporate governance which is 'appropriate and tailored to the specifics of the operating circumstances';
- processes for community engagement and internal and external accountability (both financial and non-financial);
- certain purpose-focussed features like articulation of purpose, procedures to support efficient and responsive service delivery, processes for strategic

²⁴⁰ Nettheim, Myers and Craig's *Indigenous Peoples and Governance Structures*.

²⁴¹ Ibid 482, 484. This is inherent in the first three of Mantziaris and Martin's four requirements of design.

²⁴² Ibid 483-4. See also McCrae, Nettheim & Beacroft's *Indigenous Legal Issues* 179, citing Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007* (Human Rights and Equal Opportunity Commission, 2008) 189-92 (though the point is extrapolated, fairly widely, from a review of family violence programmes).

²⁴³ See, eg, John Christman, 'Autonomy in Moral and Political Philosophy', in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2015 Edition) <<https://plato.stanford.edu/archives/spr2015/entries/autonomy-moral/>>.

²⁴⁴ McCrae, Nettheim & Beacroft's *Indigenous Legal Issues*.

²⁴⁵ Ibid 376.

²⁴⁶ Ibid 378.

²⁴⁷ Ibid 175.

²⁴⁸ Australian Collaboration and AIATSIS, 'Organising for Success: Successful Strategies in Indigenous Organisations' (Policy Report, 2007).

²⁴⁹ Ibid 12-24.

planning, and the articulation of 'core business' in pursuit of the organisation's purposes;

- the creation of a positive environment (including capacity building) for staff; flexibility to respond to change within bounds;
- the need for the organisation to be responsive to Indigenous culture and to broader Australian culture and law; and
- the relevance of positive external circumstances such as local infrastructure.

More narrowly, in the context of investment, Indigenous Business Australia states three primary Indigenous Investment Principles. First, 'community circumstances and purpose' takes stock of land, culture, heritage, traditional decision making processes, the economic circumstances, community needs, the nature and source of funds and, finally, purpose.²⁵⁰ Second, 'mandate, governance and legal form' refers to the creation of a framework – a mandate – to measure and prioritise purposes (including non-financial purposes), a clear enunciation of roles and responsibilities, and a regular review of the mandate.²⁵¹ Third, 'investment and risk management framework' covers spending rules, financial return, investment policies, performance benchmarks and regular reviews.²⁵² Indigenous Business Australia refers to five guiding objectives which informed those principles, which relevantly include capacity building, economic independence, cultural heritage and risk management.²⁵³

In a broader vein, the notion of Indigenous governance has also received attention, including as a result of the work of AIATSIS and the Australian Indigenous Governance Institute in mapping current and future research into Indigenous governance.²⁵⁴ CAEPR at the ANU and Reconciliation Australia have also undertaken an 'Indigenous Community Governance Project'.²⁵⁵ 'Governance' of course, can have a range of meanings and researchers under these projects and more broadly have interpreted the term from different perspectives. However, there is some commonality. In essence, 'governance', when applied to an organisation or a community describes the rules, processes, relationships and systems by which authority is exercised and controlled so that collective actions and decisions can be taken and includes the systems of accountability for those in control.²⁵⁶ As this definition suggests, most writers also agree that governance extends beyond formal legal structures to relationships and social

²⁵⁰ Indigenous Business Australia, *Indigenous Investment Principles* (Brochure, 2015) available at <http://www.iba.gov.au/wp-content/uploads/IB7158_IPP-brochure_FA4.pdf> 12-15.

²⁵¹ Ibid 16-19.

²⁵² Ibid 20-27.

²⁵³ Ibid 6.

²⁵⁴ AIATSIS, *Indigenous Governance Building: Mapping Current and Future Research and Practical Resource Needs* (accessed 7 May 2017).

²⁵⁵ For an overview of the project and its inception, see, eg, Mick Dodson, 'Foreword' in *Hunt et al's Contested Governance* xvii.

²⁵⁶ Cf John Farrar, *Corporate Governance: Theories, Principles and Practice* (Oxford University Press, 3rd ed, 2008) 3-4 (corporate governance context); Diane Smith and Janet Hunt, 'Understanding Indigenous Australian Governance – Research, Theory and Representations' in *Hunt et al's Contested Governance* 1, 9-10; Mick Dodson and Dianne Smith, 'Governance for Sustainable Development: Strategic Issues and Principles for Indigenous Australian Communities' (Discussion Paper No 250, CAEPR, Australian National University, 2003) 1.

norms and,²⁵⁷ in the Indigenous governance space, a number of writers have emphasised its intercultural character.²⁵⁸ Governance rules, processes, relationships and systems can thus be conceived as institutions from a neo-institutional perspective and thus governance design is highly relevant to the design of BMSs since such governance rules and systems form part of BMSs or the context within which BMSs operate.

Using the Harvard Project on Indian Economic Development as a starting point (Part 3.5.2), Dodson and Smith, for instance, have explored what constitutes 'good governance' for Indigenous communities.²⁵⁹ They define 'governance' as the processes, structures and institutions through which a group, community or society makes decisions, distributes and exercises authority and power, determines strategic goals, organises corporate, group and individual behaviour, develops rules and assigns responsibility.²⁶⁰ From this broad definition, it is apparent their work is not confined to a particular organisation, or set of organisations (as in a BMS), but examines societal action in the local community far more generally, including self-government.

As noted above, this analysis of governance would cover rules that form part of a BMS, but also the broader institutional setting in which that BMS is placed. We thus explore several of the key insights of this broader Indigenous governance research below, but with the caution that a BMS does not and does not need to contain all of those rules. Instead – and consistently with the comments of Martin and Sullivan in relation to Indigenous organisations and governance more broadly – a BMS needs to contain some of the rules and should be responsive to the remaining governance rules that exist outside of the BMS.²⁶¹ This permits a more nuanced approach to the realms in which, and extent to which, traditional cultural practices are incorporated, so supporting the ability of BMSs to act as intercultural institutions. For instance, there may be greater ability for traditional laws and customs to play a role in relation to consultation, reporting and communication processes about asset and service delivery than in formal organisational decision making procedures and board composition,²⁶² as there may be less need for an authoritative declaration of laws and customs to validate such

²⁵⁷ Cf John Farrar, *Corporate Governance: Theories, Principles and Practice* (Oxford University Press, 3rd ed, 2008) 3-4; Diane Smith and Janet Hunt, 'Understanding Indigenous Australian Governance – Research, Theory and Representations' in *Hunt et al's Contested Governance* 1, 9-10.

²⁵⁸ Diane Smith and Janet Hunt, 'Understanding Indigenous Australian Governance – Research, Theory and Representations' in *Hunt et al's Contested Governance* 1, 3-4: 'we must study Indigenous governance as relationships between and among Australian governments and Indigenous communities, and as contestation and negotiation over the appropriateness and application of policy, institutional and funding frameworks within Indigenous affairs'.

²⁵⁹ Mick Dodson and Dianne Smith, 'Governance for Sustainable Development: Strategic Issues and Principles for Indigenous Australian Communities' (Discussion Paper No 250, CAEPR, Australian National University, 2003).

²⁶⁰ *Ibid* 1.

²⁶¹ Cf David Martin, 'The Governance of Agreements between Aboriginal People and Resource Developers: Principles for Sustainability' in *Altman and Martin's Power, Culture, Economy* 99, 117; Patrick Sullivan, 'Indigenous Governance: The Harvard Project, Australian Aboriginal Organisations and Cultural Subsidiarity' (Working Paper No. 4, Desert Knowledge Cooperative Research Centre, Alice Springs, 2007) 2.

²⁶² David Martin, 'The Governance of Agreements between Aboriginal People and Resource Developers: Principles for Sustainability' in *Altman and Martin's Power, Culture, Economy* 99, 122.

consultative processes. It may also better accommodate change in the political processes of an Indigenous community over time (rather than juridifying them within the BMS).²⁶³

Further, before the Harvard Project principles can be applied, there must be some recognition that there is a limit to the extent that traditional culture should be incorporated into a BMS (known as 'cultural match'). This is because there may be no process for obtaining an authoritative declaration of the cultural decision making process (although specifying decision making processes in the BMS constituent documents is possible to an extent – subject to the need to accommodate changes in law and custom) and also because BMSs are meant to be intercultural institutions that must also incorporate elements of liberal philosophy underlying Australian society and government and reflected in Australian law.²⁶⁴

Returning to Dodson and Smith's discussion of good governance, given the differing circumstances of groups, they observe that there is no single model or checklist approach that is appropriate.²⁶⁵ Accordingly, they propose a set of core ingredients and principles to consider when building effective governance.²⁶⁶ First, there should be stable and broadly representative organisational structures. Where governing structures regularly change, ineffectiveness and conflict are increased. Second, there should be capable and effective institutions, including future-oriented planning, problem solving, revision of objectives and structures and taking action. Third, there should be sound corporate governance in its ordinary sense. Fourth, regard must be had to the limitation and separation of powers. That means preventing those who exercise legitimate powers from using that power for personal gain. Practically, decision makers such as board members should have a separation of powers from, for example, managers and staff. Policies should clearly limit and separate powers of decision makers.

Fifth, there must be fair and reliable dispute resolution and appeal processes to address conflicts of interest and corruption and provide safeguards against unfair dealings. Practically, communities may wish to establish an internal process of dispute resolution such as a committee of Elders. Alternatively, or additionally, there may be external dispute resolution mechanisms like mediators or independent arbitrators.²⁶⁷ Sixth, there should be effective financial management and administrative systems. That speaks to

²⁶³ Cf Langton and Frith who have identified the risk to PBCs of inevitable changes in traditional law and custom: Marcia Langton and Angus Frith, 'Legal Personality and Native Title Corporations: The Problem of Perpetual Succession' in Lisa Strelein (ed) *Dialogue about Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 175-6, 178-9 (discussing PBCs as sites of legal pluralism).

²⁶⁴ As to the potential for illiberal processes permitted by cultural match, see, eg, Patrick Sullivan, 'Indigenous Governance: The Harvard Project, Australian Aboriginal Organisations and Cultural Subsidiarity' (Working Paper No. 4, Desert Knowledge Cooperative Research Centre, Alice Springs, 2007) 11-13; Australian Collaboration and AIATSIS, above n 248, 8-9.

²⁶⁵ Mick Dodson and Diane Smith, 'Governance for sustainable development: Strategic issues and principles for Indigenous Australian communities' (Discussion Paper 250, 2003, ANU) 13.

²⁶⁶ Ibid 12-19.

²⁶⁷ For support that these types of internal and external accountability mechanisms are used in Indigenous organisations, such as PBCs, see, eg, Ashleigh Blechynden, 'Dispute Management: Constitutions of Prescribed Bodies Corporate' (AIATSIS Native Title Policy Paper 3, July 2017).

the resourcing dilemma and may be resolved by an improvement in capacity. Seventh, there must be simple and locally relevant information management systems in order to make informed decisions and interpret statistical information. Eighth, effective development policies and realistic strategies are important. That means members determining a desirable economic development system and developing strategies to achieve it. Ninth, there should be a cultural fit, to attract legitimacy and mandate.²⁶⁸ Cultural match does not mean simply imposing particular views of traditional Indigenous structures of authority and expecting them to be equipped to traverse complex economic, financial and legal issues. Rather, it is more about developing an adapted and realistic convergence of key cultural standards with those required by commerce and law.

There is significant overlap between these ingredients and the Mantziaris and Martin PBC principles, with many of the corporate governance or broader governance matters relating to decision making, dispute resolution and accountability covered under the principle of 'legal adequacy'²⁶⁹ and other matters captured by the principles of 'allegiance'²⁷⁰ and 'sensitivity to motivational complexity'²⁷¹. Organisational planning, information management and development strategies (Dodson and Smith's ingredients two, seven and eight) are not addressed well by the Mantziaris and Martin principles, although they are captured, particularly, by our principle of **Capacity to pursue purpose**, with information flows also receiving more emphasis under **Allegiance** and **Autonomy**.

In terms of governance of relationships between Indigenous communities and related Indigenous organisations, Martin and Sullivan have referred to the need to develop tailored and flexible information and consent mechanisms between the two that are in addition to reliance on representatives on boards or committees and to annual general meetings of the relevant community.²⁷² That is because the potential for 'localism' is heightened for many Australian Indigenous communities and may limit the flow of information and representation between the board member and the broader group that they are intended to represent. Localism means prioritising individual and local-group (such as family) interests and autonomy rather than broader and more encompassing regional interests and connections.²⁷³ Localism may mean that there are ethical and political obligations to support family members that might render a decision to vote to do so publically justifiable even if this is not other-regarding behaviour and even if it amounts

²⁶⁸ Cf Diane Smith and Janet Hunt, 'Understanding Indigenous Australian Governance – Research, Theory and Representations' in *Hunt et al's Contested Governance* 1, 12.

²⁶⁹ Dodson and Smith's ingredients three (sound corporate governance) and five (fair and reliable dispute resolution processes). To some extent, six (effective financial management and administrative systems), would also be covered.

²⁷⁰ Dodson and Smith's ingredient one (stable and broadly representative organisational structures). To some extent two (capable and effective institutions) and nine (cultural fit), are also covered.

²⁷¹ Dodson and Smith's ingredients three (sound corporate governance) and four (limitation and separation of powers).

²⁷² David Martin, 'The Governance of Agreements between Aboriginal People and Resource Developers: Principles for Sustainability' in *Altman and Martin's Power, Culture, Economy* 99, 122-3; Patrick Sullivan, 'Indigenous Governance: The Harvard Project, Australian Aboriginal Organisations and Cultural Subsidiarity' (Working Paper No. 4, Desert Knowledge Cooperative Research Centre, Alice Springs, 2007) 15-16.

²⁷³ David Martin, 'The Governance of Agreements between Aboriginal People and Resource Developers: Principles for Sustainability' in *Altman and Martin's Power, Culture, Economy* 99, 118; *Mantziaris and Martin's Native Title Corporations* 282.

to a breach of board member legal duties.²⁷⁴ Altman has also noted that Indigenous modes of governance 'prioritise kin-based obligations and sectional interests' as opposed to the broader Australian corporate notions of governance by directors as 'operat[ing] impartially without vested interest and to meet the objectives of the corporation for the benefit of its membership'.²⁷⁵ Localism may also be at odds with assumptions underlying democratic representation and accountability. It may mean that community members do not wish to elect a representative, or to be bound by decisions made by such a representative – especially when that representative is not from their family or other relevant local group.²⁷⁶

Further, large meetings are better venues for formally ratifying and recording decisions on complex matters than for actually making those decisions in an informed manner, especially as such meetings may have a particularly poor fit with common Indigenous decision making processes of 'extended consideration and discussion, involvement of appropriate individuals on the basis of such principles as seniority and legitimate knowledge, and consensus building within the local groups where such processes have force'.²⁷⁷ Poor socio-economic levels of many Indigenous communities living near resource developments may also raise capacity constraints to meaningful engagement by members of Indigenous communities in the relationship.²⁷⁸ Omitting repeated elements of Martin's list, good governance of these relationships might then require: processes for 'active participation' by Indigenous community beneficiaries at the 'individual and local group levels'; ensuring that such processes extend to the provision of services and assets by BMS entities while still 'maintaining appropriate mechanisms for prudential control';²⁷⁹ ensuring that the processes include planning for the future (eg cyclical annual or strategic plan processes); and working with beneficiaries to increase their capacity.²⁸⁰

Finally, Smith has noted the tendency, in interactions with government, for Indigenous organisation governance to be consumed by an array of administrative procedures and accountability mechanisms that are increasingly divorced from government's actual policy goals.²⁸¹

²⁷⁴ Cf David Martin, 'The Governance of Agreements between Aboriginal People and Resource Developers: Principles for Sustainability' in *Altman and Martin's Power, Culture, Economy* 99, 118-19.

²⁷⁵ Jon Altman, 'Different Governance for Difference: The Bawinanga Aboriginal Corporation' in *Hunt et al's Contested Governance* 177, 189.

²⁷⁶ David Martin, 'The Governance of Agreements between Aboriginal People and Resource Developers: Principles for Sustainability' in *Altman and Martin's Power, Culture, Economy* 99, 118-19.

²⁷⁷ *Ibid* 124.

²⁷⁸ *Ibid*. See also J Taylor and B Scambary, 'Indigenous People and the Pilbara Mining Boom: A Baseline for Regional Participation' (Research Monograph No 25, CAEPR, 2005) ch 9.

²⁷⁹ We assume that the reference to having a meaningful say 'in the operations of agreements' is to the delivery of services and benefits by Indigenous entities as contemplated by the overarching land access agreements.

²⁸⁰ David Martin, 'The Governance of Agreements between Aboriginal People and Resource Developers: Principles for Sustainability' in *Altman and Martin's Power, Culture, Economy* 99, 125.

²⁸¹ Diane Smith, 'Cultures of Governance and the Governance of Culture: Transforming and Containing Indigenous Institutions in West Arnhem Land' in *Hunt et al's Contested Governance* 76, 77.

3.5 Comparative perspectives

As the discussion below and in Appendix B of Canada, the United States and New Zealand demonstrates, treaties and constitutional law play a greater role in those jurisdictions in recognising the relationship between Indigenous peoples and the state.²⁸² This has helped to emphasise the political sovereignty of Indigenous communities in those jurisdictions and in some cases resulted in greater land use rights.²⁸³ Much discussion of Indigenous organisations in those jurisdictions – especially Canada and the United States – thus assumes that the relevant organisation will represent the Indigenous community as a political body and have authority to make a range of coercive decisions for the operation of the community as a political society. For instance, in relation to taxation and resource use.

Nevertheless, there are still some insights into the type of legal structures adopted for Indigenous organisations and into their governance and operation. In particular, the Canadian material highlights the importance of capacity building and of clearly articulating the purposes of an organisation and then of identifying specific goals and responsibilities and measuring achievement. In the United States, the Alaska native claims settlement example suggests that relying primarily on a Western construct such as a profit-maximising corporation, may enhance risks, even if it is possible to formally and informally modify the structure to better suit the Indigenous community. The Harvard Project on Indian Economic Development has also identified four key governance principles of sovereignty, cultural match, capable institutions of governance and leadership. Although they have their limits, as discussed in Part 3.4, those principles have strongly influenced much Australian work on governance and the operation of Indigenous organisations.

The New Zealand literature on Post Settlement Governance Entities suggests that there is value in a structure that can pursue both purposes and profit. In addition, the literature provides examples of useful structural features in support of matters such as accountability and cultural fit. McKay's Maori good governance principles likewise provide examples and are broadly consistent with the governance principles discussed in Part 3.4.

3.5.1 Canada

The relevant Canadian literature falls within two predominant categories: agreement making and legal structures. The literature on agreement making has included consideration of agreement assets flowing to First Nations²⁸⁴ and the types of payments

²⁸² Lisa Strelein and Tran Tran, 'Building Indigenous Governance from Native Title: Moving away from Fitting in to Creating a Decolonised Space' (2013) 18(1) *Review of Constitutional Studies* 19, 33-5.

²⁸³ If successful, contemporary moves to establish a Makarrata, or voice to the Commonwealth Parliament, would help to address this gap in Australia: 2017 First Nations National Constitutional Convention, Uluru Statement From the Heart (26 May 2017).

²⁸⁴ Brad Gilmour and Bruce Mellett, 'The Role of Impact and Benefits Agreements in the Resolution of Project Issues with First Nations' (2013) 51(2) *Alberta Law Review* 385, 392-395; Sandra Gogal, Richard Riebert

prescribed in agreements.²⁸⁵ The literature considering legal structures has canvassed the use of band-held corporations,²⁸⁶ implementation committees,²⁸⁷ and trusts.²⁸⁸ Several commentators note the importance of sharing decision making power and of resource proponents being willing to engage in collaborative capacity building.²⁸⁹ However, there appears to be a gap in the Canadian literature concerning privately constituted structures that, as a whole, manage the payments received under Impact and Benefits Agreements (that is, structures directly analogous to a BMS).

There is, nevertheless, analysis of legislated regional settlement structures that does partially fill this gap. Contemporary negotiated settlements are regional, so broader than a single Indigenous community, and also comprehensive in that they are intended to encompass a broad range of matters relating to ownership, use and management of land and other resources as well as dealing with compensation and the creation of frameworks for other issues such as self-determination, environmental matters and cooperative coexistence of Indigenous and non-Indigenous persons.²⁹⁰ While legislated regional settlements (and the structures established pursuant to those settlements to manage assets) generally reflect a broader range of socio-economic and political concerns than Australian land access agreements, many settlement structures include a range of trusts and corporations that receive and manage money and resources.

The Inuvialuit Final Agreement demonstrates, for example, the benefit of clearly identifying overarching goals for an asset management structure. While reporting is not required to be so detailed under the Inuvialuit Final Agreement, the Gwich'in Implementation Plan²⁹¹ and its Five-Year Review²⁹² provide examples of how to track progress against goals. They set out individual projects and goals, persons or entities with responsibility to complete them, timing and a measure of success. Nevertheless, a

and Joann Jamieson, 'Aboriginal Impact and Benefit Agreements Practical Considerations' (2005) 43(1) *Alberta Law Review* 129, 147-52; Jennifer Loutit, Jacqueline Madelbaum and Sam Szoke-Burke, 'Emerging Practices in Community Development Agreements' (2016) 7(1) *Journal of Sustainable Development Law & Policy* 65; Woodward & Company, 'Benefit Sharing Agreements in British Columbia: A Guide for First Nations, Businesses and Governments' (Final Report, Undated) II-2; Ciaran O'Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (Taylor and Francis, 2015).

²⁸⁵ InterGroup Consultants, 'Aboriginal Engagement in Resource Development Lead Industry Leading Practices' (October 2008) 72.

²⁸⁶ Woodward & Company, 'Benefit Sharing Agreements in British Columbia: A Guide for First Nations, Businesses and Governments' (Final Report, Undated) II-7.

²⁸⁷ Ginger Gibson and Ciaran O'Faircheallaigh, 'IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements' (Walter and Duncan Gordon Foundation, March 2010) 180-1.

²⁸⁸ Fiona Martin, 'An Analysis of The Exemption From Income Tax of Canadian "Indians" Either as Individuals or "Bands"' (2010) 5(1) *Journal of the Australasian Tax Teachers Association* 165, 179.

²⁸⁹ Jennifer Loutit, Jacqueline Madelbaum and Sam Szoke-Burke, 'Emerging Practices in Community Development Agreements' (2016) 7(1) *Journal of Sustainable Development Law & Policy* 65, 90.

²⁹⁰ See, eg, Douglas Eyford, 'A New Direction: Advancing Aboriginal and Treaty Rights' (Report of the Ministerial Special Representative on Renewing the Comprehensive Land Claims Policy, 20 February 2015) 17-23; *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 436. Note that Eyford's report recommends moving to negotiated settlements beyond regional comprehensive agreements.

²⁹¹ *Implementation Plan for the Gwich'in Comprehensive Land Claim Agreement* (Canadian Government, Government of the Northwest Territories and the Gwich'in Tribal Council, 1992).

²⁹² *Five-Year General Review of the Gwich'in Implementation Plan* (Implementation Committee of the Gwich'in Comprehensive Land Claim Agreement, 1997).

review of the system of comprehensive land claim settlements in 2014-15 still emphasised the need to further resource and coordinate the ongoing implementation of those agreements.²⁹³

3.5.2 United States

The Harvard Project on Indian Economic Development has conducted research which suggests that to achieve economic development, governance on matters that affect Indian communities needs to demonstrate four (formerly three) principles.²⁹⁴ The first is 'sovereignty', which implies self-government and autonomy such that Indian tribes make their own development decisions. The second is 'cultural match' or 'legitimacy', which requires some congruence between traditional culture and the content and processes of governing institutions – or at least some mechanism to create legitimacy. The third principle is 'capable institutions of governance', which focusses on the governance of institutions, by reference to matters such as stable decision making rules, the existence of fair dispute resolution processes, avoidance of conflicts of interest and effective administration. The fourth principle is 'leadership', being leaders who 'introduce new knowledge and experiences, challenge assumptions, and propose change'.²⁹⁵

Beyond the Harvard Project on Indian Economic Development, the United States literature is clustered around the topics of litigated resolution and legislative resolution. The literature considering litigated resolution primarily traces the development of Indian claims,²⁹⁶ focussing on the legal development of Indian title²⁹⁷ and on federal mismanagement of money contrary to the Federal-Indian trust doctrine.²⁹⁸

²⁹³ Douglas Eyford, 'A New Direction: Advancing Aboriginal and Treaty Rights' (Report of the Ministerial Special Representative on Renewing the Comprehensive Land Claims Policy, 20 February 2015).

²⁹⁴ See, eg, M Jorgensen and JB Taylor, *What Determines Indian Economic Success? Evidence from Tribal and Individual Indian Enterprises* (John F Kennedy School of Government, Harvard University, 2000) 3-4; Patrick Sullivan, 'Indigenous Governance: The Harvard Project, Australian Aboriginal Organisations and Cultural Subsidiarity' (Working Paper No. 4, Desert Knowledge Cooperative Research Centre, Alice Springs, 2007).

²⁹⁵ The Harvard Project on American Indian Economic Development available at <<http://hpaied.org/about>>.

²⁹⁶ Harvey Rosenthal, *Their Day in Court: A History of the Indian Claims Commission* (Garland Publishing, 1990); Caroline Orlando, 'Aboriginal Title Claims in the Indian Claims Commission: *United States v Dann* and its Due Process Implications' (1986) 13(2) *Boston College Environmental Affairs Law Review* 241; Russel Barsh, 'Indian Land Claims Policy in the United States' (1982) 58 *North Dakota Law Review* 7.

²⁹⁷ See, eg, Russel Barsh, 'Indian Land Claims Policy in the United States' (1982) 58 *North Dakota Law Review* 7; Shaunnagh Dorsett and Lee Godden, *A Guide to Overseas Precedents of Relevance to Native Title* (Native Title Research Unit, AIATSIS 1998).

²⁹⁸ Christopher Bowman, 'Indian Trust Fund: Resolution and Proposed Reformation to the Mismanagement Problems Associated with the Individual Indian Money Accounts in Light of *Cobell v. Norton*' (2004) 53(2) *Catholic University Law Review* 543; Billee McAuliffe, 'Forcing Action: Seeking to "Clean Up" the Indian Trust Fund: *Cobell v. Babbit*' (2001) 25 *Southern Illinois University Law Journal* 647; Armen Merjian, 'An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and *Cobell v. Salazar*' (2010) 46(3) *Gonzaga Law Review* 609; Ezra Rosser, 'The Trade-off Between Self-Determination and the Trust Doctrine: Tribal Government and the Possibility of Failure' (2005) 58 *Arkansas Law Review* 291; Keith Harper, 'Cobell v. Norton - Redressing a Century of Malfeasance' (2006) 2 *Human Rights* 5; Jered Davidson, 'This Land is Your Land, This Land is My Land? Why the 'Cobell' Settlement Will Not Resolve Indian Land Fractionation' (2010) 35(2) *American Indian Law Review* 575; David Getches et al, *Cases and Materials on Federal Indian Law* (Thomson Reuters, 6th ed, 2011) 343-6.

The literature concerning legislative resolution explores issues in statutory settlement of Indian land claims.²⁹⁹ That includes analysis of Alaskan native corporations established in accordance with the *Alaska Native Claims Settlement Act of 1971* 43 USC (1971).³⁰⁰ ANCSA provides for two tiers of native corporations: twelve regional corporations and over two hundred village corporations.³⁰¹ In broad terms, regional corporations control monetary and other benefits (such as title to subsurface minerals and petroleum), while village corporations administer the settlement land. ANCSA permits native corporations to establish settlement trusts to 'promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of [Alaskan] Natives'³⁰² and, following amendments in 1998, also authorises regional corporations to provide a range of benefits to shareholders in addition to the payment of dividends.³⁰³ Nevertheless, both tiers of corporations contain a pronounced for-profit focus and an obligation to maximise the interests of members. Acting in the best interests of shareholders was thus the chosen path to self-determination and improvement in socio-economic conditions.³⁰⁴

While Alaska Natives have generated innovative ways to pursue purposes other than profits, both through formal ANCSA provisions and also by overlaying informal institutions,³⁰⁵ stretching formal ANCSA provisions beyond their initially envisaged use

²⁹⁹ See, eg, Benjamin Kahn, 'Sword or Submission? American Indian Natural Resource Claims Settlement Legislation' (2012) 37(1) *American Indian Law Review* 109; Imre Sutton (ed), *Irredeemable America: The Indians' Estate and Land Claims* (University of New Mexico Press, 1985).

³⁰⁰ See, eg, Douglas Branson, 'Square Pegs in Round Holes Alaska Native Claims Settlement Corporations Under Corporate Law' (1979) 8 *UCLA-Alaska Law Review* 103; Imre Sutton (ed), *Irredeemable America: The Indians' Estate and Land Claims* (University of New Mexico Press, 1985); Martha Hirschfield, 'The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form' (1992) 101(6) *The Yale Law Journal* 1331; David Blurton, 'ANCSA Corporation Lands and the Dependent Indian Community Category of Indian Country' (1996) 13(2) *Alaska Law Review* 211; Kenneth Lysyk, 'Approaches to Settlement of Indian Title Claims: the Alaskan Model' (1973) 8 *University of British Columbia Law Review* 321; Douglas Branson, 'Still Square Pegs in Round Holes? A Look at ANCSA Corporations, Corporate Governance, and Indeterminate Form or Operation of Legal Entities' (2007) 24 *Alaska Law Review* 203; Dixie Dayo and Gary Kofinas, 'Institutional Innovation in Less Than Ideal Conditions: Management of Commons by an Alaska Native Village Corporation' (2010) 4(1) *International Journal of the Commons* 142.

³⁰¹ ANCSA 43 USC §§ 1606, 1607. See also, Martha Hirschfield, 'The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form' (1992) 101(6) *The Yale Law Journal* 1331, 1336.

³⁰² ANCSA 43 USC § 1629e.

³⁰³ ANCSA 43 USC § 1606(r); United States Government Accountability Office, *Regional Alaska Native Corporations: Status 40 Years after Establishment, and Future Considerations* (Report to Congressional Requesters, United States Government Accountability Office, December 2012) 38-48; Martha Hirschfield, 'The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form' (1992) 101(6) *The Yale Law Journal* 1331, 1336.

³⁰⁴ See, eg, Stephen Cornell, Jonathan Taylor, Kenneth Grant, Victor Fischer and Thomas Morehouse, 'Achieving Alaska Native Self-Governance – Toward Implementation of the Alaska Natives Commission Report', (AFN Final Report, The Economics Resource Group Inc and the Institute of Social and Economic Research, University of Alaska, 1999) 23-6, 28-9; *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 65-7 (commenting largely on the pre-1998 amendment position). Cf Branson, who notes the difficulty of applying typical corporate governance standards in the context of corporations effectively permitted to pursue purposes, such as the provision of social services and payment of elder benefits: 'Still Square Pegs in Round Holes? A Look at ANCSA Corporations, Corporate Governance, and Indeterminate Form or Operation of Legal Entities' (2007) 24 *Alaska Law Review* 203, 218-224.

³⁰⁵ Dixie Dayo and Gary Kofinas, 'Institutional Innovation in Less Than Ideal Conditions: Management of Commons by an Alaska Native Village Corporation' (2010) 4(1) *International Journal of the Commons* 142, 143; Douglas Branson, 'Still Square Pegs in Round Holes? A Look at ANCSA Corporations, Corporate Governance, and Indeterminate Form or Operation of Legal Entities' (2007) 24 *Alaska Law Review* 203, 218-20, 235-6.

and relying on informal institutions enhances some risks. In particular, greater uncertainty and risk of liability for directors, as well as increased potential for conflicts of interest.³⁰⁶ It can also result in poorer decision making and mission drift.³⁰⁷

3.5.3 New Zealand

The New Zealand literature has focused far less on agreement making, and more on the legal structures available. Assets, typically including land, are mostly received from settlements with the Crown in respect of treaty obligations. Those assets are held by a 'Post Settlement Governance Entity' or PSGE - an Iwi entity approved by the relevant Iwi and the New Zealand Government. The literature describes a proliferation in the differing types of legal 'entities' that have been used as PSGEs, including in combination with each other.³⁰⁸ The entities considered in the literature include: charitable trusts, incorporated societies, companies, private trusts, Maori trust boards, and statutory bodies. The literature indicates that the preferred PSGE is a private trust.³⁰⁹ However, the organisational structure of a PSGE is typically akin to that of a corporate group, with both charitable and for-profit arms,³¹⁰ as depicted below:³¹¹

³⁰⁶ Douglas Branson, 'Still Square Pegs in Round Holes? A Look at ANCSA Corporations, Corporate Governance, and Indeterminate Form or Operation of Legal Entities' (2007) 24 *Alaska Law Review* 203, 218-24.

³⁰⁷ *Ibid* 222-4.

³⁰⁸ Hone Sadler and Callum MacKinnon, 'Pathways for Ngapuhi's Future: Post Settlement Governance Entity' (2014) 7(5) *International Journal of Arts & Sciences* 749, 760; Kel Sanderson, Mathew Arcus and Fiona Stokes, 'Functions and Costs of Operating a Post-Settlement Governance Entity' (Report to the Crown Forestry Rental Trust, December 2007); Meredith Gibbs, 'What Structures are Appropriate to Receive Treaty of Waitangi Settlement Assets?' (2004) 21 *New Zealand Universities Law Review* 197.

³⁰⁹ Crown Forestry Rental Trust, 'Guide for Claimants Negotiating Treaty Settlements' (Crown Forestry Rental Trust, November 2007) 253; Office of Treaty Settlements, 'Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown' "Red Book" (March 2015); Law Commission Review of the Law of Trusts – Preferred Approach (NZLC IP31, 2012) [1.14]–[1.17]; Law Commission, Review of the Law of Trusts A Trusts Act for New Zealand (Report 130, Wellington, New Zealand, August 2013)

³¹⁰ Hone Sadler and Callum MacKinnon, 'Pathways for Ngapuhi's Future: Post Settlement Governance Entity' (2014) 7(5) *International Journal of Arts & Sciences* 749, 760.

³¹¹ Office of Treaty Settlements, 'Post Settlement Governance Entities: A Guide' (Office of Treaty Settlements, 2012) 8; Office of Treaty Settlements, 'Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown' "Red Book" (March 2015) 68.

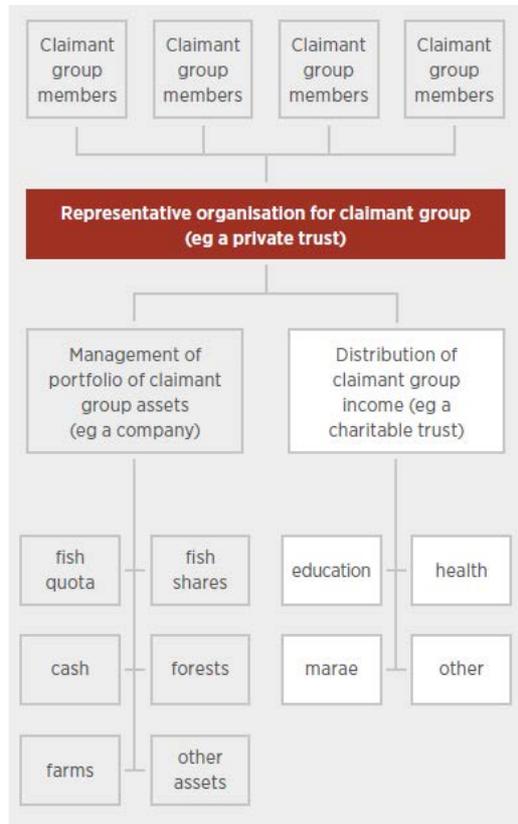


Figure 2.15: example of a governance entity for distribution of settlement assets (based on a model developed by Te Ohu Kai Moana)

The New Zealand Government's key requirements for a PSGE are: claimant group representation; transparent decision making processes and dispute resolution processes; and accountability to claimant group members.³¹² More detailed preferred structural features are also specified, although commentators have noted the importance of monitoring costs in implementing such features.³¹³

First, a PSGE should appropriately maintain a register of the membership of a claimant group.³¹⁴ A Membership Validation Committee is commonly established for the purpose of reviewing all applications and is comprised of members of the claimant group, appointed by the PSGE, who have knowledge of the claimant group which is brought to bear when considering applications.³¹⁵

³¹² Crown Forestry Rental Trust, 'Guide for Claimants Negotiating Treaty Settlements' (Crown Forestry Rental Trust, November 2007) 253; Office of Treaty Settlements, 'Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown' "Red Book" (March 2015) 70-2.

³¹³ Kel Sanderson, Mathew Arcus and Fiona Stokes, 'Functions and Costs of Operating a Post-Settlement Governance Entity' (Report to the Crown Forestry Rental Trust, December 2007) 15.

³¹⁴ Crown Forestry Rental Trust, 'Guide for Claimants Negotiating Treaty Settlements' (Crown Forestry Rental Trust, November 2007) 283.

³¹⁵ Ibid.

Second, there should be effective methods for the appointment and removal of trustees.³¹⁶ For example, elections are to be held and trustees are democratically elected by the claim group.³¹⁷ Moreover, there are comprehensive notice requirements where an election is conducted.³¹⁸ The office of a trustee may be terminated if they, for instance, retire, become bankrupt, are convicted of an indictable offence, or are physically or mentally incapacitated.³¹⁹

Third, it is common for a PSGE to provide for what is referred to as a Kumatura Committee. That is a particular committee which is established to provide non-binding advice to the elected trustees.³²⁰

Fourth, while it is not usually a legal requirement, many PSGEs prepare annual and five year plans to enhance accountability.³²¹

Fifth, there is some operational benefit obtained in practice by separating the key functions within a PSGE between separate companies.³²² Those separate companies administer assets on behalf of the claimant group. The management of each company is separated, but there is some risk that trustees may interfere with the day to day operations of those companies.³²³

Sixth, there may be a custodian or nominee trustee.³²⁴ Transfer costs are purportedly reduced, enhancing efficiency.³²⁵

Beyond legal structures, in the context of governance, McKay has sought to articulate 'Good Maori Governance' principles.³²⁶ In doing so, McKay draws on the Harvard Project insights discussed above, as well as the United Nations Economic and Social Commission for Asia and the Pacific Governance Principles of: participation, the rule of law, transparency, responsiveness, consensus oriented, equity and inclusiveness, effectiveness and efficiency, and accountability. McKay also considers the Canadian Institute on Governance's five key principles of good governance: legitimacy and voice, direction, performance, accountability, and fairness.³²⁷

McKay contends that there are five clear principles relevant to Maori governance. First, the entity must promote participation in decision making processes. Second, the entity's

³¹⁶ Ibid 287.

³¹⁷ Ibid.

³¹⁸ Ibid 289-290.

³¹⁹ Ibid 292.

³²⁰ Ibid 256.

³²¹ Ibid.

³²² Cf Kel Sanderson, Mathew Arcus and Fiona Stokes, 'Functions and Costs of Operating a Post-Settlement Governance Entity' (Report to the Crown Forestry Rental Trust, December 2007) 17.

³²³ Crown Forestry Rental Trust, 'Guide for Claimants Negotiating Treaty Settlements' (Crown Forestry Rental Trust, November 2007) 256

³²⁴ The Te Arawa Lakes, Ngati Mutunga and Ngati Awa governance entity rules contemplate this type of trustee: *ibid.*

³²⁵ *Ibid.*

³²⁶ Liam McKay, 'Waka Umanga: Has the Government Missed the Boat on Maori Collective Assets Management?' (LLM Thesis, University of Otago, 2012).

³²⁷ *Ibid* 94-9.

institutions and process must be established by clear rules that make them accountable to members, analogously to rule of law principles. Third, the entity must be effective and efficient. That is achieved through capable leadership and strong dispute resolution processes that can build consensus among members and balance the many competing interests to achieve best outcomes for the greatest number of members. Fourth, the entity must have a vision or aspiration. Fifth, the entity must be capable of incorporating aspects of traditional custom into its process and institutions in order to achieve cultural match and legitimacy. These principles were developed in light of certain specific problems faced by Maori groups in collectively owning and using land, being: lack of commonality amongst the members of the Maori group, problems in obtaining finance, the proportion of Maori group 'landowners' who did not live on the relevant land, the relatively large size of many Maori groups and consequent difficulties in reaching consensus.³²⁸ Many of these issues are likely to apply to Australian Indigenous communities. Indeed, the lesser land rights represented by native title may actually enhance difficulties such as obtaining finance and the likelihood of group members living off-country.

³²⁸ Ibid 98-9.

4. Specific Issues Raised by BMSs

The literature on BMSs and on Indigenous organisations that often form part of BMSs raises a range of issues or challenges that are likely to be faced by BMSs. Several additional issues that are not broadly discussed in the literature (overlapping decision making bodies, succession planning, professional trustee conflicts, strategic planning, implementation versus structure and siloing) were also raised by stakeholders.

While not comprehensive, the issues discussed in this section reflect a broad span of that spectrum. They have been selected because they reflect strong themes from stakeholder interviews and focus groups. The issues are:

The need to support autonomy	Recognising every community, family and individual is different	Incorporation of traditional law and custom
Need for capacity building	Governance	Communication and participation in decision making
Overlapping decision making bodies	Filling boards/committees and succession planning	Administration costs and the scale of compliance activities
Achieving equity	Timing of funding for the Indigenous corporation 'doer'	Restrictions on economic development
Geographical remoteness and dispersion	Professional trustees and inherent conflicts of interest	Interactions with pre-existing structures and with government
Strategic planning to achieve BMS purposes	Change	Implementation versus structure
Siloing		

4.1 Supporting autonomy

As identified in Part 2.3, all stakeholders agreed autonomy is a very important consideration for BMSs, and that decision making is a central component of autonomy. However, the literature notes that resource proponents often seek BMSs that result in some restrictions on the ultimate uses of funds, or on the decision making processes taken to determine a particular use of funds. For instance, by requiring a portion of funds to be provided to a charitable trust, which then limits use of those funds to being for charitable purposes.³²⁹ This may be due to the emphasis placed by many resource proponents on the desire for BMSs to improve the lives of Indigenous communities and due to the perceived governance rigour of charitable trusts.³³⁰

However, Levin has noted that externally required controls are something that must be balanced against the objective of self-determination.³³¹ Indeed, resource proponents recognise the critical importance of autonomy for Indigenous communities and some

³²⁹ *Levin's Observations*, 252.

³³⁰ See, eg, Part 2.1; Resource Proponent Manager 10 August 2017.

³³¹ *Levin's Observations*, 252.

resource proponents have indicated that they are therefore currently reducing such control rights. For instance, by removing the need for resource proponent approval of BMS investment or accumulation policies.³³² One resource proponent representative stated that there can be a tension between autonomy and intergenerational equity, where a group wishes to access its future fund now for economic development.³³³

Trustee officers expressed varied approaches in relation to autonomy. Some trustees emphasised the importance of Indigenous-led initiatives, of Aboriginal communities being able to make changes and decisions for themselves and of Aboriginal representatives being in the best position to know what's best for a particular community, within parameters set by the trustee's obligations. Thus, autonomy might be enhanced by providing flexibility within trust documents, and by facilitating group decision making at a very general guidance level.³³⁴ Other trustees adopted a more hands-on and prescriptive approach, which appears grounded in a philosophy that some Aboriginal communities and representatives might need significant initial support and capacity building to enable them to autonomously make decisions.³³⁵ As with other stakeholders, trustee officers typically noted that ensuring autonomy results in slower decision making.

Aboriginal community and corporation representatives emphasised the significance of decision making processes for autonomy. Even though effective decision making is often time consuming, time must be taken if autonomy is to be achieved. Autonomy may become easier to achieve as time passes and capacity increases. Thus, BMSs need to be able to respond to changes over time in a group's capacity to make decisions.

Aboriginal community and corporation representatives noted that trustees play an important role in providing information to decision makers, and that the trustee provision of information could be improved in some cases. Some Aboriginal community and corporation representatives also identified the importance of individualised approaches to dealings with community members to enhance autonomy.³³⁶ The distinction between group self-determination and individual autonomy was also noted by a resource proponent representative, who stated that accommodation of both self-determination and autonomy should be a feature of BMSs.³³⁷

4.2 Every community/family/individual is different

Aboriginal community and corporation stakeholders generally agreed that customisation is necessary because of the differences in capacity, size and funding of groups and variations in the content and distribution of native title rights or rights

³³² See, eg, Resource Proponent Manager 10 August 2017.

³³³ Resource Proponent Implementation Adviser 10 August 2017.

³³⁴ Trustee Officer 18 May 2017.

³³⁵ See, eg, n 654 and accompanying text.

³³⁶ Pilbara Aboriginal Corporation Director 20 June 2018.

³³⁷ Resource Proponent Manager 24 January 2017.

related to native title. However, many Aboriginal community and corporation stakeholders suggested that the Pilbara BMSs with which they had experience were insufficiently customised and felt like templates.³³⁸ This partly reflected stakeholder perceptions of the significant complexity of BMS documents (see Part 6.3.1). Trustee and resource proponent stakeholders acknowledged the need for each community, family and individual to be treated differently, but tended to consider that the Pilbara BMS documents were already heavily customised, potentially at the expense of their efficient operation.³³⁹

Several Aboriginal community and corporation representatives also emphasised that BMS purposes of bettering Indigenous peoples' lives involves different dimensions in practice, as some families and individuals have more capacity than others to bring about change. They argued for an individually targeted approach to delivering services and measuring outcomes:³⁴⁰

The approach to improving living standards needs to be worked out on a case by case basis, and information needs to be kept on a system so we can review each individual's living status (eg when people receive money and how much, or whether they are attending school). This much more individualised approach would allow a more effective view of how our membership is doing. A trustee can then (eg) work with a financial planner to work on specific issues.

This individualised approach was echoed by a resource proponent social investment manager.³⁴¹

4.3 Incorporating traditional laws and customs

The general literature on the operation and governance of Indigenous organisations (Part 3.4) emphasises the desirability of reflecting a community's traditional laws and customs – especially of governance and decision making – in an Indigenous organisation's processes.³⁴² These general concerns have also been reflected in the literature dealing specifically with BMS trusts.³⁴³ The difficulty is in attempting to satisfy Western notions of corporate governance and traditional laws and customs.³⁴⁴ Stakeholder interviews displayed a range of views on the incorporation of traditional

³³⁸ Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Executive 10 May 2018; Pilbara Aboriginal Corporation Executive 4 July 2018; Pilbara Aboriginal Corporation Director 21 June 2018. Cf Independent BMS Facilitator 21 March 2018.

³³⁹ See further, Part 6.3.1.

³⁴⁰ Pilbara Aboriginal Corporation Director 20 June 2018; Pilbara Aboriginal Corporation Director 21 June 2018; Pilbara Aboriginal Corporation Executive 5 July 2018.

³⁴¹ Resource Proponent Social Investment Manager 22 February 2017.

³⁴² See also AIATSIS, 'Native Title Payments and Benefits' (Literature Review, Native Title Research Unit, 2008) 29; Toni Bauman and Rhian Williams, 'The Business of Process: Research Issues in Managing Indigenous Decision making and Disputes in Land' (Report, Indigenous Facilitation and Mediation Project, AIATSIS, 2004) 10.

³⁴³ *Levin's Observations*, 248.

³⁴⁴ See, eg, *Bauman, Strelein and Weir's Living with Native Title* 159; Matthew Storey et al, 'Exploring the Role of Traditional Decision making Structures in Enterprise Focused PBCs' (Native Title Services Victoria Ltd, 2013) 6.

laws and customs in BMSs. Indeed, various stakeholders cautioned against building traditional law and custom too far into a BMS. Several Aboriginal community and corporation representatives noted that requirements to consult or seek approval from those with cultural authority (eg Elders) on too wide a range of matters can delay decision making and result in unreasonable expectations that the Elders have experience/capacity on matters that are more about business or finance than culture.³⁴⁵ More fundamentally, an Aboriginal corporation executive and resource proponent representatives indicated that building in traditional law and custom could make decisions less certain, such that a careful balance had to be struck:³⁴⁶

by incorporating traditional law and custom, this may make [BMSs] more complex and less certain. Particular individuals may claim insufficient incorporation of law and custom if they don't like a decision that the structure makes.

Some stakeholders thus emphasised the importance of accountability to the community for those with cultural authority.³⁴⁷

Case Example – MG Corporation

Sullivan³⁴⁸ and Guest³⁴⁹ have each given an account of MG Corporation and the incorporation of traditional law and custom in the BMS associated with MG Corporation. MG Corporation was the Winner of the 2008 Highly Commended Award as part of the 2008 Indigenous Governance Awards and also winner of an Indigenous Governance Award in 2012.³⁵⁰ The case example illustrates a culturally appropriate decision making processes, albeit one that resulted in material administrative difficulties and costs and that possibly underestimated the potential for disputes at the codified and partially constructed *dawang* level, being a traditional land area/kinship group for that land.

The Miriuwung and Gajerrong people obtained a determination that native title existed in 1998, which was appealed, with a consent determination reached in 2003 and a further consent determination over another area in 2006. Recognition of native title rights resulted in land use negotiations with the State of Western Australia, culminating in the Ord Final Agreement, being an agreement over the development of an area of irrigated agriculture.³⁵¹ Due to requests from the Kimberley Land Council, the State provided funding to the Kimberley Land Council to develop the BMS before and after the Ord Final

³⁴⁵ Pilbara Aboriginal corporation executive 5 July 2018; Director Pilbara Aboriginal Corporation 21 June 2018; Trustee officer 18 May 2017. Cf Pilbara Aboriginal corporation executive 4 July 2018.

³⁴⁶ Pilbara Aboriginal corporation executive 5 July 2018; Resource proponent representative – February 2017.

³⁴⁷ See, eg, Director Pilbara Aboriginal Corporation 20 June 2018

³⁴⁸ Patrick Sullivan, 'The Ord River Stage 2 Agreement and Miriuwung Gajerrong native title corporations', in: *Bauman, Strelein and Weir's Living with Native Title* 199-203.

³⁴⁹ Krysti Guest, 'The Promise of Comprehensive Native Title Settlements' (AIATSIS Research Discussion Paper, No 27, October 2009) 38-41.

³⁵⁰ Davina Thomas, Jessica Jeeves and Rowena Withers, 'Celebrating Indigenous Governance: Success Stories of the 2008 Indigenous Governance Awards' (Reconciliation Australia, Canberra, Undated) 18; Reconciliation Australia, 'Indigenous Governance Awards' (24 May 2019) <<https://www.reconciliation.org.au/iga/#iga-past-winners>>.

³⁵¹ Patrick Sullivan, 'The Ord River Stage 2 Agreement and Miriuwung Gajerrong native title corporations', in: *Bauman, Strelein and Weir's Living with Native Title* 181, 186-9.

Agreement was signed.³⁵² Thus the Miriuwung and Gajerrong people were able to work on their BMS as part of the land use agreement negotiations.

Culturally appropriate decision making processes

One of the most celebrated aspects of MG Corporation has been its committees and groups. Membership of MG Corporation is made up of all members of the MG dawangs that comprise the whole of Miriuwung and Gajerrong traditional country. Miriuwung and Gajerrong people become members of the MG Corporation by application and must nominate their dawang group. As noted above, a dawang was codified in the initial MG Corporation rules as being 'the country of the local (or estate) groups within the broader country of the MG People',³⁵³ such that each dawang group comprised a kinship group with traditional rights in relation to a piece of country.³⁵⁴

The original structure of MG Corporation and its affiliated entities within the MG Corporation BMS looked as follows (though the PBC boards were not necessarily the same as that for MG Corporation):³⁵⁵

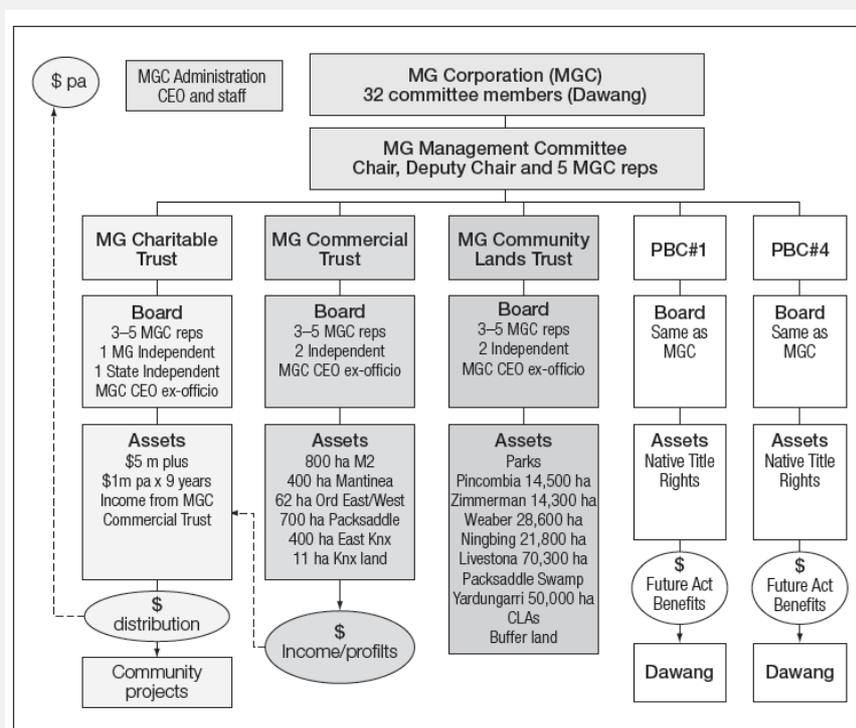


Figure 6.2 Corporate structure of MG Corporation, 2006, including MG#1 and MG#4 RNTBCs (shown here as 'PBC#1' and 'PBC#4'). Diagram courtesy of MG Corporation

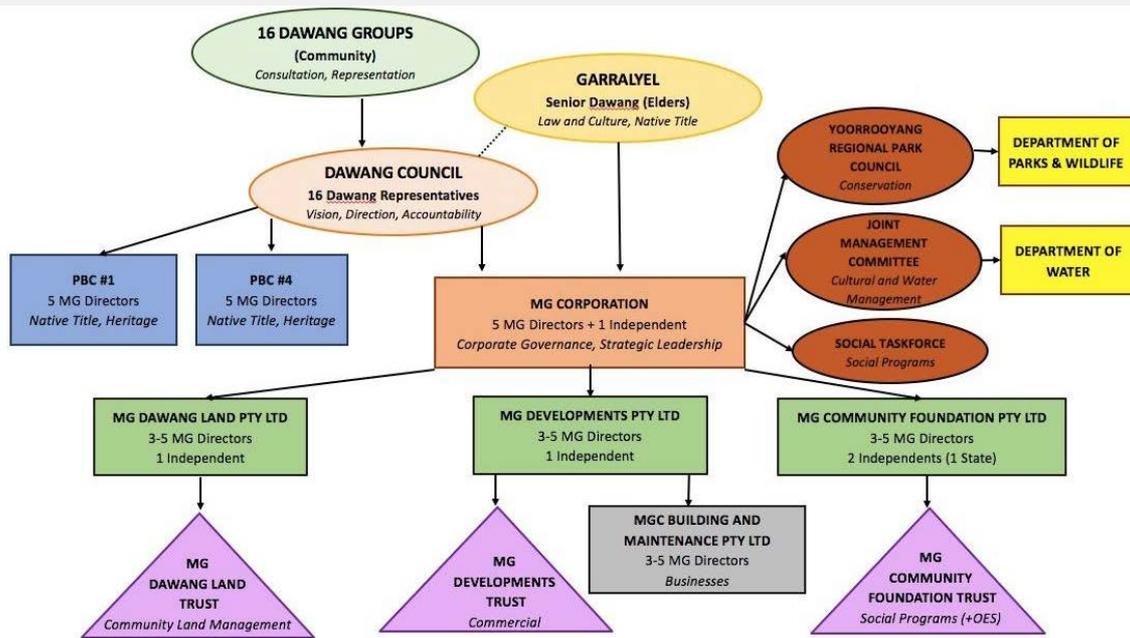
³⁵² Krysti Guest, 'The Promise of Comprehensive Native Title Settlements' (AIATSIS Research Discussion Paper, No 27, October 2009) 38.

³⁵³ Ord Final Agreement between the State of Western Australia and the Miriuwung and Gajerrong Traditional Owners and others (6 October 2005) cl 2.1.

³⁵⁴ Cf Patrick Sullivan, 'The Ord River Stage 2 Agreement and Miriuwung Gajerrong native title corporations', in: *Bauman, Strelein and Weir's Living with Native Title* 181, 196-7 (noting that some anthropologists contest the notion of local or estate groups as Western constructs).

³⁵⁵ Ibid 187.

However, there have since been material changes such that the structure of MG Corporation and its affiliated entities has recently been depicted diagrammatically as:³⁵⁶



The original structure of MG Corporation, as provided in the Ord Final Agreement, involved dual boards.³⁵⁷ There was a Governing Committee comprised of 32 members, including 2 delegates from each of the 16 dawang, or traditional land areas that came together under the agreement.³⁵⁸ The delegates are elected by each subgroup, the dawangs, rather than by MG Corporation’s members as a whole. Given the large size of the Governing Committee, MG Corporation had a second ‘board’ called a ‘Management Group’. The Management Group was comprised of at least three and no more than five Governing Committee members.³⁵⁹ The purpose of the Management Group was to supervise MG Corporation operations and staff, including the chief executive officer (who, somewhat confusingly was also a member of the Management Group).³⁶⁰

³⁵⁶ Allan Wedderburn and Dominique Reeves, MG Corporation, ‘MG Corporation: Many Laws – One Land’ (Presentation at the AIATSIS National Native Title Conference, June 2018, Broome).

³⁵⁷ Ord Final Agreement between the State of Western Australia and the Miriuwung and Gajerrong Traditional Owners and others (6 October 2005) cl 20.5, cl 20.6 <www.dpc.wa.gov.au/lantu/Agreements/OrdFinal>.

³⁵⁸ Davina Thomas, Jessica Jeeves and Rowena Withers, ‘Celebrating Indigenous Governance: Success Stories of the 2008 Indigenous Governance Awards’ (Reconciliation Australia, Canberra, Undated) 14; Patrick Sullivan, ‘The Ord River Stage 2 Agreement and Miriuwung Gajerrong native title corporations’, in: *Bauman, Strelein and Weir’s Living with Native Title* 197.

³⁵⁹ Patrick Sullivan, ‘The Ord River Stage 2 Agreement and Miriuwung Gajerrong native title corporations’, in: *Bauman, Strelein and Weir’s Living with Native Title* 199.

³⁶⁰ Ord Final Agreement between the State of Western Australia and the Miriuwung and Gajerrong Traditional Owners and others (6 October 2005) cl 20.6; Patrick Sullivan, ‘The Ord River Stage 2 Agreement and Miriuwung Gajerrong native title corporations’, in: *Bauman, Strelein and Weir’s Living with Native Title* 181, 199-200.

This approach seems to promote **Allegiance** through greater acknowledgement of localism and of traditional law and custom in using the dawang concept to provide a voice in respect of each piece of country, to those with traditional rights in relation to that country. Interestingly, it also partially side-stepped some of the problems with relying on representatives discussed in Part 3.4 because committee members were delegates rather than representatives. The members of each dawang could vote in a dawang meeting on the way that they required their delegate to vote in a Governing Committee meeting.³⁶¹

However, Sullivan points out that this could be problematic firstly if the dawang did not properly understand in advance the matter for decision and secondly if the delegate did not agree with the instructions from the dawang.³⁶² Further, there was material scope for conflict not only at the Governing Committee and Management Group level, but also at the level of each dawang, whether that be in the selection of delegates or in the instructing of delegates.³⁶³ There was also uncertainty (and lack of **Efficiency**) because both the Governing Committee and Management Group were responsible for the general administration or management of MG Corporation, without a clear division of those responsibilities.³⁶⁴ The sheer number of committee members also posed resourcing issues for governance and capacity building.³⁶⁵ Further, the dawang concept itself is open to some question over whether it properly reflects the rich nature of interlinked rights and obligations in relation to country and also whether such codification will curtail changes over time, recognised in traditional law and custom, in the country of a local group or the number of local groups.³⁶⁶

Accordingly, it is unsurprising that there have been some changes to the MG Corporation structure to reduce the number of committee members and to clarify roles, although still maintaining an integral place for traditional law and custom and for the dawang concept. As can be seen from the revised MG Corporation structure diagram, the Governing Committee/Dawang Council is now smaller and its function is more clearly separated from the MG Corporation Board as Dawang Council members cannot also be board members and the Dawang Council's role is more clearly limited to approving the strategy and vision of MG Corporation, reviewing the performance and composition of the board (including appointing board members) and approving membership applications.³⁶⁷ In addition, 'dawang' is defined in a broader way so as to expressly contemplate the possibility of change in the number and scope of each dawang in accordance with the

³⁶¹ Patrick Sullivan, 'The Ord River Stage 2 Agreement and Miriuwung Gajerrong native title corporations', in: *Bauman, Strelein and Weir's Living with Native Title* 198.

³⁶² Ibid.

³⁶³ Cf ibid 200-1.

³⁶⁴ Ord Final Agreement between the State of Western Australia and the Miriuwung and Gajerrong Traditional Owners and others (6 October 2005) cl 20.5, cl 20.6; ibid 199-200.

³⁶⁵ Cf Allan Wedderburn and Dominique Reeves, MG Corporation, 'MG Corporation: Many Laws – One Land' (Presentation at the AIATSIS National Native Title Conference, June 2018, Broome).

³⁶⁶ Patrick Sullivan, 'The Ord River Stage 2 Agreement and Miriuwung Gajerrong native title corporations', in: *Bauman, Strelein and Weir's Living with Native Title* 181, 197, 200-1.

³⁶⁷ Rule Book of MG Corporation (March 2017) cl 7.2.5, 10, 13.1, 14.5.2, 21, sch 6.

traditional laws and customs of the Miriuwung and Gajerrong people.³⁶⁸ MG Corporation's rule book also contemplates the Garralyel, which is a committee of senior Miriuwung and Gajerrong people that makes advisory recommendations to the board and the Dawang Council on matters of traditional law and custom, amongst other things.³⁶⁹

It has been said that the success of MG Corporation is in the way in which it has purposely aligned its structure with its cultural values, while also making sure that it fits in the kartiya (whitefella) world.³⁷⁰

4.4 Need for capacity building – especially due to complexity

Capacity building can be a key challenge for Indigenous communities³⁷¹ and organisations,³⁷² including Indigenous-controlled BMS trustees.³⁷³

Stakeholder interviews generally reflected capacity building as a key issue for BMSs and two stakeholders stated that capacity building should be a core function of BMSs.³⁷⁴ While a number of stakeholders expressed the need for caution about the time and cost of capacity building,³⁷⁵ most, however, suggested that more capacity building is needed. A professional adviser also suggested that professional trustee companies have been too willing to hand out money for purposes other than capacity building.³⁷⁶ In particular, stakeholders emphasised the role of capacity building in

³⁶⁸ Rule Book of MG Corporation (March 2017), sch 1 (**Dawang** means the country of a local (or estate) group that, together with other Dawang, comprises the country of the MG People within the determination area subject to the Ord Final Agreement. A list of the Dawang described as at the date of incorporation of the Corporation is set out in Schedule 5. For the sake of clarification, if in the future it is required in accordance with the Traditional Laws and Customs of the MG People that the description of these Dawang be amended, such amendment is permissible under these Rules).

³⁶⁹ Rule Book of MG Corporation (March 2017) cl 11, sch 7.

³⁷⁰ Davina Thomas, Jessica Jeeves and Rowena Withers, 'Celebrating Indigenous Governance: Success Stories of the 2008 Indigenous Governance Awards' (Reconciliation Australia, Canberra, Undated) 15.

³⁷¹ Ciaran O'Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (Taylor and Francis, 2015) 40, 49; David Martin 'Rethinking the Design of Indigenous Organisations: The Need for Strategic Engagement' (Discussion Paper No 248, CAEPR, 2003) 6; Krysti Guest, 'The Promise of Comprehensive Native Title Settlements' (AIATSIS Research Discussion Paper, No 27, October 2009) 18; Marcia Langton and Odette Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the Resource Curse and the Mining Boom' (2008) 26(1) *Journal of Energy & Natural Resources Law* 31, 60; Janet Hunt, 'Capacity Development in the International Development Context: Implications for Indigenous Australia' (Discussion Paper No 278, CAEPR, Australian National University, 2005); Mick Dodson and Dianne Smith, 'Governance for Sustainable Development: Strategic Issues and Principles for Indigenous Australian Communities' (Discussion Paper No 250, CAEPR, Australian National University, 2003).

³⁷² Robert Levitus, 'Aboriginal organizations and development: The structural context', in *Altman and Martin's Power, Culture, Economy* 73, 74; Ciaran O'Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (Taylor and Francis, 2015) 80, 96, 106, 141, 143.

³⁷³ *Levin's Observations*, 250.

³⁷⁴ Professional Adviser 31 January 2018; Trustee Officer 28 June 2018.

³⁷⁵ Some trustee officers cautioned that, in practice, they have limited time or money to assist with capacity building; Trustee Officer 8 March 2019; cf Trustee Officer 28 June 2018. Several Aboriginal community and corporation representatives also noted that care is needed about the cost of capacity building: Karratha Workshop 3 May 2018; Pilbara Aboriginal Corporation Executive 5 July 2018.

³⁷⁶ Professional Adviser 31 January 2018.

supporting autonomy, creating a sense of ownership of BMSs and enabling communities to access the flexibility of BMSs.³⁷⁷

Several stakeholders commented on the broad spectrum of levels at which capacity building might occur (eg general Indigenous community, members of the community interested in joining boards or committees, current board/committee members) and the challenges in selecting priorities within that spectrum. For example, an Aboriginal corporation executive commented that it would be useful to conduct capacity building for the broader community to raise the general level of understanding of BMSs and grow the pool of community members ready to take on decision making roles.³⁷⁸ There were several suggestions that community capacity building ought to relate not just to the BMS, but also to the background to the relevant land use agreements and the BMS.³⁷⁹ Several stakeholders also identified that even within broad groupings (eg community versus committee members), capacity building needs to involve a range of different approaches because different people are at different stages and have different interests: '[i]nterest and understanding is... at different levels for different people'.³⁸⁰ Indeed, a Pilbara Aboriginal corporation director commented that:³⁸¹

the trustee could talk until it is blue in the face about the structure and some people would get it, but others don't. I'm not sure about how best to get the word out about the structure. People get the general gist of it – they know what a Traditional Owner Council is and what it does (eg for direct benefits trust distributions, speak to your Council representative), member services. Most people know what they need to know.

For instance, some people are interested in BMS governance, while others are in need of more fundamental skills such as personal budget training and household maintenance.³⁸² Capacity building must therefore encompass a broad range of needs. This is echoed in a comment by a trustee officer that it can be difficult to work out whether the trust should fund more capable individuals, or expend more on individuals with more fundamental capacity building requirements (such as financial literacy).³⁸³

In relation to the nexus between capacity building and decision making, several stakeholders commented that sometimes people join boards for cultural reasons but do not have the capacity to effectively acquit their role as directors or committee members.³⁸⁴ Financial literacy was a particular concern, with some stakeholders

³⁷⁷ See, eg, nn 970 to 975; Karratha Workshop 3 May 2018; Pilbara Aboriginal Corporation Director 21 June 2018.

³⁷⁸ Pilbara Aboriginal Corporation Executive 5 July 2018. See also Karratha Workshop 3 May 2018.

³⁷⁹ Karratha Workshop 3 May 2018.

³⁸⁰ Trustee Officer 19 July 2018. See also Pilbara Aboriginal Corporation Director 20 June 2018; Pilbara Aboriginal Corporation Director 21 June 2018; Pilbara Aboriginal Corporation Executive 21 May 2018.

³⁸¹ Pilbara Aboriginal Corporation Director 21 June 2018.

³⁸² Trustee Officer 19 July 2018; Pilbara Aboriginal Corporation Director 20 June 2018.

³⁸³ Trustee Officer May and June 2018.

³⁸⁴ See, eg, Trustee Officer May and June 2018; Pilbara Aboriginal Corporation Executive 2 May 2018; Pilbara Corporation Executive 7 June 2018.

suggesting that capacity building around decision making was often too focused on corporate governance.³⁸⁵

Stakeholders also identified a range of ways in which capacity building could be undertaken. For example, encouraging committee members to develop personal development plans to increase their ownership over where the committee role might lead.³⁸⁶ One trustee officer distinguished between 'real life' capacity building and other forms of capacity building:³⁸⁷

One of the problems with capacity building is that you can put someone through a course and unless they get to use those skills in real life... unless they are put in an environment where they are supported to utilise the skills - then the person doesn't get that much from the training. So you need to have the training and then the opportunity at the end to use that training.

Indeed, most stakeholders agreed that service providers such as trustees ought to be providing services in such a way as to progressively build capacity so as to shift more of their responsibilities to an Indigenous community and its representatives over time.³⁸⁸

Several stakeholders also suggested that future funds could be accessed to promote capacity-building projects, essentially as a form of social impact investment.³⁸⁹

Another factor for capacity building is time. Of critical importance to BMSs is that once funding is received by the BMS, entities within the structure need capacity to make decisions about those funds. This can mean that BMSs at different ages have differing capacities to achieve objectives.³⁹⁰ BMSs also need to take account of the increasing capacity of Indigenous communities over time.³⁹¹ This also reflects the view expressed in Part 2.3 that BMSs and their purposes may need to change over time, to reflect changing capacity and needs of community members. As one corporation representative noted:³⁹²

If someone has been trained up and has their own job, has money in the bank and superannuation etc. They have caught up to everyone else in the broader community and so may not need specific help. They don't need to access a medical distribution as they have their own health insurance. At this stage there are then likely to be some whole of community social programs, but not individualised support to the same degree. Perhaps an investment fund approach. Some of this thinking comes from my dislike of current arrangements being a type of Centrelink situation, where people come in and apply for a

³⁸⁵ See, eg, Pilbara Aboriginal Corporation Executive 2 May 2018.

³⁸⁶ Trustee Officer May and June 2018.

³⁸⁷ Trustee Officer 28 June 2018.

³⁸⁸ Trustee Officer 28 June 2018; Trustee Officer May and June 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Executive 10 May 2018; Pilbara Aboriginal Corporation Director 21 June 2018; Resource Proponent Manager 24 January 2018.

³⁸⁹ See, eg, n 585 and accompanying text.

³⁹⁰ See, eg, Resource Proponent Manager 10 August 2017.

³⁹¹ Pilbara Aboriginal Corporation Director 21 June 2018.

³⁹² Pilbara Aboriginal Corporation Officer 12 March 2019.

range of supports from the trust. This has become the norm and there needs to be an end in sight. It is disempowering.

Two different resource proponent representatives independently raised another issue: the need for capacity building for all stakeholders, such that the resource proponent can increase its internal capacity as well – particularly taking into account turnover in resource proponent implementation staff.³⁹³ Two-way capacity building, in terms of cultural training for trustees and resource proponents was also highlighted.³⁹⁴

4.5 Governance

Indigenous organisations often lack sufficient administrative and governance capacity.³⁹⁵ Indeed, governance capacity, inter-group and intra-group disputes, fraud or mismanagement and lack of diligence were highlighted as general issues in Chapter 3. For BMSs in particular, the literature has highlighted governance capacity,³⁹⁶ conflicts of interest³⁹⁷ and inter-group and intra-group disputes.³⁹⁸ To expand on conflicts of interest, BMS decision makers drawn from an Indigenous community are also (themselves or their families) potential benefit recipients, giving rise to a potential conflict of interests and duties,³⁹⁹ albeit their family ties may also enhance decision makers' understanding of the needs and desires of community members. Additionally, community decision makers may face conflicts between their native title responsibilities and their responsibilities as a director or decision maker.⁴⁰⁰ Further, even for intended integrity measures such as the inclusion of independent directors or committee members, conflicts of interest may be relevant, with one stakeholder noting the potential for conflict between self-interest in continued remuneration and duty to the BMS.⁴⁰¹ The Njamal People's Trust example below, vividly demonstrates some of the conflict of interest issues that may arise, along with some recommended approaches.

³⁹³ Resource Proponent Social Investment Manager 22 February 2018; Resource Proponent Manager 10 August 2017.

³⁹⁴ Karratha Workshop 3 May 2018.

³⁹⁵ Marcia Langton and Odette Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the Resource Curse and the Mining Boom' (2008) 26(1) *Journal of Energy & Natural Resources Law* 31, 60; Marcia Langton and Angus Frith, 'Legal Personality and Native Title Corporations: The Problem of Perpetual Succession' in Lisa Strelein (ed) *Dialogue about Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 170, 174.

³⁹⁶ See, eg, n 373 and accompanying text; Rob Heferen et al, 'Taxation of Native Title and Traditional Owner Benefits and Governance Working Group: Report to Government' (Report, 1 July 2013); Sarah Prout Quicke, Alfred Michael Dockery, Aileen Hoath, 'Aboriginal Assets? The Impact of Major Agreements Associated with Native Title in Western Australia' (Report, 2017) 78.

³⁹⁷ Sarah Prout Quicke, Alfred Michael Dockery, Aileen Hoath, 'Aboriginal Assets? The Impact of Major Agreements Associated with Native Title in Western Australia' (Report, 2017) 78; *Levin's Observations*, 249-251.

³⁹⁸ *Levin's Observations*, 246; Benedict Scambray, 'Mining agreements, development, aspirations, and livelihoods' in *Altman and Martin's Power, Culture, Economy* 186-7.

³⁹⁹ *Levin's Observations*, 249-51.

⁴⁰⁰ *Ibid* 250.

⁴⁰¹ Pilbara Aboriginal Corporation Executive 7 March 2019.

Case example: Njamal People's Trust

The Njamal People's Trust is a charitable trust that was created in 2003. It was established for a range of charitable purposes primarily in relation to the Njamal People, who are the traditional owners in respect of country in the Pilbara region of Western Australia. Throughout its existence, it has been administered by four trustees: an individual, Abbott Trustee Services Pty Ltd, Australian Executor Trustees Ltd (a licensed trustee company) and Indigenous Services Pty Ltd. A committee comprised of 14 people, being representatives from each of the 14 Njamal family groups, the 'Trust Advisory Committee' provides non-binding advice to the trustee, but also has the power to remove and replace the trustee.⁴⁰² Trust Advisory Committee members are obliged to declare conflicts of interest, but still permitted to participate in the relevant decision.⁴⁰³ The Njamal People's Trust also held interests in a range of commercial and operating entities and was affiliated (through unit holding or common trusteeship) with several further trusts, one being a public benevolent institution and the other a unit trust intended to stream profits to either the public benevolent institution or the Njamal People's Trust, as desired.⁴⁰⁴ The affiliated trusts did not include a discretionary trust.

Between 2017 and 2018 the Njamal People's Trust was subject to what appears to be the first ever inquiry held by an Attorney-General under section 20 of the *Charitable Trusts Act 1962 (WA)*.⁴⁰⁵ The inquiry examined the 'nature and objects, administration, management and results thereof' of the Njamal People's Trust and also the 'value, condition, management and application' of its property.⁴⁰⁶

Several key themes were identified, with one being the tension between the desire for economic development activities and the governance and other legal rules about the purposes and processes for use of trust funds.⁴⁰⁷ A further theme linked to governance was the theme of self-interested actions and the need to guard against them, especially by trustees and decision makers.⁴⁰⁸

The Inquiry revealed that ISPL's governance practices failed to ensure that proper processes were followed.⁴⁰⁹ For example, ISPL failed to keep proper records of the minutes of directors meetings; did not properly document various contractual arrangements; did not provide or record disclosures in relation to actual and potential conflicts of interest; did not adequately report corporate changes to ASIC; and failed to implement and document clearly defined organisational roles and structures, along with lines of decision making authority and reporting responsibility.

⁴⁰² Alan Sefton, 'Report on Njamal People's Trust' (Inquiry under Section 20 of the *Charitable Trusts Act 1962 (WA)*, 1 November 2018) 235, 485-6.

⁴⁰³ Ibid 430.

⁴⁰⁴ Ibid ch 6.

⁴⁰⁵ Ibid.

⁴⁰⁶ Ibid 53.

⁴⁰⁷ Ibid 9-10.

⁴⁰⁸ Ibid 15.

⁴⁰⁹ Ibid 10.

ISPL also did not adequately document the making of loans (which were not clearly permitted by the trust deed).⁴¹⁰ The Inquiry emphasised the fundamental importance of processes to achieving good governance and accountability.⁴¹¹ Additional key improvements that needed to be made were the clarification of 'roles and responsibilities' and ensuring that 'the Trust is properly and transparently managed'.⁴¹² Also, amending the trust deed or applying to the Supreme Court to confirm the trust deed ambiguity over the trustee's ability to make social impact investments by way of loans.⁴¹³

In relation to conflicts of interest, the Inquiry found multiple potential areas of concern. Trust Advisory Committee members were not routinely declaring conflicts of interest and conflicts were not being recorded, even in instances where, for example, an advisory committee member recommended a capital grant to themselves for a boxing ring, or where the committee approved use of motor vehicles by committee members.⁴¹⁴ The Inquiry recommended that declarations of interest be routinely made by committee members and recorded in the minutes of committee meetings, irrespective of whether the interest is obvious to other committee members.⁴¹⁵ Additionally, the trustee should actively seek to identify whether conflicts exist (whether or not declared) and, where a conflict exists, should consider whether the trustee is satisfied with the merits of the decision and that it accords with the trust objects.⁴¹⁶

As to trustees, it appeared that AET had no documented procedure in place for identifying, recording and disclosing conflicts of interest that it might have as trustee and the Inquiry recommended that such a procedure be put in place.⁴¹⁷ ISPL was found to have engaged in potential breaches of the conflict rule by entering into dealings (such as for motor vehicle leasing) with related parties to the ISPL directors.⁴¹⁸ The Inquiry recommended that third party dealings only be entered into where there are 'clear and documented declarations of any conflict', consideration of such disclosures, and 'clear, documented and executed agreements for the provision of [services]'.⁴¹⁹ This included the creation of a conflicts register by ISPL so as to record conflicts of ISPL itself, its directors and officers, agents, employees and consultants; as well as a plan for how the conflict is to be managed.⁴²⁰

To expand on inter- and intra-group disputes, inter-group disputes involve conflict between different Indigenous communities that are covered by the same BMS, which is

⁴¹⁰ Ibid.

⁴¹¹ Ibid 10.

⁴¹² Ibid 15.

⁴¹³ Ibid 343-65.

⁴¹⁴ Ibid 432-3

⁴¹⁵ Ibid 433.

⁴¹⁶ Ibid 433.

⁴¹⁷ Ibid 434-7.

⁴¹⁸ Ibid 438-56.

⁴¹⁹ Ibid 456, 458-9.

⁴²⁰ Ibid 484.

not uncommon.⁴²¹ Factionalised disputes over membership, representation and community access to benefits waste precious resources and may significantly impair the function of BMS entities.⁴²² Intra-group disputes arise within one Indigenous community⁴²³ and might involve intergenerational conflict,⁴²⁴ disagreement about the cultural identity of a group,⁴²⁵ or in circumstances in which families and other groupings seek ways of monopolising control of a BMS and, consequently, benefit distribution.⁴²⁶

Fraud and mismanagement are also highlighted in case examples such as the Groote Eylandt example below and the Gumala example outlined in Part 4.7.

Case example: Groote Eylandt

An example of misuse of trust funds is provided by the Groote Eylandt Aboriginal Trust. GEAT has experienced losses in the vicinity of \$35 million.⁴²⁷

The Public Officer of GEAT pleaded guilty to offences relating to transactions involving the expenditure of approximately \$600,000.⁴²⁸ The Public Officer was heavily involved in the administration of GEAT, was a signatory for GEAT's bank accounts, and was also a beneficiary of GEAT.⁴²⁹ Much of the dissipation occurred by way of insufficiently acquitted expenditure from GEAT's bank accounts. Large amounts were drawn from GEAT's bank account by cheques drawn to "cash". There were insufficient details recorded in respect of those cheques to enable validation of the purpose or use of the expenditure.⁴³⁰

⁴²¹ Levin's Observations, 246. See, eg, the Gumala example in Part 4.7.

⁴²² Cf Diane Smith, *Cultures of Governance and the Governance of Culture: Indigenous Australians and the State* (ANU, PhD Thesis, 2011) 245; Marcia Langton and Angus Frith, 'Legal Personality and Native Title Corporations: The Problem of Perpetual Succession' in Lisa Strelein (ed) *Dialogue about Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 170, 178. See, eg, the Gumala example in Part 4.7.

⁴²³ Benedict Scambary, 'Mining agreements, development, aspirations, and livelihoods' in *Altman and Martin's Power, Culture, Economy* 186-187. See also Krysti Guest, 'The Promise of Comprehensive Native Title Settlements' (AIATSIS Research Discussion Paper, No 27, October 2009) 31, 33, 42; Paul Memmott and Scott MacDougall, *Holding Title and Managing Land in Cape York: Indigenous Land Management and Native Title*, (Research Project, National Native Title Tribunal, Perth, 2003) 80, 90, 114; Deloitte Access Economics, 'Review of the Roles and Functions of Native Title Organisations' (Report, March 2014) 13.

⁴²⁴ This consideration has been discussed in the context of determining an appropriate Distribution Policy: AIATSIS, 'Native Title Payments and Benefits' (Literature Review, Native Title Research Unit, 2008) 30.

⁴²⁵ Cf Toni Bauman and Rhian Williams, 'The Business of Process: Research Issues in Managing Indigenous Decision making and Disputes in Land' (Report, Indigenous Facilitation and Mediation Project, AIATSIS, 2004) 7-8; Benjamin Smith and Frances Morphy (eds), 'The Social Effects of Native Title: Recognition, Translation, Coexistence' (Research Monograph No 27, ANU E-Press, 2007) 154; *Bauman, Strelein and Weir's Living with Native Title* 10.

⁴²⁶ Cf Robert Levitus, 'Aboriginal organizations and development: The structural context', in *Altman and Martin's Power, Culture, Economy* 86; David Martin, 'The Governance of Agreements between Aboriginal People and Resource Developers: Principles for Sustainability' in *Altman and Martin's Power, Culture, Economy* 99, 119; Deloitte Access Economics, 'Review of the Roles and Functions of Native Title Organisations' (Report, March 2014) 13.

⁴²⁷ This figure was cited in the subsequent litigation in *GEAT v Deloitte, Touche Tohmatsu & Ors* [2016] NTSC 39 at [5] per Hiley J.

⁴²⁸ *GEAT v Deloitte, Touche Tohmatsu & Ors* [2016] NTSC 39 at [5] per Hiley J.

⁴²⁹ *GEAT (Statutory Manager Appointed) v Skycity Darwin Pty Ltd* [2014] NTSC 28 at [3] per Master Luppino.

⁴³⁰ *GEAT (Statutory Manager Appointed) v Skycity Darwin Pty Ltd* [2014] NTSC 28 at [3] – [5] per Master Luppino.

Resource proponent stakeholders emphasised the importance of having a durable BMS with good governance.⁴³¹ One resource proponent representative noted that:⁴³²

we as a company listed on various stock exchanges are subject to various compliance requirements and they go to concerns around anti-corruption, and Foreign Corrupt Practices Act type requirements.

This stakeholder stated that having strong governance requirements in place – such as the inclusion of a professional trustee company – allows the resource proponent, as contributor, to be comfortable with the way in which BMSs are functioning.

Nevertheless, all stakeholders noted the importance of governance and challenges to achieving good governance. In line with the literature, those challenges are broadly associated with capacity and with conflicts of interest. Inter and intra-group disputes were largely⁴³³ viewed as an efficiency issue and are discussed primarily in Part 4.7.

Aboriginal community and corporation representatives noted that there is a conflict of interest potential inherent in all boards and committees, because members need to make decisions about benefits paid to themselves and their own family members. Stakeholders reported various levels of compliance with governance requirements in these complex circumstances. Several stakeholders stated that some boards do a good job of making sure that all members take a broader community view, but one also noted that good governance can be difficult to achieve where directors/committee members are required to attend too many meetings (which is commonly the case where the pool of suitable decision makers is small).⁴³⁴ Conversely, one Aboriginal community member referred to ‘greed and power’, ‘[y]ou’ve got greed and power for ... who wants to be a leader and greed and power for who wants to benefit themselves’⁴³⁵ and another Aboriginal corporation executive stated:⁴³⁶

the simple answer is that boards and committees do not work. In particular because of self-interest and conflicts of interest.

This stakeholder stated that where cultural and kinship structures are very strong, Indigenous directors can find that ‘social pressures make it very difficult to make decisions on particular matters. People get plenty of governance training – the real issue is that there are two different cultural mentalities’.⁴³⁷

⁴³¹ See nn 108 and 110 and accompanying text.

⁴³² Resource Proponent Manager 24 January 2017.

⁴³³ Not exclusively. Some stakeholders did comment on factional disputes impacting on the viability of BMSs or on the fairness of distributions. See, eg, Pilbara Aboriginal Corporation Director 20 June 2018; Trustee Officer 18 May 2017.

⁴³⁴ Pilbara Corporation Executive 7 June 2018; Aboriginal Community Representatives 3 May 2018; Trustee Officer 19 July 2018. Cf Pilbara Aboriginal Corporation Director 21 June 2018.

⁴³⁵ Pilbara Aboriginal Corporation Director 20 June 2018.

⁴³⁶ Pilbara Aboriginal Corporation Executive 5 July 2018. Cf Trustee Officer 18 May 2017.

⁴³⁷ Pilbara Aboriginal Corporation Executive 5 July 2018

Some other stakeholders also indicated that decision makers were subject to social pressure to adopt a family-focussed rather than community-focussed perspective, with several suggesting that having a robust consultation and participation process in place for key decisions/projects could help alleviate the issue.⁴³⁸ Other suggestions included separation of powers,⁴³⁹ secret ballots to deal with standover tactics,⁴⁴⁰ sanctioning by peers on committees⁴⁴¹ and building interpersonal trust.⁴⁴² While independent members of decision making bodies – a type of separation of powers – was suggested by some,⁴⁴³ others cautioned that independents can also be motivated by self-interest and that sometimes too much focus is placed on independence and not enough on the expertise that an independent brings.⁴⁴⁴ A range of stakeholders also warned about the danger of decision makers being more motivated by board/sitting fees than BMS objectives, potentially seeking to extend meetings to increase fees.⁴⁴⁵

The conflict of interest issues cannot be entirely resolved by capacity building. Nevertheless, many stakeholders were of the view that more governance training is required and would help generally with governance capacity. For example, a BMS reviewer noted that often people were confused about the level of compliance required and suggested that specifying minimum standards for compliance would be very useful.⁴⁴⁶ This sentiment was echoed by other stakeholders, including a resource proponent representative, who argued that governance and compliance requirements need to be simplified because in their current form they are often not well understood.⁴⁴⁷ One Aboriginal community member also emphasised that it can be difficult trying to hold Elders accountable if they do not have a good understanding of their Western governance responsibilities: ‘it’s all about how do you make the two worlds meet’.⁴⁴⁸ A number of Aboriginal community and corporation representatives indicated that materially insufficient governance and financial literacy training was being provided,⁴⁴⁹ with some noting that training was only provided to a limited cross-section of BMS stakeholders, stating for example that in one case training was provided to BMS Indigenous corporation directors but not to trust committee

⁴³⁸ Pilbara Aboriginal Corporation Executive 4 July 2018; Trustee Officer 28 June 2018.

⁴³⁹ Pilbara Aboriginal Corporation Executive 5 July 2018

⁴⁴⁰ Pilbara Aboriginal Corporation Executive 2 May 2018

⁴⁴¹ Trustee Officer 18 May 2017.

⁴⁴² See, eg, Trustee Officer 19 July 2018.

⁴⁴³ Resource Proponent Manager 24 January 2018 (eg professional trustee company).

⁴⁴⁴ Pilbara Aboriginal Corporation Director 21 June 2018; Trustee Officer 19 July 2018.

⁴⁴⁵ See n 559 and accompanying text.

⁴⁴⁶ Independent BMS Facilitator 21 March 2018.

⁴⁴⁷ Resource Proponent Implementation Adviser 10 August 2017. See also Professional Adviser 31 January 2018;

⁴⁴⁸ Pilbara Aboriginal Corporation Director 20 June 2018.

⁴⁴⁹ Pilbara Aboriginal Corporation Executive 2 May 2018; Aboriginal Community Representatives 3 May 2018.

members.⁴⁵⁰ Other Aboriginal communities appeared to have more widely available governance and financial literacy training.⁴⁵¹

Several stakeholders indicated, however, that there can be tension within particular communities, between community members who have a limited understanding of and interest in the complexity around compliance and enforcement, and those who do.⁴⁵² It was suggested that people living in poverty may have little interest in governance.⁴⁵³

Several stakeholders also emphasised that decision makers were typically very cautious at first as they were aware of the complexity of the issues with which they were dealing, of previous governance failures and of the dangers of rogue advisers,⁴⁵⁴ which mirrors the timing issue for capacity discussed in Part 4.4.

Bauman, Strelein and Weir have also noted a link between poor decision making processes and disputes. Poor decision making processes can cause members to feel excluded, leading to disputes based on lack of support for the institution.⁴⁵⁵ In that sense, there seems to be a nexus with participation and communication, as discussed in Part 4.6.

4.6 Communication and participation

As set out in Chapter 2, BMSs generally involve a number of stakeholders and groups of people:

- One or more **resource proponents** who make payments to the BMS under land use agreements.
- A **trustee company**, which may be an independent professional trustee company.
- An Aboriginal community, which may **comprise**:
 - one or more groups of **native title holders** in relation to the land use area, and who are intended to control the BMS;
 - an overlapping, but potentially larger group of people who comprise the **local Aboriginal community** that is intended to benefit from the BMS;

and may also be **represented** by:

- a technical trust committee, the Decision Making Committee;
- a broader trust committee with knowledge of traditional laws and customs, the Traditional Owner or Elders' Council; and

⁴⁵⁰ Aboriginal Community Representatives 3 May 2018.

⁴⁵¹ Cf Pilbara Aboriginal Corporation Executive 4 July 2018.

⁴⁵² Trustee Officer May and June 2018; Trustee Officer 19 July 2018. Cf Pilbara Aboriginal Corporation Director 21 June 2018.

⁴⁵³ Trustee Officer 19 July 2018.

⁴⁵⁴ See, eg, Pilbara Aboriginal Corporation Director 21 June 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Trustee Officer 18 May 2017. Cf Pilbara Aboriginal Corporation Executive 10 May 2018.

⁴⁵⁵ *Bauman, Strelein and Weir's Living with Native Title* 10.

- an Indigenous corporation, through its: board, senior executive management and membership (noting that the **members** of the Indigenous corporation, who have to apply for membership, may not be identical to the group of native title holders).

Virtually every stakeholder interviewed signalled that adequate communication between these various stakeholders and people was critical to a BMS' ability to pursue its purposes. Most stakeholders, including representatives from all classes of stakeholder, indicated that communication could be materially improved. Even a trustee officer who indicated that communication was currently being carried out successfully noted that '[i]t just never seems to be enough [communication]' for the community.⁴⁵⁶ Comments included:

- The importance of general capacity building and a basic understanding of the BMS and land use agreement – at the Indigenous community and at the board/committee level, in order to support information and consultation about operating the BMS.⁴⁵⁷ One Aboriginal community member stated: '[c]ommunication needs to be improved. There needs to be better understanding of what structures are and what they can do to help people understand where it [the BMS] is going'.⁴⁵⁸ However, representatives of a range of stakeholders strongly emphasised that capacity building, even of the basics of the BMS itself, needs to be highly tailored to individual circumstances.⁴⁵⁹ An Aboriginal corporation executive noted that the corporation was addressing this capacity building by focussing on information about:⁴⁶⁰

governance processes, members understanding what the structure is, who is on the structure, what decision is it making and how is it relevant to my life?

- Several participants in the Karratha workshop suggested that the Aboriginal community itself should have a greater role in ensuring appropriate communications with the community by the trustee and the BMS Indigenous corporation, based on previous experience where reporting and communications from the trustee and corporation at a community annual general meeting had been insufficient and where the trustee and corporation were not being proactive in setting up communication processes.⁴⁶¹
- One trustee officer stated 'One of the big problems with many licensed trustee companies is that they only tell communities what they think communities need to know – they spoon-feed information. This is not because licensed trustee

⁴⁵⁶ Trustee Officer 19 July 2018.

⁴⁵⁷ See, eg, Karratha Workshop 3 May 2018; Pilbara Aboriginal Corporation Executive 2 May 2018; Pilbara Aboriginal Corporation Executive 5 July 2018; Pilbara Aboriginal Corporation Director 20 June 2018; Aboriginal Community Representatives 3 May 2018; Independent BMS Facilitator 21 March 2018.

⁴⁵⁸ Director Pilbara Aboriginal Corporation 20 June 2018.

⁴⁵⁹ See Part 4.4.

⁴⁶⁰ Pilbara Aboriginal Corporation Executive 21 May 2018.

⁴⁶¹ Karratha Workshop 3 May 2018.

companies are trying to do the wrong thing, but is partly because the communities are not really holding the trustees accountable: the relationship is too one-way, which is not ideal'.⁴⁶²

- That BMS 'should give a voice to the native title community. In terms of selecting decision makers and in approving key policies/strategies'.⁴⁶³

A key theme was that general meetings of community members were not particularly effective for consultation and while of mixed effectiveness for disseminating information, they were very expensive and not easy to tailor to the different interests, capacities and communication styles of community members.⁴⁶⁴ Trustees and Aboriginal corporations had thus also attempted a range of further communication and consultation practices, many of which are identified in Part 4.13.⁴⁶⁵ Several trustee and corporation officers indicated that they had undertaken some of these additional activities and that they routinely visited some community members such as family groups and Elders; that they obtained information through their member services/grants telephone lines and services; and that they relied on trust committee members to pass on information and gather community views.⁴⁶⁶ Nevertheless, many trustee officers and other stakeholders indicated that general meetings⁴⁶⁷ (or meetings with smaller groups, such as family groups, immediately preceding a general meeting) and reliance on trust committee members and corporation board members were the predominant means of communication about BMS trust matters.⁴⁶⁸ Corporation annual reports and websites were also important means of communicating corporation activities in some cases.⁴⁶⁹

Communication between a professional trustee and trust committees highlighted different perspectives:

- Some stakeholders indicated that communication worked reasonably well and these stakeholders tended to be commenting on structures where coordinated strategic planning across BMS bodies was more advanced.⁴⁷⁰

⁴⁶² Trustee Officer 28 June 2018.

⁴⁶³ Pilbara Aboriginal Corporation Executive 21 May 2018.

⁴⁶⁴ See, eg, Trustee Officer May and June 2018; Trustee Officer 18 May 2017; Pilbara Aboriginal Corporation Executive 5 July 2018; Independent BMS Facilitator 21 March 2018. Cf Trustee Officer 28 June 2018; Professional Adviser 31 January 2018. This position is consistent with the literature on Indigenous governance discussed at nn 277 to 278 and accompanying text.

⁴⁶⁵ See nn 618 to 621 and accompanying text.

⁴⁶⁶ Trustee Officer 19 July 2018; Trustee Officer May and June 2018; Trustee Officer 18 May 2017; Pilbara Aboriginal Corporation Executive 4 July 2018; Pilbara Aboriginal Corporation Director 21 June 2018.

⁴⁶⁷ Held twice a year rather than annually in several cases.

⁴⁶⁸ See, eg, Trustee Officer May and June 2018; Trustee Officer 18 May 2017; Resource Proponent Manager 24 January 2017; Independent BMS Facilitator 21 March 2018. Cf Trustee Officer 28 June 2018; Pilbara Aboriginal Corporation Executive 21 May 2018.

⁴⁶⁹ Resource Proponent Manager 24 January 2017.

⁴⁷⁰ See, eg, several responses to Karratha Workshop 3 May 2018; Trustee Officer 19 July 2018; Pilbara Aboriginal Corporation Executive 10 May 2018.

- For other BMSs, Aboriginal community members on trust committees and Aboriginal corporation executives indicated that trustees provided insufficient information or provided information too close to the holding of a meeting for committee members to read that information.⁴⁷¹
- Some trustee officers and other stakeholders also referred to communication difficulties which limited their ability to provide information to committee members, such as: inability to contact some committee members between meetings; a majority of committee members not having read committee papers before the meeting; and skill levels of some Decision Making Committee members, especially in relation to financial and investment concepts.⁴⁷² One trustee officer also noted frequent committee member turnover as a problem, although this was not an issue experienced by most stakeholders.⁴⁷³

A further theme from the comments and the above description of BMS bodies, is that BMSs rely to some extent on **representatives** to make decisions and convey information. The usefulness of representative decision makers in Indigenous organisations has been acknowledged in the literature,⁴⁷⁴ however, such decision makers are frequently perceived to be insufficiently representative of native title groups or interests.⁴⁷⁵ In the case of PBCs, that may sometimes result from a divergence, as noted above, between native title group or Indigenous community membership and PBC membership.⁴⁷⁶ Further, there are likely to be a broad range of specific rights and interests held by different native title holders, or held under traditional laws and customs in relation to native title areas by Indigenous people who are not native title holders.⁴⁷⁷

Designing appropriate representational mechanisms to account for that diversity is key to achieving engagement.⁴⁷⁸ Strelein and Tran note that some PBCs use governing

⁴⁷¹ Pilbara Aboriginal Corporation Executive 2 May 2018; Pilbara Aboriginal Corporation Director 21 June 2018; Aboriginal Community Representatives 3 May 2018. See also Professional Adviser 31 January 2018.

⁴⁷² See, eg, Trustee Officer May and June 2018. See also Pilbara Aboriginal Corporation Executive 5 July 2018. Cf Pilbara Aboriginal Corporation Director 20 June 2018. Some Aboriginal community members agreed that Decision Making Committee members required greater financial and investment skills and suggested that the trustee should ensure that adequate training was provided: Aboriginal Community Representatives 3 May 2018.

⁴⁷³ Trustee Officer 18 May 2017.

⁴⁷⁴ Mick Dodson and Diane Smith, 'Governance for sustainable development: Strategic issues and principles for Indigenous Australian communities' (Discussion Paper 250, 2003, ANU) 13.

⁴⁷⁵ Paul Memmott and Scott McDougall, *Holding Title and Managing Land in Cape York Indigenous Land Management and Native Title*, (National Native Title Tribunal, Perth, 2003) 4; Benjamin Smith and Frances Morphy (eds), *The Social Effects of Native Title: Recognition, Translation, Coexistence* (Research Monograph No 27, ANU E-Press, 2007) 195; David Martin, 'The Governance of Agreements Between Aboriginal People and Resource Developers: Principles for Sustainability', in *Altman and Martin's Power, Culture, Economy* 170; Bauman, Strelein and Weir's *Living with Native Title* 211, 267.

⁴⁷⁶ *Mantziaris and Martin's Native Title Corporations* 185-6.

⁴⁷⁷ See for example: Toni Bauman, 'Whose Benefits Whose Rights Negotiating rights and interests amongst native title parties' (Vol 3 Issues Paper No 2, 2005) 9; David Martin 'Rethinking the Design of Indigenous Organisations: The Need for Strategic Engagement' (Discussion Paper No 248, CAEPR, 2003) 12.

⁴⁷⁸ David Martin 'Rethinking the Design of Indigenous Organisations: The Need for Strategic Engagement' (Discussion Paper No 248, CAEPR, 2003)

committees structured around familial representation.⁴⁷⁹ A difficulty with this model is that, with time, familial lines become blurred. If representation is based on apical ancestry, political strategising can also result in families with multiple ancestry fielding multiple candidates for boards, thereby increasing their effective representation to the detriment of others.⁴⁸⁰ Limerick proposes that structures should ideally be self-governing, to allow adequate expression of Indigenous authority and processes and therefore maximize representativeness.⁴⁸¹ This, however, raises difficulties in obtaining certainty that a decision has been made, particularly for third parties. Further, even if it were possible to sufficiently represent the Indigenous community members in the Indigenous organisation, changes in the composition and structure of the group might mean that the organisation is no longer representative.⁴⁸² Martin has also contended that the assumptions of democratic representation may be at odds with Indigenous culture.⁴⁸³ Rather, Indigenous culture may prioritise autonomy and resist being bound by the decisions of others outside the 'religious and ritual arena'.⁴⁸⁴ Cultural influences such as these arise from the 'localism' discussed in Part 3.4.⁴⁸⁵

Martin has thus argued that representative mechanisms 'can never truly reflect the... fluid and diverse groupings and alliances that characterise Aboriginal political systems' and that only a minimal level of representativeness should be attempted for boards or committees.⁴⁸⁶ The suggestion is that a representative body should comprise a 'broad cross-section' of the Aboriginal community constituency and 'reflect as far as feasible the cultural geography of the governance environment'.⁴⁸⁷ This approach also reflects the assertion in Part 3.4 that BMSs need not and should not attempt to incorporate an Indigenous community's full suite of governance rules and processes, including its political systems. Indeed, in line with that reasoning, greater consistency with an Indigenous community's political systems might be achieved by institutionalising broad consultation and participation methods so that a BMS supports and records community decisions rather than trying to replicate the community's political systems within the BMS.⁴⁸⁸

⁴⁷⁹ Lisa Strelein and Tran Tran, 'Native Title Representative Bodies and Prescribed Bodies Corporate: Native Title in a Post Determination Environment' (Native Title Research Report 2/2007, Native Title Research Unit, AIATSIS, Canberra, 2007).

⁴⁸⁰ Matthew Storey et al, 'Exploring the Role of Traditional Decision making Structures in Enterprise Focused PBCs' (Native Title Services Victoria Ltd, 2013) 8.

⁴⁸¹ M Limerick, 'Resource Document on Alternative Governing Structures' (Law Justice and Culture Unit, Office of Aboriginal and Torres Strait Islander Affairs, September 1994).

⁴⁸² Marcia Langton and Angus Frith, 'Legal Personality and Native Title Corporations: The Problem of Perpetual Succession' in Lisa Strelein (ed) *Dialogue about Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 170, 175.

⁴⁸³ David Martin, 'The Governance of Agreements Between Aboriginal People and Resource Developers: Principles for Sustainability', in *Altman and Martin's Power, Culture, Economy* 99, 118.

⁴⁸⁴ *Ibid.*

⁴⁸⁵ *Ibid* 118-119.

⁴⁸⁶ *Ibid* 120-1.

⁴⁸⁷ *Ibid* 120-1.

⁴⁸⁸ See, especially, Patrick Sullivan, 'Indigenous Governance: The Harvard Project, Australian Aboriginal Organisations and Cultural Subsidiarity' (Working Paper No. 4, Desert Knowledge Cooperative Research Centre, Alice Springs, 2007) 15-16. See also n 261.

When considering which bodies should have responsibility for providing information and undertaking consultation, there will clearly need to be collaboration between and involvement of the various BMS bodies, albeit with some division of responsibilities.⁴⁸⁹ Most stakeholders focussed mainly on the trustee and the BMS Indigenous corporation. As discussed below in Part 4.11,⁴⁹⁰ stakeholders generally considered the corporation best placed to liaise with the Indigenous community,⁴⁹¹ including by providing information/capacity building about the BMS itself – with input from the trustee as requested by the corporation;⁴⁹² with the trustee having a key role in relation to financial planning and acquittals and in communicating with the trust committees and with the BMS Indigenous corporation.⁴⁹³ Stakeholders also suggested that strategic planning was a matter that would require all BMS entities and that the question of whether the trustee or BMS Indigenous corporation took the lead role would depend on the context.

Resource proponent representatives also noted the importance of reporting and communication to maintenance of resource company reputation and social licence to operate⁴⁹⁴ and to communicating with the broader community the role and significance of BMSs.⁴⁹⁵

4.7 Overlapping decision making bodies

As identified in Chapter 2, BMSs typically comprise a number of legal entities, some with multiple decision making bodies. It is also clear from the discussion in Part 2.2 that, in order to retain Indigenous community involvement in decision making and also to ensure incorporation of traditional laws and customs, there may be some overlapping areas of decision making authority for these bodies like overlapping roles in relation to strategic decisions such as the content of distribution policies or strategic plans; and day-to-day decisions such as the selection of projects. The interactions between these sets of decision makers raise particular issues. Stakeholder interviews highlighted, in particular, the time delays and additional administration costs that such overlaps can entail. By way of example:

- One trustee officer reported that Aboriginal community members had become very unhappy with the trustee because the Decision Making Committee had taken 2 years and \$700,000 to develop its first distribution policy, such that ‘tens of millions’ of dollars were ‘frozen’ in the meantime.⁴⁹⁶ This was in large part due

⁴⁸⁹ This was the general position of stakeholders at the Karratha Workshop 3 May 2018.

⁴⁹⁰ See nn 602 to 606 and accompanying text.

⁴⁹¹ This view was not universal. For instance, one stakeholder commented in the Karratha Workshop 3 May that the trustee should be responsible for beneficiary meetings and consultation on personal financial plans.

⁴⁹² Karratha Workshop 3 May 2018.

⁴⁹³ In addition to n 490, see also Karratha Workshop 3 May 2018.

⁴⁹⁴ Resource Proponent Manager 24 January 2017; Resource Proponent Social Investment Manager 22 February 2017.

⁴⁹⁵ Resource Proponent Manager 10 August 2017.

⁴⁹⁶ Trustee Officer 18 May 2017.

to the time taken to build capacity for committee members and the risk-averse approach adopted by the committee.

- A resource proponent representative noted that '[e]fficiency is also a problem, that's a multi-staged decision making process, convening committees. There's time lag involved in that. There is also cost. Those committees cost to convene, but ... one thing is the cost of participating in those committees, I think, serves as a really good de facto mechanism of redistributing funds into the community and it's indirect acknowledgment of time and participation'.⁴⁹⁷
- Respondents at the Karratha Workshop indicated that 'the creation of so many layers... turn [BMSs] into government departments... adding cost and hindering actions'.⁴⁹⁸

Most stakeholders emphasised that some overlap in decision making authority was useful as it enabled a decision maker with more capacity (for instance, a professional trustee) to help build the capacity of other decision makers.⁴⁹⁹ And some respondents also indicated that there may be higher costs imposed by other aspects of BMSs.⁵⁰⁰

However, there have also been suggestions that trust committees such as the Traditional Owner Council and Decision Making Committee have actually come to resemble one another in terms of their composition and roles, with questions then raised about the continued need for two separate committees.⁵⁰¹ One trustee officer expressed the issue this way:⁵⁰²

There should be no requirement for a Council [a trust committee intended to reflect community members with political and cultural authority – see Figure 6.2] – I don't think they add anything. When you spend so much money to bring them all together and then you find out that they already know all the policies very well and it's just to tick the box – it's great to tick the box, but to spend \$30,000 on each meeting just to tick the box?

There's no real difference in expertise between the Decision Making Committee [a trust committee intended to reflect community members with greater financial and legal compliance expertise – see Figure 6.2] and [the] Council. No-one is putting forward Decision Making Committee members on the basis of merit; it's pure popularity. The idea of the Elders' non-technical Council and the more technical expertise Decision Making Committee has not happened – the two are very similar.

⁴⁹⁷ Resource Proponent Manager 24 January 2017.

⁴⁹⁸ Karratha Workshop 3 May 2018.

⁴⁹⁹ See, eg, Trustee Officer 18 May 2017; Trustee Officer May and June 2018; Karratha Workshop 3 May 2018; Pilbara Aboriginal Corporation Director 20 June 2018. Cf Resource Proponent Manager 24 January 2017.

⁵⁰⁰ Karratha Workshop 3 May 2018.

⁵⁰¹ See, eg, Resource Proponent Manager 24 January 2017; Independent BMS Facilitator 21 March 2018; Professional Adviser 31 January 2018. Cf Pilbara Aboriginal Corporation Executive 2 May 2018.

⁵⁰² Trustee Officer 18 May 2017.

Other stakeholders, however, indicated that under their BMS the Traditional Owner Council (ie, the Elders' Council) and more technical Decision Making Committee had a distinctly different composition and focus.⁵⁰³ For BMSs such as the Pilot Structure discussed in Chapter 6, this reflects the intention of the drafters that the Council was to be the primary representative body for the Indigenous community, with the Decision Making Committee only created in response to the use of a Professional Trustee company, in order to act like a board of directors overseeing the performance of the Professional Trustee as a kind of CEO.⁵⁰⁴

As directors typically consider broader strategy and impacts on stakeholders, as well as focussing on more technical compliance and CEO performance, the different roles of the Council and Decision Making Committees clearly pose some tensions, even setting aside the potential for localism within Indigenous communities to drive factional political contestation over control of these committees. Unsurprisingly then, many of these stakeholders still agreed that there would likely be a cost saving without much loss of functionality if the Council and Decision Making Committee were combined (or the Council role materially reduced) – the main concern being that it might take slightly longer to organise meetings if the combined body was closer to the size of the Council than the smaller Decision Making Committee.⁵⁰⁵

In addition to delays and costs, several stakeholders also noted that having overlapping decision makers can even impede achievement of BMS purposes. This was attributed in part to lack of understanding of what BMS structures meant for community members and also to the impact that decisions about funding (by the trusts) can have on the implementation of projects (by the BMS Indigenous corporation).⁵⁰⁶ One trustee officer stated:⁵⁰⁷

Structurally, I think one of the problems is that the entities within a BMS are not cohesive enough. You have these different entities within a BMS, but the strategy piece needs to be better implemented across the entities. They might have similar purposes, but it is not enough that their broad purposes all match up. They don't have a consistent strategy. This is a hard one, because you need to have people understand what they can achieve and then actually have people sit down to talk about what they want to achieve and to agree on a course of action. That is a difficult thing to do.... It is all about psychology and getting the group thinking to happen.

A Pilbara Aboriginal corporation director noted:⁵⁰⁸

We've got a wide spectrum of people because there is the trustee, the Council, the Decision Making Committee, then you've got the [PBC] board. Who drives all of this? ... It's the Decision Making Committee that is making the policies, yet at the end of the day, we're the

⁵⁰³ Trustee Officer May and June 2018.

⁵⁰⁴ Cf Professional Adviser 3 May 2019.

⁵⁰⁵ Resource Proponent Implementation Adviser 10 August 2017; Karratha Workshop 3 May 2018; Pilbara Aboriginal Corporation Director 21 June 2018. Cf Trustee Officer 19 July 2018.

⁵⁰⁶ Independent BMS Facilitator 21 March 2018; Pilbara Aboriginal Corporation Executive 21 May 2018.

⁵⁰⁷ Trustee Officer 28 June 2018. See also Pilbara Aboriginal Corporation Executive 21 May 2018.

⁵⁰⁸ Pilbara Aboriginal Corporation Director 20 June 2018.

ones on the board who are liable. We're the ones who hold native title, we're the ones who have made the [land use] agreement.

In a similar vein, in a number of instances, the existence of multiple sites of decision making authority has led to serious political contestation between different decision making bodies for overall control of a BMS.⁵⁰⁹ Historically, this has often revolved around the scope of authority of a decision making body for a funding entity versus that of a decision making body relating to a doing entity.⁵¹⁰ In some instances the conflict has led to very substantive disruption of BMS activities, as demonstrated by the two case examples below.

Case example: Ngarluma

In *Ngarluma Tharndu Karrungu Maya Ltd v Ngarluma Aboriginal Corporation RNTBC* [2014] WASC 79, the plaintiff (NTKML) and the defendant (NAC) were non-profit corporations, within a BMS. The BMS involved two trusts: a charitable trust and a discretionary trust. NTKML was the trustee of those two trusts. NAC was the sole member of NTKML.⁵¹¹

The members of NAC were individual Ngarluma People. A determination of native title was made in favour of the Ngarluma People by the Federal Court in 2005. NAC was the PBC. Although NAC was the sole and thus controlling member of NTKML, the documents comprising the BMS contemplated consultation with the Ngarluma People directly regarding operation of the trusts. NTKML's constitution entitled the Ngarluma People to notice of a general meeting, despite the fact they could not vote. The constitution also provided that whilst the appointment of a director was by ordinary resolution of NTKML, any appointment had to be endorsed by the Ngarluma People.⁵¹²

The relationship between NTKML and NAC deteriorated after the board of NAC made allegations of financial mismanagement against the board of NTKML.⁵¹³ NAC sought to convene a special general meeting to dismiss and replace the board of NTKML. NAC did not properly notify the Ngarluma People and NTKML sought an injunction restraining the holding of that meeting. Justice Hall considered that the requirement in NTKML's constitution requiring that notice be given to the Ngarluma People was to afford them an opportunity to attend any meeting and to express their views as to how NAC should exercise its vote and that this was 'no mere formality'.⁵¹⁴ NAC was also obliged to exercise its vote having regard to the interests of the Ngarluma People. As Hall J concluded that there was a serious question to be tried, he granted an injunction.

⁵⁰⁹ See, eg, Resource Proponent Implementation Adviser 10 August 2017; Resource Proponent Manager 10 August 2017; Resource Proponent Manager 24 January 2017. Cf Trustee Officer 19 July 2018.

⁵¹⁰ See, eg, Pilbara Aboriginal Corporation Director 21 June 2018.

⁵¹¹ *Ngarluma Tharndu Karrungu Maya Ltd v Ngarluma Aboriginal Corporation RNTBC* [2014] WASC 79 [5]-[7].

⁵¹² *Ibid* [7].

⁵¹³ *Ibid* [9].

⁵¹⁴ *Ibid* [25]-[26].

An annual general meeting for NTKML was due to be held relatively soon after the decision at which the proposed resolution by NAC could be dealt with. However, at the general meeting the terms of office of the existing directors expired and no replacement directors were appointed. NTKML nevertheless remained trustee of the two trusts. However, the custodian trustee under the trusts advised NAC that, under the terms of the Custodian Trustee Agreement, it could only accept instructions from authorised persons. Given NTKML had no board, there were no authorised persons.⁵¹⁵ The money of the charitable trust was effectively tied up, causing financial difficulties.⁵¹⁶

This resulted in further litigation: *Ngarluma Aboriginal Corporation RNTBC v Attorney-General of Western Australia* [2014] WASC 245, in which NAC sought orders for the removal of NTKML as trustee of the two trusts, and the appointment of a new trustee. Justice Allanson was satisfied that it was expedient to appoint a new trustee.⁵¹⁷ However, the litigation was by NAC as a person beneficially interested in each trust.⁵¹⁸ This was not problematic for the direct benefits trust, as NAC was a specified beneficiary. However, NAC was not a specified beneficiary of the charitable trust. As Allanson J accepted that a charitable trust is for a purpose, not persons, he considered that the Attorney-General was the only proper party to bring proceedings for the substitution of the trustee of the charitable trust; NAC did not have standing.⁵¹⁹ Justice Allanson adjourned the proceedings in relation to the charitable trust to allow the Attorney-General to consider his position.⁵²⁰

Case example: Gumala Foundation

The Gumala BMS arose from the 1997 Yandi Land Use Agreement, a private agreement negotiated prior to the commencement of the NTA's ILUA provisions. The YLUA's purpose was to provide a 'community benefits package' to the Indigenous parties in return for their agreement to establish and operate the Yandicoogina mine.⁵²¹ The YLUA was entered into by Rio Tinto and GAC, a CATSI Act corporation⁵²² representing three different Indigenous peoples, the Nyiyaparli, Banjima and Yinhawangka peoples (each of whom now, but not at the time of the YLUA, have been determined to hold native title and have established their own PBC).⁵²³

⁵¹⁵ *Ngarluma Aboriginal Corporation RNTBC v Attorney-General (WA)* [2014] WASC 245 [27].

⁵¹⁶ *Ibid* [28].

⁵¹⁷ *Ibid* [44].

⁵¹⁸ *Ibid* [45]; *Trustees Act 1962* (WA) s 93.

⁵¹⁹ *Ngarluma Aboriginal Corporation RNTBC v Attorney-General (WA)* [2014] WASC 245 [54].

⁵²⁰ *Ibid* [57].

⁵²¹ *Scambary's My Country* 141.

⁵²² GIPL, *Third Review of the Foundation and Trust Deed* (2013) <<http://www.gumalatrust.com/wp-content/uploads/2015/04/Third-Review-of-the-Fuondation-and-Trust-Deed.pdf>> 4. Note that GAC was originally incorporated under the predecessor legislation.

⁵²³ *Scambary's My Country* 141.

Payments made under the YLUA were to be principally received and administered by GAC via two trusts: the Gumala Foundation and the Elderly and Infirm trust, which provided some limited cash payments to Elders.⁵²⁴ The Foundation is the only trust still operating.⁵²⁵

There are four key 'entities'⁵²⁶ operating under the YLUA: GAC, its business arm Gumala Enterprises Pty Ltd, the Foundation and its corporate trustee, GIPL. GAC is the manager of the Foundation⁵²⁷ and is the sole member of GEPL and GIPL.⁵²⁸ GEPL is separately managed, however it receives some funding from the Foundation.⁵²⁹ GAC makes recommendations to GIPL on distribution decisions,⁵³⁰ and is the 'on the ground Indigenous organisation' to assist beneficiaries with funding proposals.⁵³¹ The GIPL trustee, incorporated under the Corporations Act,⁵³² is independent of GAC and has ultimate decision making powers in all matters relating to the Foundation.⁵³³ However, GAC owns the shares in GIPL, manages the Foundation,⁵³⁴ and receives funding from it,⁵³⁵ which structurally creates a problematic relationship with potential for conflict of interest in decision making, particularly regarding distribution of benefits.

At an early stage, conflict arose between GEPL and the board of GIPL when GIPL decided not to release funds for the recruitment of a general manager for GEPL, likely due to an assessment of the risk level for GEPL's business ventures.⁵³⁶ Those tensions remained and were not resolved by GAC's board. That led to a communication breakdown between GIPL, GEPL and GAC and the departure of the initial chairperson of GAC.⁵³⁷ Tensions continued, in large part due to a perception by Aboriginal community members that GIPL did not sufficiently understand on-the-ground concerns of community

⁵²⁴ *Scambary's My Country* 153.

⁵²⁵ Mary Edmunds, 'Harnessing the cyclone – Gumala Aboriginal Corporation: a case study' in Bruce Walker (ed), *The Challenge, Conversation, Commissioned Papers and Regional Studies of Remote Australia* (Desert Knowledge Australia, 2012) 181, 190.

⁵²⁶ Note that a trust is not a legal entity and the term 'entity' is used in a broader sense here.

⁵²⁷ GAC Rule Book r 3.1.2; Gumala General Foundation Trust Deed Recital E, cl 2(2), cl 4.2.

⁵²⁸ Gumala General Foundation, *Gumala Group Annual Report 2013-14* (2014)

<<http://www.gumala.com.au/documents/GUMALA%20ANNUAL%20REPORT%202014%20web.pdf>> 39.

⁵²⁹ *Scambary's My Country* 141, 170, citing C Hoffmeister, *Review of the Gumala Foundation: Final Report to the Trustee Gumala Investments Pty Ltd* (2002).

⁵³⁰ Mary Edmunds, 'Harnessing the cyclone – Gumala Aboriginal Corporation: a case study' in Bruce Walker (ed), *The Challenge, Conversation, Commissioned Papers and Regional Studies of Remote Australia* (Desert Knowledge Australia, 2012) 181, 191; Gumala General Foundation Trust Deed cls 8.1, 8.3, 8.5, 8.7, 8.9A, 8.10, and 8.11.

⁵³¹ Sarah Holcombe, 'Indigenous entrepreneurialism and mining land use agreements' in *Altman and Martin's Power, Culture, Economy* 149, 156.

⁵³² GIPL, *Third Review of the Foundation and Trust Deed* (2013) <<http://www.gumalatrust.com>> 4; Fred Chaney and Paul Lennon, *2013 YLUA Review* (10 October 2013); GAC

<www.gumala.com.au/assets/final-report-ylua-review.pdf> 4.

⁵³³ Gumala General Foundation Trust Deed cl 6; Sarah Holcombe, 'Indigenous entrepreneurialism and mining land use agreements' in *Altman and Martin's Power, Culture, Economy* 149, 155.

⁵³⁴ GAC Rule Book cl 3.1.2; Gumala General Foundation Trust Deed Recital E, cls 2(2) and 4.2.

⁵³⁵ Gumala General Foundation Trust Deed cl 10.2.

⁵³⁶ *Scambary's My Country* 141, 158-71.

⁵³⁷ *Ibid.*

members in the same way as GAC. The tensions built to the point that GAC attempted to wind GIPL up in 2007 and GIPL obtained a court injunction to preclude this attempt.⁵³⁸ Mediation resulted in a settlement between GIPL and GAC, a change of the GAC CEO and an independent review (Parakeelya Review) of the Foundation and the relationship between GIPL and GAC.⁵³⁹ The Parakeelya Review included recommendations that the decision making bodies within the Foundation be fundamentally restructured so as to provide 'unambiguous' governance and executive roles for those bodies, to remove duplication of administrative and governance responsibilities and to involve Aboriginal community members to a greater extent in governance roles and in the design and execution of programs.⁵⁴⁰ A subsequent review in 2009 made broadly consistent recommendations, as well as recommending that the Aboriginal community members should directly appoint any trustee, rather than relying on GAC as their representative.⁵⁴¹ While GAC and GIPL were taking steps to implement the reports, GAC increased the provision of services and benefits to members, but also dramatically increased associated administration costs.⁵⁴² An ORIC examination in 2011 suggested that those administration costs were likely higher than necessary and potentially reflected breaches of governance standards, including 106 related-party transactions that had not been properly authorised.⁵⁴³

Community members did not approve a fundamental restructure of the Foundation bodies, so GAC and GIPL instead took steps such as establishing Foundation-wide policies and procedures, writing charters for boards and committees to set out roles and responsibilities, agreeing projected budgets and joint use of office space.⁵⁴⁴ A yet-further report in 2013 also recommended that the GAC and GIPL boards develop a single strategic plan for the Foundation, hold joint bi-monthly meetings to discuss strategic issues for the Foundation, that senior executives likewise hold regular joint meetings, that high-level compliance (including reporting to third parties) and finance management be taken over entirely by GIPL and that member consultation be undertaken in practice by GAC (even if on behalf of GIPL).⁵⁴⁵

⁵³⁸ Mary Edmunds, 'Harnessing the cyclone – Gumala Aboriginal Corporation: a case study' in Bruce Walker (ed), *The Challenge, Conversation, Commissioned Papers and Regional Studies of Remote Australia* (Desert Knowledge Australia, 2012) 181, 195.

⁵³⁹ Sarah Holcombe, 'Indigenous Entrepreneurialism and Mining Land Use Agreements' in *Altman and Martin's Power, Culture, Economy* 149, 159-60.

⁵⁴⁰ As contained in GIPL, *Third Review of the Foundation and Trust Deed* (2013) <www.gumalatrust.com> 14.

⁵⁴¹ *Ibid* 11.

⁵⁴² See n 563 and accompanying text.

⁵⁴³ ORIC, *Notice Under Sections 439-20(1) and 439-20(3) of the Corporations (Aboriginal and Torres Strait Islander) Act 2006* (29 March 2012).

⁵⁴⁴ GIPL, *Third Review of the Foundation and Trust Deed* (2013) <<http://www.gumalatrust.com/wp-content/uploads/2015/04/Third-Review-of-the-Fuondation-and-Trust-Deed.pdf>> 6.

⁵⁴⁵ Fred Chaney and Paul Lennon, *2013 YLUA Review* (10 October 2013) <www.gumala.com.au/assets/final-report-ylua-review.pdf> 6-10.

It appears that the above steps led to the partial capture of GIPL (and its compliance and governance functions) by GAC. A reduction in land use payments to the Foundation occurred in 2014, prompting the appointment of a new chair of GIPL. In 2015, GIPL requested further detail from GAC about GAC's expenditure and finances and following a refusal by GAC to provide more information, GIPL applied to the Supreme Court of Western Australia in 2015 for directions and orders.⁵⁴⁶ Those actions and the decline in revenue resulted in a change in GAC's CEO, the institution of legal proceedings by GAC against the former CEO for breach of duties and an 84% reduction in administration costs.⁵⁴⁷ In 2017, GAC ended the sharing of back-office support with GIPL and recommended to the Aboriginal communities that GIPL should be replaced with a professional trustee company.⁵⁴⁸ While this did not eventuate, it suggests that even now the relationship between GAC and GIPL could be improved.

4.8 Filling boards/committees & succession planning

A number of stakeholders reported difficulties in filling BMS Indigenous corporation board or trust committee vacancies or in filling such vacancies with suitably experienced or diverse appointees. For example:

- A number of Aboriginal community members highlighted the difficulties of meeting board/committee meeting and preparation requirements for people who have full time or significant work or study commitments.⁵⁴⁹ The problem is exacerbated if the same person sits on more than one board/committee, for instance to help information flows between those bodies.⁵⁵⁰
- Concerns about lack of experience/capacity and information about the BMS structure and consequently higher risk of personal liability.⁵⁵¹
- Board/committee members frequently live and interact closely with their community and so may be required to justify and receive criticism over their decisions to a greater extent than would ordinarily be the case for board members.⁵⁵²

⁵⁴⁶ GIPL, *Annual Report 2014-15* <<http://www.gumalatrust.com/wp-content/uploads/2015/11/Gumula-IPL-2015-Annual-Report-Final-web.pdf>>; Paul Cleary, 'Dreamtime turns to Dust' *The Australian* (online) 28 May 2015 <www.theaustralian.com.au/national-affairs/indigenous/dreamtime-turns-to-dust/news-story/0dab329d6bb57bac15730ebb7f1c0f1e>.

⁵⁴⁷ GAC, *Annual Report 2016-17* <<http://gumala.com.au/wp-content/uploads/GAC-Annual-Report-2017.pdf>>.

⁵⁴⁸ Ibid.

⁵⁴⁹ Pilbara Corporation Executive 7 June 2018; Karratha Workshop 3 May 2018. Cf Trustee Officer May and June 2018.

⁵⁵⁰ Pilbara Aboriginal Corporation Director 20 June 2018.

⁵⁵¹ Aboriginal Community Representatives 3 May 2018. See also Pilbara Aboriginal Corporation Director 20 June 2018.

⁵⁵² Pilbara Aboriginal Corporation Executive 5 July 2018.

- Including youth representatives was generally considered important due to the frequently high proportion of youth in the relevant Aboriginal communities, but it was also considered difficult to interest youth representatives, including for the reasons set out above.⁵⁵³
- Some stakeholders indicated that Aboriginal Elders have sometimes considered that boards/committees should comprise Elders and not young people because the Elders know the traditional laws and customs.⁵⁵⁴ Some communities have addressed this by having a young person shadow an elder member of a board/committee, by appointing Elders as mentors or by establishing a youth advisory committee.⁵⁵⁵ Others suggested an advisory Elders' Council with more diverse representation on the formal decision making bodies.⁵⁵⁶

On the flip side, several stakeholders identified factors that had encouraged them or others to join boards or committees:

- A desire to obtain a better understanding of how BMS funds are being spent and to participate in decision making about that.⁵⁵⁷ This motivation was also reflected in a non-altruistic way by one Aboriginal community member as 'greed and power for... who wants to be a leader and greed and power for who wants to benefit themselves'.⁵⁵⁸ Several stakeholders also referred to the desire for sitting fees and travel allowances by some members.⁵⁵⁹
- Family encouragement and a sense of obligation to represent and inform families about BMS decisions.⁵⁶⁰ However, other stakeholders also identified that voting on family lines for family representation could also preclude board diversity and experience.⁵⁶¹

4.9 Administration costs and scale of compliance activities

All groups of stakeholders referred to a desire to carefully manage and ideally reduce BMS administration costs. This reflects some references in the literature to the potential for high administration costs⁵⁶² and also some real life examples of high costs.

⁵⁵³ Aboriginal Community Representatives 3 May 2018; Pilbara Aboriginal Corporation Director 21 June 2018; Trustee Officer May and June 2018; Independent BMS Facilitator 21 March 2018.

⁵⁵⁴ Pilbara Corporation Executive 7 June 2018; Pilbara Aboriginal Corporation Executive 5 July 2018.

⁵⁵⁵ Pilbara Corporation Executive 7 June 2018; Pilbara Aboriginal Corporation Director 21 June 2018. Cf Trustee Officer May and June 2018.

⁵⁵⁶ Pilbara Aboriginal Corporation Director 20 June 2018.

⁵⁵⁷ Aboriginal Community Representatives 3 May 2018; Pilbara Aboriginal Corporation Director 20 June 2018.

⁵⁵⁸ Pilbara Aboriginal Corporation Director 20 June 2018. Cf Trustee Officer 18 May 2017.

⁵⁵⁹ Pilbara Aboriginal Corporation Executive 5 July 2018; Pilbara Aboriginal Corporation Executive 2 May 2018; Trustee Officer 18 May 2017; Trustee Officer 19 July 2018 Trustee Officer 8 March 2019.

⁵⁶⁰ Aboriginal Community Representatives 3 May 2018.

⁵⁶¹ Pilbara Aboriginal Corporation Executive 2 May 2018. Cf Trustee Officer 18 May 2017.

⁵⁶² Cf *Levin's Observations*, 251.

For example, an independent review of the Gumala BMS (see case example in Part 4.7) indicated that administration costs of \$78 were incurred to deliver each \$100 of benefits to Aboriginal community members in 2011/12.⁵⁶³ If this figure is adjusted on the basis that it may not fully account for the non-financial benefits from service delivery costs, it suggests a cost of at least \$54 to deliver \$100 of benefits.

To some extent, high administration costs reflect a number of the other issues, especially supporting autonomy (creation of additional committees so that Aboriginal community members can guide a professional trustee), incorporating traditional laws and customs, capacity building, governance and overlapping decision making bodies. In this regard, they are not necessarily problematic as they may reflect a choice to pursue non-financial objectives. Stakeholders identified awareness of this trade-off and of the need to explicitly consider the degree of administration costs justified by these other objectives.⁵⁶⁴

In addition, a number of administration costs relate to activities that generate administration costs for multiple stakeholders – both internal and external to a BMS. For instance, reporting to third parties and obtaining third party consents can involve the provision of an annual BMS report to a resource proponent or resource proponent consent to amend an investment policy.⁵⁶⁵ Internal reporting can involve development and reporting on personal financial plans by Indigenous community members.⁵⁶⁶ Multiple decision making bodies within a BMS can give rise to a proliferation of meeting costs for a decision on the same matter. Given the duplication of administration costs, areas such as these warrant particular attention.

4.10 Equity

Native title rights may be communal, group or (occasionally) individual rights in relation to land or waters.⁵⁶⁷ To successfully establish such rights, claimants must, amongst other things, demonstrate a continued acknowledgment and observance of traditional laws and customs under which those communal, group or individual rights in relation to land or waters (the native title rights) are possessed.⁵⁶⁸ To state the obvious then, even individual rights are held according to a communally accepted body of traditional laws and customs. Accordingly, Strelein has described native title rights as having a

⁵⁶³ Fred Chaney and Paul Lennon, 2013 YLUA Review, (10 October 2013) available at: <www.gumala.com.au/assets/final-report-ylua-review.pdf> 16.

⁵⁶⁴ See especially, Karratha Workshop 3 May 2018; Independent BMS Facilitator 21 March 2018.

⁵⁶⁵ See, eg, Table 6.2. For example, as resource proponents do not necessarily have investment experience, there may not be much additional asset protection achieved by requiring consent to amend an investment policy: Resource Proponent Manager 24 January 2017.

⁵⁶⁶ See, eg, Karratha Workshop 3 May 2018.

⁵⁶⁷ Lisa Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (Aboriginal Studies Press, 2nd ed, 2009) 12-13.

⁵⁶⁸ See, eg, NTA s 223(1)(a); *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 447 [56], 456-7 [88]-[90] (Gleeson CJ, Gummow and Hayne JJ); *Ward* (2002) 213 CLR 1, 66 [17] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

'communal and intergenerational nature'.⁵⁶⁹ In cases of communal or group rights the potential for new members to be born into or otherwise join the relevant community or group directly raises the issue of intergenerational equity in terms of how assets received in relation to native title rights ought to be shared between current and future members. The issue is also emphasised by the long-term nature of many land use agreements under which payments are made to BMSs,⁵⁷⁰ along with the differing ways in which land use may impact native title rights and holders over time.⁵⁷¹

The nature of the rights also raises intragenerational equity: equity between the contemporary members of a native title group. Further, given the place of potential individual rights within the broader Indigenous community's laws and customs, even payments for impacts on individual rights indirectly raise questions of fairness to the broader community, and to future members of that community.

In addition, to the extent that BMSs include charities, those charities must be for the benefit of a sufficient section of the public.⁵⁷² While a sufficient section of the public, at least at the federal level, may be interpreted to countenance a native title claim group, there are limits on the relevant provisions and they do not apply at the state and territory level, such that charitable trusts, to be valid, must meet the more restrictive test at common law.⁵⁷³ There are common law authorities which accept that Indigenous groups can amount to a section of the public, in contradistinction to traditional Western family groups, including groups of biological descendants from one or two named ancestors, potentially on the basis of being members of a group that holds communal rights in land.⁵⁷⁴ However, the authorities do not appear to include examples of very close family groupings as a section of the public. Many of the authorities are also relatively recent

⁵⁶⁹ Lisa Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (Aboriginal Studies Press, 2nd ed, 2009) 16.

⁵⁷⁰ Rio Tinto and BHP have emphasised the importance of the intergenerational nature of many such agreements and the consequent need for intergenerational benefits: Resource Proponent Manager 10 August 2017; Resource Proponent Manager 24 January 2017.

⁵⁷¹ See, eg, Diane Smith 'Valuing Native Title: Aboriginal, Statutory and Policy Discourses About Compensation', (CAEPR Discussion Paper No. 222, CAEPR, ANU, Canberra) 41.

⁵⁷² There are exceptions in some circumstances, for instance, for charities for the relief of poverty or of necessitous circumstances. However, BMS charities would typically be for a broader range of purposes.

⁵⁷³ *Charities Act 2013* (Cth) s 9. For a discussion of the relevant provisions and the common law, see, eg, Ian Murray, 'Public Benevolent Institutions for Native Title Groups: an Underappreciated Model?' (2015) 43 *Federal Law Review* 424, 435-40; Fiona Martin, 'Convergence and Divergence with the Common Law: The Public Benefit Test and Charities for Indigenous Peoples' in Matthew Harding, Ann O'Connell and Miranda Stewart (eds), *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 159; ACNC, *Commissioner's Interpretation Statement: Indigenous Charities*, CIS 2013/02.

⁵⁷⁴ See, eg, Ian Murray, 'Public Benevolent Institutions for Native Title Groups: an Underappreciated Model?' (2015) 43 *Federal Law Review* 424, 435-40 (and the cases there cited); *Groote Eylandt Aboriginal Trust Inc v Deloitte, Touche Tohmatsu* (No 2) [2017] NTSC 4, [153]-[155], [202], [222]-[227], [239]-[243] (Hiley J; 14 clans descended from apical ancestors, comprising in total 800 to 1500 people); cf *Plan B Trustees Ltd v Parker* (No 2) [2013] WASC 216 [118]-[119] (Edelman J; a single native title claim group)

and the ATO had historically viewed single native title claim/holding groups as not comprising a sufficient section of the public.⁵⁷⁵

Accordingly, it has been common for charities and public benevolent institutions that benefit Indigenous persons to phrase their objects as the pursuit of purposes in respect of Indigenous persons (including, but not limited to a native title group) in a particular geographic area.⁵⁷⁶ This approach may now seem overly cautious, but given the dire consequences of failing to meet the section of the public test, another mechanism to ensure certainty would be required if the group who benefits is narrowed. For instance, seeking a declaration from the court as to validity soon after creation of a trust.

Where the cautious approach has been adopted, the need to share assets between members of the native title group and other Indigenous persons in a geographic area in the context of a potentially perpetual charity also raises issues of intra- and intergenerational equity.⁵⁷⁷

Thus, while it does not always use these terms, the literature relating to Indigenous asset management does express concern about equity between contemporaries and between current and future generations.⁵⁷⁸ Smith, for example, draws attention to the ‘twin issues’ of distributive equity and distributive spread.⁵⁷⁹ Distributive equity in Smith’s formulation is concerned with ensuring payments for impacts on native title rights go to the “right” native title party and equitably to all the members of that party—within the group and over time.⁵⁸⁰ Distributive spread is concerned with whether the beneficiaries of the payments are a broader class than merely the native title holders, due to social networks with those broader classes of people and due to the likely impact of land use on a broader group of Indigenous people than merely the native title holders.⁵⁸¹ The literature also refers to the notion of ‘sustainable development’, which Dodson and Smith emphasise is ‘multidimensional’, but that incorporates ‘social processes concerned with the

⁵⁷⁵ See, eg, *Plan B Trustees Ltd v Parker* (No 2) [2013] WASC 216 [116] (Edelman J).

⁵⁷⁶ See, eg, Lisa Strelein, ‘Taxation of Native Title Agreements’ (Native Title Research Monograph No 1/2008, AIATSIS, May 2008) 33; Adam Levin, ‘Observations on the Development of Native Title Trusts in Australia’ (Paper presented at the STEP Australasia Conference, Sydney, 28-30 May) 8-9, 19.

⁵⁷⁷ See, eg, Fiona Martin, ‘Aboriginal and Torres Strait Islander Peoples’ Use of Charities as a Structure to Receive Mining Payments’ (2013) 22(1) *Griffith Law Review* 206, 215; Marcia Langton, ‘From Conflict to Cooperation’ (Minerals Council of Australia, 2015) 35.

⁵⁷⁸ Raelene Webb, ‘Governance Challenges in the Implementation of Mining Agreements’ (Paper presented at the AMPLA Fortieth Annual Conference, Brisbane, 12-14 October 2016) 6; Sarah Prout Quicke, Alfred Michael Dockery, Aileen Hoath, ‘Aboriginal Assets? The Impact of Major Agreements Associated with Native Title in Western Australia’ (Report, 2017) 78; Toni Bauman, Lisa Strelein and Jessica Weir, ‘Navigating Complexity: Living with Native Title’ in: *Bauman, Strelein and Weir’s Living with Native Title* 16; AIATSIS, ‘Native Title Payments and Benefits’ (Literature Review, Native Title Research Unit, 2008) 30; Ciaran O’Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (Taylor and Francis, 2015) 166; *Scambary’s My Country* 141, 154; Diane Smith ‘Valuing Native Title: Aboriginal, Statutory and Policy Discourses About Compensation’, (CAEPR Discussion Paper No. 222, CAEPR, ANU, Canberra) 41-2; Marcia Langton, ‘From Conflict to Cooperation’ (Minerals Council of Australia, 2015) 44.

⁵⁷⁹ Diane Smith ‘Valuing Native Title: Aboriginal, Statutory and Policy Discourses About Compensation’, (CAEPR Discussion Paper No. 222, CAEPR, ANU, Canberra) 42.

⁵⁸⁰ *Ibid.* As noted in Part 5.11, this approach not only draws on notions of distributive justice, but also of corrective justice.

⁵⁸¹ *Ibid.* 10-15, 42-3.

distributional aspects of benefits and adverse impacts', especially between generations.⁵⁸² There is also a nexus here with notions of fair processes under Indigenous institutions, as canvassed in the Harvard Project.⁵⁸³

All groups of stakeholders noted equity as an issue in interviews and were clear that equity does not mean the provision of equal benefits to all potential beneficiaries, but rather means fair treatment within and between generations. A clear theme across all stakeholder groups in interviews and more broadly recognised in the literature is that there can be a tension between near term needs and development and longer term intergenerational priorities, as well as a link between the two, in that near term development can itself benefit future generations if it results in stronger institutions and improved social, economic and cultural circumstances.⁵⁸⁴ Several stakeholders also noted that social impact investments could potentially be made to achieve both a financial return and a social return, such that they assisted current and future generations.⁵⁸⁵ A minority of interviewees suggested that the BMS for which they were stakeholders had sufficient resources that it was possible to make substantial provision for current and future generations without being faced with difficult choices.⁵⁸⁶ However, the stakeholder comments on levels of funding were fairly varied. Other stakeholders indicated that where BMSs had lower levels of funds, intergenerational equity became harder to achieve.⁵⁸⁷ Yet, others also suggested that lower levels of funds resulted in a more cooperative and holistic approach to decision making about expenditure of funds on group objectives, including assisting future generations.⁵⁸⁸

O'Faircheallaigh, along with some stakeholder interviews,⁵⁸⁹ has identified that extended kinship networks or networks of social obligations, which are frequently found in Aboriginal groups, may pose real difficulties for intergenerational justice, although they can be supportive of sharing between contemporaries.⁵⁹⁰ Further, the importance of maintaining culture and connection to country, along with 'looking after' country, for many Indigenous communities can provide a strong cultural and social basis for

⁵⁸² Mick Dodson and Dianne Smith, 'Governance for Sustainable Development: Strategic Issues and Principles for Indigenous Australian Communities' (Discussion Paper No 250, CAEPR, ANU, 2003) 6.

⁵⁸³ M Jorgensen and JB Taylor, *What Determines Indian Economic Success? Evidence from Tribal and Individual Indian Enterprises* (John F Kennedy School of Government, Harvard University, 2000) 4.

⁵⁸⁴ Toni Bauman, Lisa Strelein and Jessica Weir, 'Navigating Complexity: Living with Native Title' in: *Bauman, Strelein and Weir's Living with Native Title* 16; AIATSIS, 'Native Title Payments and Benefits' (Literature Review, Native Title Research Unit, 2008) 30. See also Trustee Officer 28 June 2018; Trustee Officer 18 May 2017; Pilbara Aboriginal Corporation Executive 5 July 2018; Pilbara Aboriginal Corporation Director 21 June 2018; Resource Proponent Social Investment Manager; Resource Proponent Manager 24 January 2017.

⁵⁸⁵ Trustee Officer May and June 2018; Trustee Officer 18 May 2017; Pilbara Aboriginal Corporation Executive 10 May 2018; Pilbara Aboriginal Corporation Executive 21 May 2018.

⁵⁸⁶ Trustee Officer May and June 2018.

⁵⁸⁷ Pilbara Aboriginal Corporation Executive 5 July 2018.

⁵⁸⁸ Aboriginal Community Representatives 3 May 2018; Resource Proponent Implementation Adviser 10 August 2017.

⁵⁸⁹ Independent BMS Facilitator 21 March 2018.

⁵⁹⁰ Ciaran O'Faircheallaigh, 'Use and Management of Revenues from Indigenous-Mining Company Agreements: Theoretical Perspectives' (Working Paper No 1/2011, Agreements Treaties and Negotiated Settlements Project, June 2011) 15-17, citing Filer, Banks, Biersack and Peterson and Taylor; Ciaran O'Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (Taylor and Francis, 2015) 41-4.

preserving assets for the future.⁵⁹¹ This was a point made by several Aboriginal community and corporation representatives and trustee officer stakeholders in interviews,⁵⁹² and is supported by the repeated and express assertion by Aboriginal community and corporation representatives that BMS benefits should accrue to future generations.⁵⁹³

Several stakeholders also raised what they described as the problem of ‘double-dipping’, where a person has ties to more than one Indigenous community, can potentially be recognised as a member of both communities and hence the ability to benefit from the BMSs of more than one community.⁵⁹⁴

Of course, the best strategy to ensure intergenerational equity will differ between communities.

4.11 Timing of funding for the Indigenous corporation ‘doer’

Memmott, Blackwood and McDougall maintain that poor funding has two consequences.⁵⁹⁵ First, it causes corporate compliance deficiencies such as a failure to hold annual general meetings, to meet financial reporting obligations, and other corporate requirements, along with PBC obligations where applicable. This is a subset of the capacity building issues discussed in Part 4.4. Second, a lack of funding frequently results in reduced levels of consultation with Indigenous community members, exacerbating difficulties in incorporating traditional decision making processes.

Thus there have been repeated calls for government investment in capacity building for Indigenous corporations,⁵⁹⁶ most especially of PBCs given their statutory duties.⁵⁹⁷ These concerns are equally applicable to BMS Indigenous corporations, especially those

⁵⁹¹ See, eg, Diane Smith ‘Valuing Native Title: Aboriginal, Statutory and Policy Discourses About Compensation’, (CAEPR Discussion Paper No. 222, CAEPR, ANU, Canberra) 41; Ciaran O’Faircheallaigh, ‘Use and Management of Revenues from Indigenous-Mining Company Agreements: Theoretical Perspectives’ (Working Paper No 1/2011, Agreements Treaties and Negotiated Settlements Project, June 2011) 17; Catherine Grant, ‘Speaking of Future Generations... Let’s Not Forget Culture’ *The Conversation* (16 March 2015).

⁵⁹² See eg Trustee Officer 19 July 2018; Pilbara Aboriginal Corporation Executive 21 May 2018. Cf Pilbara Aboriginal Corporation Director 21 June 2018; Former Aboriginal Corporation CEO & Management Consultant 14 February 2019.

⁵⁹³ Discussed in Part 2.3.

⁵⁹⁴ See, eg, Pilbara Aboriginal Corporation Director 21 June 2018; Karratha Workshop 3 May 2018.

⁵⁹⁵ Paul Memmott, Peter Blackwood and Scot McDougall, ‘A Regional Approach to Managing Aboriginal Land Title on Cape York’, Chapter Thirteen in: James Weiner and Katie Glaskin (eds) *Customary Land Tenure and Registration in Australia and Papua New Guinea: Anthropological Perspectives* (Asia-Pacific Environment Monograph 3, ANU E-Press, 2007) 2934. See also, Marcia Langton and Odette Mazel, ‘Poverty in the Midst of Plenty: Aboriginal People, the Resource Curse and the Mining Boom’ (2008) 26(1) *Journal of Energy & Natural Resources Law* 31, 59.

⁵⁹⁶ See, eg, Marcia Langton and Odette Mazel, ‘Poverty in the Midst of Plenty: Aboriginal People, the Resource Curse and the Mining Boom’ (2008) 26(1) *Journal of Energy & Natural Resources Law* 31, 59; Lisa Strelein and Tran Tran, ‘Native Title Representative Bodies and Prescribed Bodies Corporate: Native Title in a Post Determination Environment’ (Native Title Research Report 2/2007, Native Title Research Unit, AIATSIS, Canberra, 2007) 21.

⁵⁹⁷ Paul Memmott and Scott McDougall, *Holding Title and Managing Land in Cape York Indigenous Land Management and Native Title*, (National Native Title Tribunal, Perth, 2003) 122, Recommendation 19.

that are also PBCs. Additionally, however, BMSs raise several timing issues. First, if BMS entities such as the BMS Indigenous corporation are created and funded after a land use agreement is signed, then frequently funds will be received shortly after execution of the land use agreement by entities that have had insufficient time to build operational capacity.⁵⁹⁸ And in addition to compliance and consultation difficulties, the lack of capacity can also and understandably result in a slower and more cautious approach, delaying and narrowing service delivery.⁵⁹⁹ MG Corporation has been identified as a partial 'success' in this regard by Guest, in that the Miriuwung and Gajerrong people proposed setting up the corporation during negotiations of the Ord Final Agreement and, while they did not achieve this, detailed structures and responsibilities were determined for MG Corporation and related entities and trusts before execution, such that MG Corporation was incorporated and functional less than five months later.⁶⁰⁰ However, as examined in Part 4.3, the corporate structure and governance arrangements established were relatively complex and required ongoing investment in capacity building at a level disproportionate to MG Corporation's income.

Second, in many cases, the incorporated 'doer' will be established after the trusts and the trustee company and this can cause challenges for the relationship between the trustee and the BMS Indigenous corporation as they need to address the changing maturity of the incorporated entity and also accept the initial difficulties that the incorporated entity will have in carrying out BMS activities.⁶⁰¹ This also ties in with stakeholder views that the BMS Indigenous corporation is generally best placed to liaise with the Indigenous community because it is the site of community decision making, including particular native title functions where the corporation is a PBC.⁶⁰² And because the corporation typically has more experience interacting with community members, holding community events and delivering general services directly to members.⁶⁰³ MG Corporation was also identified as a success in regards this relationship with the trustee, in that it was perceived to have greater control over strategic planning and service delivery.⁶⁰⁴ However, a number of stakeholders, particularly Aboriginal community and corporation representatives, emphasised that strategic planning for the relevant community (ie beyond the issues of communication and consultation) was a matter that would require all BMS entities and that the question of whether the trustee or BMS

⁵⁹⁸ In the context of BMS trust committees composed primarily of Indigenous community members, see, eg, Trustee Officer 18 May 2017. Cf Ciaran O'Faircheallaigh, 'Registered Native Title Bodies Corporate and mining agreements: capacities and structures' in: *Bauman, Strelein and Weir's Living with Native Title* 288; Karratha Workshop 3 May 2018.

⁵⁹⁹ See, eg, Trustee Officer 18 May 2017; Resource Proponent Manager 24 January 2017.

⁶⁰⁰ Krysti Guest, 'The Promise of Comprehensive Native Title Settlements' (AIATSIS Research Discussion Paper, No 27, October 2009) 38. The success was only partial as additional corporate structures remained to be developed, for which funding was insufficient.

⁶⁰¹ See, eg, Pilbara Aboriginal Corporation Director 21 June 2018; Pilbara Aboriginal Corporation Officer 12 March 2019; Resource Proponent Manager 10 August 2017; Resource Proponent Manager 24 January 2017; Professional Adviser 31 January 2018; Karratha Workshop 3 May 2018; Trustee Officer 8 March 2019.

⁶⁰² Pilbara Aboriginal Corporation Executive 21 May 2018; Professional Adviser 31 January 2018.

⁶⁰³ Pilbara Corporation Executive 7 June 2018; Pilbara Aboriginal Corporation Officer 12 March 2019; Karratha Workshop 3 May 2018. See also the discussion of unbundling services at n 647 and accompanying text.

⁶⁰⁴ Professional Adviser 31 January 2018.

Indigenous corporation took the lead role would depend on the context.⁶⁰⁵ In particular, stakeholders suggested that the trustee should have a key role in relation to financial planning and acquittals and one stakeholder phrased this more broadly in terms of the trustee having a role akin to a philanthropic foundation that might impose outcome and reporting requirements on grant recipients.⁶⁰⁶

4.12 Restrictions on economic development

As identified in Chapter 2, economic development for the relevant Aboriginal communities and their members is typically one of a BMS' overarching purposes. However, because charitable trusts are restricted to the pursuit of charitable purposes, the literature indicates that there are difficulties in adopting means of achieving economic development that involve substantial private benefits for individuals or that result in economic development beyond a certain level.⁶⁰⁷ Some of those difficulties reflect the boundaries of charity law, but some represent psychological, administrative and other practical difficulties in obtaining certainty about new ways of doing charity.

In this regard, it is noteworthy that the ACNC has issued a Factsheet which appears to accept that Indigenous corporations can advance social or public welfare by providing employment opportunities to disadvantaged Aboriginal people.⁶⁰⁸ The Indigenous disadvantage and promotion of commerce cases discussed by Murray, also suggest that business start-up and development advice and general assistance would often be consistent with charity status and that financial support by way of seed-funding grants and social impact loans might often be possible too.⁶⁰⁹ So too might loans to assist Indigenous businesses, at least if made on commercial terms such that the loan can be treated as an exercise of investment powers.⁶¹⁰ However, the precise boundaries remain to be developed and are highly context dependent.

Given the prevalence of charitable trusts in the BMSs of the stakeholders who were interviewed, charitable trust economic development difficulties were raised surprisingly infrequently. There appear to be three key reasons why this was so. First, all but one stakeholder commented on BMSs involving a discretionary trust and an Indigenous corporation, in addition to a charitable trust, and these alternate vehicles are not (in the case of the discretionary trust) and may not be (many Indigenous corporations are also charities) subject to the same economic development limits.⁶¹¹ Second, as identified in

⁶⁰⁵ Pilbara Aboriginal Corporation Executive 5 July 2018; Pilbara Aboriginal Corporation Director 21 June 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Karratha Workshop 3 May 2018.

⁶⁰⁶ Pilbara Aboriginal Corporation Director 21 June 2018. Cf *Levin's Observations*, 263.

⁶⁰⁷ See above nn 184 to 190. See also Fiona Martin, "To Be, or Not to Be, a Charity?" That is the Question for Prescribed Bodies Corporate under the Native Title Act' (2016) 21(1) *Deakin Law Review* 25, 37-8.

⁶⁰⁸ ACNC, 'Aboriginal and Torres Strait Islander Corporations – Applying for Charity Registration with the ACNC' (Factsheet, 20 May 2019) <www.acnc.gov.au/tools/factsheets/aboriginal-and-torres-strait-islander-corporations-applying-charity-registration>.

⁶⁰⁹ See, eg, Ian Murray, 'Public Benevolent Institutions for Native Title Groups: an Underappreciated Model?' (2015) 43 *Federal Law Review* 424.

⁶¹⁰ See, eg, *Flynn v Mamarika* [1996] NTSC 16.

⁶¹¹ Cf Resource Proponent Social Investment Manager 22 February 2017.

in relation to equity (Part 4.10), charitable trusts frequently focus in the initial stages on shorter-term aid and relief rather than development projects and many of the stakeholder BMSs were less than five or six years old. Thus there may have been fewer attempts to pursue economic development at the time of our interviews than might occur in the future.

Third, several stakeholders did raise the issue.⁶¹² Both an Aboriginal community member and a trustee officer suggested that a significant part of the problem was the conservatism of some trustees and regulators, such that it is difficult and costly to pursue economic development.⁶¹³

4.13 Geographical remoteness and dispersion

The geographical remoteness and dispersion of members often makes in-person meetings difficult and expensive to convene.⁶¹⁴ This has been recognised as a consideration in relation to organisational design as it affects the format and frequency of communication and participation in decisions.⁶¹⁵ Stakeholder interviews also emphasised that geographical remoteness and dispersion can cause difficulties in recruiting committee and board members and in holding meetings of those decision makers.⁶¹⁶ Likewise, there may be a smaller pool and higher costs when recruiting employees such as CEOs and a similar comment applies to engaging service providers. BMS service delivery may also be complicated where trustees and, in some cases, BMS Indigenous corporations do not have offices in the Pilbara.⁶¹⁷

The issue is relevant to the potential for greater information to be provided from BMSs to Indigenous communities and, to an even greater extent, to greater direct consultation with community members. However, there are alternatives to in-person meetings, such as newsletters, teleconferencing, web conferencing, email, SMS, online/mobile surveys, mobile telephone applications, Facebook and other social media, or the provision of information on a website. Some trustees and Aboriginal corporations also had relationships with other corporations and organisations in the Pilbara, with those organisations routinely passing on messages or information.⁶¹⁸ Several stakeholders also tried to block meetings together for a range of decision making bodies, including regional bodies, so as to reduce the difficulties in attending those meetings.⁶¹⁹ Stakeholders expressed mixed views about the usefulness of newsletters in interviews and more broadly noted that more 'old-fashioned' forms of communication such as

⁶¹² Resource Proponent Social Investment Manager 22 February 2017; Pilbara Aboriginal Corporation Director 21 June 2018; Trustee Officer 19 July 2018.

⁶¹³ Pilbara Aboriginal Corporation Director 21 June 2018; Trustee Officer 19 July 2018.

⁶¹⁴ Marcia Langton and Odette Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the Resource Curse and the Mining Boom' (2008) 26(1) *Journal of Energy & Natural Resources Law* 31, 60.

⁶¹⁵ *Mantziaris and Martin's Native Title Corporations* 264-5.

⁶¹⁶ Pilbara Aboriginal Corporation Executive 2 May 2018. Cf Pilbara Corporation Executive 7 June 2018.

⁶¹⁷ Trustee Officer May and June 2018.

⁶¹⁸ Trustee Officer May and June 2018 (for instance, because those organisations are owned by community members or already have significant dealings with community members).

⁶¹⁹ Independent BMS Facilitator 21 March 2018.

newsletters, emails and letters were often less successful than mobile telephone-based ones.⁶²⁰ The preferred website in stakeholder interviews, by both trustee officers and Aboriginal community and corporation representatives, was the Aboriginal corporation's website,⁶²¹ which links with the discussion about the corporation's role in Part 4.11.

Research in Canada indicates that electronic communications can be successfully implemented for Indigenous communities,⁶²² and a number of stakeholders indicated in interviews that they had successfully employed these methods, with the emphasis being on using a range of different methods in order to cater to the different circumstances of different community members.⁶²³

Of course, the geographical remoteness of members may also pose barriers to accessing electronic communications and this would need to be investigated for the relevant Indigenous community. In addition, there are likely to be accompanying integrity and verification issues associated with some forms of electronic communication that may increase the complexity and cost of using those communication means. The use of social media can also pose a risk of loss of control over how messages are interpreted, disseminated and reinterpreted.⁶²⁴ Consideration also needs to be given to confidentiality of electronic communications and some stakeholders had addressed this, for instance, by way of closed online communities – such as a closed Facebook group.⁶²⁵

4.14 Professional trustees and inherent conflicts of interest

Professional trustees are typically in the form of licensed trustee companies (**LTCs**), being trustees prescribed by regulations to the Corporations Act and that are required to hold an Australian financial services licence for the provision of traditional trustee company services.⁶²⁶ The Corporations Act chapter 5D sets out a regulatory regime for LTCs. The regime requires an LTC to be a fit and proper person and to be capable of providing traditional trustee services,⁶²⁷ contains rules about LTC fees⁶²⁸ and imposes duties on LTC officers to act honestly and with due care and diligence and imposes duties on LTC officers and employees to not make improper use of information or

⁶²⁰ See eg Trustee Officer 16 May 2018, Trustee Officer 19 July 2018. Cf Pilbara Aboriginal Corporation Director 21 June 2018.

⁶²¹ Trustee Officer 19 July 2018; Pilbara Aboriginal Corporation Executive 21 May 2018.

⁶²² See, eg, Chelsea Gabel, Nicole Goodman, Karen Bird and Brian Budd, 'Indigenous Adoption of Internet Voting: A Case Study of Whitefish River First Nation' (2016) 7(3) *The International Indigenous Policy Journal* art 3; Karen Bird, Chelsea Gabel and Nicole Goodman, 'The Impact of Digital Technology on First Nations Participation and Governance in Ontario' (Paper presented to the Annual Meeting of the Canadian Political Science Association, May 27-29 2014).

⁶²³ See also Trustee Officer 19 July 2018; Trustee Officer 18 May 2017; Pilbara Aboriginal Corporation Executive 4 July 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Professional Adviser 31 January 2018.

⁶²⁴ Trustee Officer May and June 2018; Trustee Officer 18 May 2017; Pilbara Aboriginal Corporation Executive 21 May 2018.

⁶²⁵ Pilbara Aboriginal Corporation Director 21 June 2018.

⁶²⁶ Corporations Act ch 5D. See, especially, s 601RAC.

⁶²⁷ *Ibid* s 601RAB(2A).

⁶²⁸ *Ibid* pt 5D.3.

position.⁶²⁹ The AFS licence requirements bring further obligations. Some relate to the integrity, competence and organisational capacity of the LTC.⁶³⁰ Some requirements relate more directly to trust administration. For instance, the AFS licence requirements to do all things necessary to ensure that services are provided ‘efficiently, honestly and fairly’.⁶³¹

These requirements clearly go to the fitness and capacity of LTCs and their officers and employees and hence help reduce agency costs of conflicts of interest or mission drift. However, there have been suggestions in the literature that where LTC fees are based in some way on the level of trust assets, LTCs might seek to maintain or increase trust capital to enhance their fees.⁶³² Professional trustee fees are typically raised in a broader sense as a potential disadvantage in literature relating to BMSs, albeit with some acknowledgment that there can also be significant administrative costs for a community controlled trustee.⁶³³ Two stakeholders raised a related conflict arising from the engagement by professional trustee companies of related entities to advise on and arrange investment of trust funds.⁶³⁴ A trustee officer expressed the conflict as:⁶³⁵

You tell me you want to invest your assets. Now I'm going to go and create an investment policy. I'm going to engage my own adviser to do that, I'm going to charge you fees for that and they're going to use my platform and my product. For me, that is a problem.

Fees arise on the investment advice (for the investment policy and its implementation), for use of the investment platform and for investment in a particular product under the platform. Each of these fees is frequently based on the value of the relevant assets and so can incentivise trustees to retain funds in their own investments rather than employed by way of social impact to help the relevant Indigenous community.⁶³⁶ It was suggested that the revenue to a group of companies from the non-trustee services would frequently exceed the fees from acting as trustee and that some professional trustee companies refuse to act as trustee of a BMS unless they are given the power to determine investment of assets, including in their related entities. Contrary to this, however, several professional trustee stakeholders indicated that their trustee did not routinely make investments with related parties.⁶³⁷

Several stakeholder interviews and focus group responses indicated an additional concern that professional trustee companies might be motivated to work for themselves

⁶²⁹ Ibid pt 5D.4.

⁶³⁰ See, eg, ibid ss 912A(1)(d), (e), (f), (h), 913B.

⁶³¹ Ibid s 912A(1)(a). As to the scope and impact of this requirement, see, eg, Paul Latimer, ‘Providing Financial Services “Efficiently, Honestly and Fairly”’ (2006) 24(6) *Company and Securities Law Journal* 362.

⁶³² When reviewing LTC administration of charitable trusts, CAMAC received divergent submissions on the reasonableness of fees charged by LTCs and ultimately recommended both ‘stewardship audits’ of the reasonableness of LTC fees and the addition of a ‘fair and reasonable’ fee requirement: CAMAC, ‘Administration of Charitable Trusts’ (Report, May 2013) 5, 7, 10-11 23-31, 34-7.

⁶³³ See, eg, *Levin’s Observations*, 251.

⁶³⁴ Trustee Officer 28 June 2018; Pilbara Aboriginal Corporation Executive 2 May 2018.

⁶³⁵ Trustee Officer 28 June 2018.

⁶³⁶ Trustee Officer 28 June 2018.

⁶³⁷ Trustee Officer 18 May 2017; Trustee Officer 8 March 2019.

rather than the community.⁶³⁸ This appeared to be based in part on a perception that the relevant fee structures adopted for professional trustees motivated them to provide services where there were more fees/reimbursed administrative expenses and to reduce services (even where needed for the strategic direction of a trust or assessment of the impact of expenditure) in areas where fees were capped.⁶³⁹ An alternative reason that was suggested was that professional trustee companies are largely assessed by community members based on their ability to deliver member services and so they focus on service delivery rather than longer-term planning.⁶⁴⁰ One trustee officer expressed these conflicts in a different way – that trustees are focused on technical compliance with the relevant trust deeds (presumably to avoid liability and to ensure they have met the requirements for their fees) rather than on broader impacts or outcomes.⁶⁴¹ Another trustee officer noted that:⁶⁴²

Some professional trustees are told [under their service agreements] to run the administration on a shoestring in order to save costs... I am so busy with the core business of technical trust administration that I can't get onto development plans and engage in broader strategic planning and capacity building and communication/participation as much as I would like.

One stakeholder also suggested that professional trustees were more conservative and so less likely to be innovative,⁶⁴³ perhaps in order to protect their corporate reputation, but this conservatism was disputed by a professional trustee officer who suggested that the size and reputation of such trustees enabled them to push some boundaries, eg of the means that can be employed under a charitable trust.⁶⁴⁴ Further, several trustee officer responses suggested that some trustees might be reluctant to take too assertive a role in relation to strategic planning because they want to ensure that it is the Indigenous community that makes decisions: 'We are very hands off and want the community to run the trust themselves'.⁶⁴⁵ Trustee officers did, however, generally acknowledge that communication about strategic planning and the more rigorous measurement of impact and outcomes could be improved.⁶⁴⁶

Interviewees from several stakeholder groups also noted that the pure trustee services role and professional trustee core skills were relatively narrow (eg fund accounting, fund custody, distributions, acquittals), certainly not extending to the delivery of general services to community members.⁶⁴⁷ Many of these interviewees therefore recommended unbundling the range of services that trustees provided, so that trustees could focus on their core competencies. Unbundling may help with trustee conflicts of

⁶³⁸ Karratha Workshop 3 May 2018. Cf Trustee Officer 28 June 2018.

⁶³⁹ See, eg, Independent BMS Facilitator 21 March 2018; Pilbara Aboriginal Corporation Executive 2 May 2018. Cf Pilbara Aboriginal Corporation Director 20 June 2018

⁶⁴⁰ See, eg, Professional Adviser 31 January 2018.

⁶⁴¹ See also n 1131 and accompanying text.

⁶⁴² Trustee Officer 8 March 2019.

⁶⁴³ See, eg, Director of Pilbara Indigenous Corporation 21 June 2018.

⁶⁴⁴ Trustee officer 19 July 2018

⁶⁴⁵ Trustee officer 18 May 2017.

⁶⁴⁶ See, eg, Part 4.16.

⁶⁴⁷ See, eg, Trustee Officer 19 July 2018; Professional Adviser 31 January 2018; Pilbara Aboriginal Corporation Executive 5 July 2018. Cf Trustee Officer 18 May 2017.

interest as it would remove some of the roles that cause conflicts and would also permit a clearer articulation of trustee duties and of the fees for those duties.

4.15 Interactions with pre-existing structures and with government

This issue is related to Issue 2 - Every community/family/individual is different. In the general context of organisational design, Goodin has emphasised the importance of 'goodness of fit' between the organisation and the broader surrounds in which it is placed,⁶⁴⁸ which will often include other Indigenous organisations and will certainly include various levels of government. This point has been made in the context of PBCs (native title responsibilities) and Island Councils (with local government responsibilities to represent and provide services to residents within a geographic area) in the Torres Strait, with Sanders noting that the two types of organisations 'provide different locuses of power and authority for the two countervailing constituencies of native title holders and residents'.⁶⁴⁹ Tran and Stacey have also emphasised this issue more broadly in relation to PBCs and community/shire councils.⁶⁵⁰ Indeed, Tran and Stacey note that many pre-existing structures may have expanded their decision making beyond their initially envisaged remit to become 'proxy decision makers' in respect of traditional lands.⁶⁵¹

Clearly, multiple BMSs can also generate multiple sites of authority, with potential for checks and balances and conflict.⁶⁵² Filling board and committee positions can also present opportunities for individual development, but also pose a risk for over-stretching a community's leadership pool.⁶⁵³ Stakeholder interviews also identified that overlapping service provision needs to be considered, with one trustee officer noting that Aboriginal community members who receive funds from multiple BMSs might be required to prepare separate personal financial plans in relation to the funds from each BMS, but not a comprehensive financial plan that takes account of funds from all BMSs (and other sources) and all expenditures.⁶⁵⁴ In relation to service delivery, many stakeholders also emphasised the risks (withdrawal of government funding) and potential synergies posed by manifold intersections with local, state and federal government.⁶⁵⁵

⁶⁴⁸ R E Goodin, 'Institutions and their Design' in R E Goodin (ed), *The Theory of Institutional Design* (Cambridge University Press, 1998) 1, 33-4.

⁶⁴⁹ Will Sanders quoted in *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 349.

⁶⁵⁰ Tran Tran and Claire Stacey, 'Wearing Two Hats: The Conflicting Governance Roles of Native Title Corporations and Community/Shire Councils in Remote Aboriginal and Torres Strait Islander Communities' (2016) 6(4) *Land, Rights, Laws: Issues of Native Title Series, AIATSIS*. See also Sarah Prout Quicke, Alfred Michael Dockery, Aileen Hoath, 'Aboriginal Assets? The Impact of Major Agreements Associated with Native Title in Western Australia' (Report, 2017) 38-9.

⁶⁵¹ Tran Tran and Claire Stacey, 'Wearing Two Hats: The Conflicting Governance Roles of Native Title Corporations and Community/Shire Councils in Remote Aboriginal and Torres Strait Islander Communities' (2016) 6(4) *Land, Rights, Laws: Issues of Native Title Series, AIATSIS* 3, 9-12.

⁶⁵² See, eg, Pilbara Aboriginal Corporation Executive 4 July 2018.

⁶⁵³ Cf Pilbara Corporation Executive 7 June 2018; Professional Adviser 31 January 2018.

⁶⁵⁴ Trustee Officer May and June 2018. See also Pilbara Aboriginal Corporation Director 21 June 2018; Resource Proponent Social Investment Manager 22 February 2017.

⁶⁵⁵ Pilbara Aboriginal Corporation Executive 5 July 2018; Pilbara Aboriginal Corporation Director 21 June 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Trustee Officer May and June 2018; Resource Proponent Social Investment Manager 22 February 2017.

4.16 Strategic planning to achieve BMS purposes

As highlighted in Part 2.3, BMSs are more than just asset pools that are intended to achieve and distribute financial returns to individual community members. They are also vehicles for pursuing autonomy, as well as cultural, economic, social and other purposes. They are a form of social enterprise. Without the ability to plan for, articulate, encourage behaviour supportive of and measure achievement of purpose as well as financial return, poor BMS decisions are likely to be made. This point is emphasised by Indigenous Business Australia in the context of purpose for investment decisions.⁶⁵⁶ It is also emphasised in the *Organising for Success* report discussed in Chapter 3.⁶⁵⁷

It is also well recognised in the broader social enterprise literature that, by virtue of their hybrid nature and dual mission, social enterprises contain an inherent and acute source of tension in respect of pursuing and measuring success. Accountable both to a social mission and financial sustainability and/or productivity, social enterprises must include both social and commercial dimensions in their definition of 'success'. It is trite to state that these objectives are not necessarily aligned, and may even be contradictory. These 'competing logics' have the potential to create risks to the entity's mission, where social objectives are sacrificed to achieve financial sustainability.⁶⁵⁸ Separately, but relatedly, commentators highlight potential 'managerial tensions and challenges, particularly in the areas of mission, finance and management of people'.⁶⁵⁹ An additional problem, lies in the difficulty of quantifying pursuit of purpose, and success therein.⁶⁶⁰

These factors pose particular issues for BMS strategic planning and highlight its importance.

4.17 Change

The literature recognises that Indigenous organisations – like any organisations – should be capable of revising their structures and procedures to accommodate changing circumstances and the lessons of experience.⁶⁶¹ This might include changes in traditional laws and customs that impact on a BMS. For instance, a native title group may move from a patrilineal clan-estate system to one in which a sub-regional cultural bloc holds more generalised rights over an area, but with certain families derived from the original clans holding some specific rights for particular areas.⁶⁶² In interviews, all groups of stakeholders endorsed an ability to change BMS documents over time,

⁶⁵⁶ Indigenous Business Australia, *Indigenous Investment Principles* (Brochure, 2015) 15.

⁶⁵⁷ See n 248.

⁶⁵⁸ Alnoor Ebrahim, Julie Battilana and Johanna Mair, 'The Governance of Social Enterprises: Mission Drift and Accountability Challenges in Hybrid Organizations' (2014) 34 *Research in Organizational Behaviour* 81, 82.

⁶⁵⁹ Chris Mason and Bob Doherty, 'A Fair Trade-off? Paradoxes in the Governance of Fair-trade Social Enterprises' (2015) 136(3) *Journal of Business Ethics* 451.

⁶⁶⁰ Alnoor Ebrahim, Julie Battilana and Johanna Mair, 'The Governance of Social Enterprises: Mission Drift and Accountability Challenges in Hybrid Organizations' (2014) 34 *Research in Organizational Behaviour* 81, 82.

⁶⁶¹ *Mantzziaris and Martin's Native Title Corporations* 326.

⁶⁶² See, eg, Christos Mantziaris and David Martin, *Guide to the Design of Native Title Corporations* (Commonwealth of Australia, National Native Title Tribunal, September 1999) 47.

although noting their experience that it typically took a long time to amend BMS documents, particularly trust deeds. This was partly due to technical complexity of the documents and to the need for multiple stakeholder consents to changes. In addition, different stakeholders reflected a divergence of views about the ease and timing of change.

- **Resource proponents and their professional advisers** accepted the need for changes, but suggested that some calls for change reflected issues with implementing the structure (which could be addressed by a different manner of implementation) or reflected a loss of institutional knowledge – by all stakeholders – about negotiated asset protection mechanisms (such as the freezing of distributions until an underlying issue is resolved).⁶⁶³ They also tended to support changes being developed by way of periodic reviews of BMSs held every 3-5 years.⁶⁶⁴
- A number of **Aboriginal community and corporation representatives** suggested that change should be easier to achieve (although recognising the need for some barriers), particularly in response to practical difficulties with trust deeds and constitutions revealed by attempts to implement provisions under what are relatively new BMSs.⁶⁶⁵ One stakeholder suggested that 5 years was too long a period for review and change.⁶⁶⁶
- Several **trustee officers** expressed a desire for greater ability to negotiate amendments to trust deeds before the trusts are settled, as deeds are often presented to trustees near the end of negotiations between other stakeholders.⁶⁶⁷ Additionally, trustee officers, like Aboriginal community and corporation representatives, appeared readier to amend BMSs to respond to difficulties in implementation.⁶⁶⁸

4.18 Implementation versus structure

A number of the above issues can be viewed, at least partly, as issues with implementing a workable structure. All groups of stakeholders identified implementation as a key issue. As noted by one professional adviser, ‘there is no operating manual in existence’.⁶⁶⁹ Some stakeholders, especially professional advisers involved in drafting BMS trust deeds and constitutions, indicated that most BMS issues could be dealt with by support for implementation rather than amendment of BMS documents.⁶⁷⁰ However,

⁶⁶³ Resource Proponent Manager 10 August 2017; Resource Proponent Manager 24 January 2017; Professional Adviser 16 November 2017.

⁶⁶⁴ Resource Proponent Manager 10 August 2017; Professional Adviser 16 November 2017.

⁶⁶⁵ See, eg, Pilbara Aboriginal Corporation Executive 2 May 2018; Pilbara Aboriginal Corporation Executive 10 May 2018; Pilbara Aboriginal Corporation Executive 21 May 2018.

⁶⁶⁶ Pilbara Aboriginal Corporation Executive 2 May 2018.

⁶⁶⁷ Trustee Officer 18 May 2017; Trustee Officer 19 July 2018.

⁶⁶⁸ Trustee Officer 18 May 2017; Trustee Officer 19 July 2018.

⁶⁶⁹ Professional Adviser 31 January 2018.

⁶⁷⁰ See, eg, n 663; Professional Adviser 31 January 2018.

this ignores the impact that the structure of BMS documents has on their implementation. In particular:

- BMS processes can affect who the actors are within a BMS and how they behave. For example, as discussed in Part 4.6, some stakeholders indicated that providing greater information to Indigenous community members and to board/committee members and improving their ability to participate in BMS decisions is likely to increase the pool of eligible board/committee members and to more closely align their behavior with the objectives of the overall Indigenous community.⁶⁷¹ By way of further example, one Aboriginal community representative commented that BMSs don't automatically take into account the increasing capacity of an Indigenous community, in that if capacity has increased, there ought to be less need for some BMS processes and safeguards – retaining those processes and safeguards causes frustration, additional cost and lost choices.⁶⁷²
- The complexity of BMS documents impeding the practical implementation of their theoretical flexibility.⁶⁷³
- The structure can affect implementation costs. For example, trustee officers generally considered that there were a number of aspects of administration that would be better dealt with by amending the BMS documents than relying on difficult and costly implementation practices.⁶⁷⁴

4.19 Siloing

'Siloing' was strongly identified by interviewees from all groups of BMS stakeholders as an issue, along with the desirability of greater cooperation with other actors in pursuing BMS goals. However, different stakeholders emphasised particular dimensions of isolation or cooperation:

- **Interaction with government in service delivery.** Some Aboriginal corporation executives indicated that government agencies do not interact well with Indigenous organisations (or other NGOs) and that when government does interact it tends to adopt a command and control relationship rather than a partnership: 'when they do intervene it is less a partnership and more government telling Indigenous organisations how to behave'.⁶⁷⁵ Some Aboriginal community and corporation representatives suggested that Indigenous organisations such as PBCs tend to be rather insular, in part due to

⁶⁷¹ Karratha Workshop 3 May 2018; Aboriginal Community Representatives 3 May 2018; Pilbara Aboriginal Corporation Executive 5 July 2018. See also Part 4.4.

⁶⁷² Pilbara Aboriginal Corporation Director 21 June 2018.

⁶⁷³ See also, Part 4.2.

⁶⁷⁴ See, eg, nn 667 to 668.

⁶⁷⁵ Pilbara Aboriginal Corporation Executive 5 July 2018.

the recent creation of many PBCs and to capacity constraints.⁶⁷⁶ Other stakeholders emphasised opportunities for greater cooperation with government, especially in areas where government has experience or advantages.⁶⁷⁷

- **Interaction with NGOs.** A range of stakeholders noted significant capacity for purchasing services from, or jointly pursuing goals with, NGOs - for instance, NGOs with experience in addressing health, education and related issues.⁶⁷⁸
- **Interaction with resource proponents.** Several stakeholders indicated that there had been some reluctance to share knowledge between different stakeholders and groups of stakeholders, including resource proponents.⁶⁷⁹
- **Cooperation geographically – across the Pilbara region.** A number of Aboriginal community and corporation representatives emphasised the synergies that could arise from cooperation by BMSs and Aboriginal organisations and communities across the Pilbara.⁶⁸⁰ For example, one community member stated:⁶⁸¹

CEOs should get together to better address Pilbara wide issues. The good thing about having [a regional committee for BMSs] is that it can help [BMSs] collaborate. Health is one of the hot topics, for example. Aboriginal organisations should come up with a way to help with funding a couple of dialysis machines for the Pilbara – for the wider community – for example, so that sick people don't have to move away from home to get medical treatment.

Pilbara-wide interaction is also important as many Aboriginal community members do not live on country, but actually live with the members of other Aboriginal communities in various towns in the Pilbara as well as further afield.⁶⁸² There would thus be savings in having one office/access point per town in the Pilbara, rather than multiple offices all co-located in fewer towns. One trustee officer also supported more cohesive approaches across the Pilbara and indicated that current mechanisms were inadequate for Aboriginal communities to work together.⁶⁸³ However, moves to adopt regional approaches would likely need to retain respect for the localism discussed in

⁶⁷⁶ Pilbara Aboriginal Corporation Director 21 June 2018.

⁶⁷⁷ Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Director 21 June 2018; Trustee Officer May and June 2018; Professional Adviser 31 January 2018.

⁶⁷⁸ Resource Proponent Social Investment Mmanager 22 February 2017; Resource Proponent Manager 24 January 2017; Professional Adviser 31 January 2018; Pilbara Aboriginal Corporation Executive 21 May 2018.

⁶⁷⁹ Professional Adviser 31 January 2018, Independent BMS Facilitator 21 March 2018.

⁶⁸⁰ See, eg, Pilbara Aboriginal Corporation Director 21 June 2018; Pilbara Aboriginal Corporation Executive 21 May 2018.

⁶⁸¹ Pilbara Aboriginal Corporation Director 20 June 2018.

⁶⁸² Pilbara Aboriginal Corporation Executive 21 May 2018.

⁶⁸³ Trustee Officer 28 June 2018.

Part 3.4.⁶⁸⁴ There have been some steps in this direction with the formation of the Pilbara Regional Implementation Committee and the release of a report commissioned by the committee into indicators of Aboriginal wellbeing.⁶⁸⁵

- **Cooperation with other Indigenous communities and organisations beyond the Pilbara region.** Stakeholders did not explicitly suggest cooperation with Indigenous communities and organisations around Australia, although this was implicit in several comments.⁶⁸⁶ This may be partly due to the explicit focus of the research project on BMSs in the Pilbara.

The need to address siloing is consistent with ensuring ‘goodness of fit’ between an organisation and its surrounds as identified for Issue 15. However, it goes beyond in that it focuses on the relationships between the different entities and the ways in which they can cooperatively pursue BMS goals. The discussion of unbundling trustee services and involving other service providers to a greater degree (Issue 14 - Professional trustees and inherent conflicts of interest) does overlap with an approach to more cooperative service delivery with government, NGOs and other service providers.

⁶⁸⁴ Cf Will Sanders, ‘Regionalism that Respects Localism: The Anmatjere Community Government Council and Beyond’ in *Hunt et al’s Contested Governance* 283.

⁶⁸⁵ John Taylor, ‘The RIC Report: Change in Wellbeing Indicators of Pilbara Aboriginal People: 2001 – 2016’ (Commissioned Report, September 2018).

⁶⁸⁶ Cf Aboriginal Community Representatives 3 May 2018; Professional Adviser 31 January 2018.

5. Twelve Design Considerations for Your BMS

The design considerations proposed in this Chapter 5 build on the review of BMS structures, operations and purposes, literature on the structure and operation of Indigenous organisations and specific BMS issues examined in Chapters 2 to 4. The question of design is approached starting from a neo-institutional framework, but as informed by stakeholder feedback from focus groups and interviews. As set out in Chapter 1, neo-institutionalism places the emphasis on institutions – the rules or customs that guide or give meaning to human behaviour – and seeks to explain the ways in which institutions affect behaviour, as well as the creation and change of institutions, including as a result of the behaviour of persons interacting with those institutions. It is cognisant of the broader socio-cultural context and thus focuses on how BMS rules might be applied by human beings and under social institutions and how the actions of people and social institutions might result in changes to BMS rules.

By institutional ‘design’, we mean the creation or shaping of the laws, rules and customs that constitute a BMS. As lawyers, our focus is on the formal laws, rules and customs, the trust deeds, corporate constitutions and applicable legislation,⁶⁸⁷ but mindful that these laws, rules and customs will both shape and be shaped by individuals and by broader institutional settings. ‘Design’ means looking for ‘goodness of fit’ between the shape of BMS rules on the one hand and, on the other:

- the broader institutional context in which the BMS exists;
- the BMS’s organisational goals; and
- what neo-institutionalism tells us more generally about the way that institutions affect the behaviour of individuals and are themselves affected in turn.⁶⁸⁸

We thus use ‘design’ in a broader sense than some organisational design researchers who distinguish design from neo-institutional theory by limiting design to mean applied and pragmatic research into new organisational systems.⁶⁸⁹

Shaping BMS rules to fit the institutional context in which the BMS is set means, fundamentally, ensuring that it is customised to the needs and circumstances of the

⁶⁸⁷ With much less focus on matters such as workforce planning and management practices.

⁶⁸⁸ R E Goodin, ‘Institutions and Their Design’ in R E Goodin (ed), *The Theory of Institutional Design* (Cambridge University Press, 1998) 1, 33-4. While many neo-institutional studies have tended to focus on why institutions have failed, changed, or been created, rather than advocating general principles of design, that is not true of all neo-institutional studies and thus neo-institutional theory also contains valuable insights for prescribing design features: *Scott’s Institutions and Organizations* 274-5. Cf Lex Donaldson, ‘The Conflict Between Contingency and Institutional Theories of Organizational Design’ in Richard Burton, Dorthe Håkansson, Thorbjørn Knudsen and Charles Snow (eds), *Designing Organizations: 21st Century Approaches* (Springer, 2008) ch 1; Nicolay Worren, *Organization Design: Simplifying Complex Systems* (Routledge, 2018) 4-8.

⁶⁸⁹ See, eg, Georges Romme, ‘Making a Difference: Organization as Design’ (2003) 14(5) *Organization Science* 558; Nicolay Worren, *Organization Design: Simplifying Complex Systems* (Routledge, 2018) ch 1. Of course, insights from research into the practical application of new systems of organisation is relevant to BMSs and we refer to such research. In addition, writers such as Romme and Worren accept that some neo-institutional theory also pertains to design.

stakeholders; most especially, the relevant Indigenous community. Further, to exist, a BMS must also be consistent with the Australian legal system and standards, such as corporate governance practices. The existence of organisational goals requires that a BMS have means of pursuing such goals. A BMS's asset-management function requires that those goals include an approach to the distribution of assets (typically in pursuit of social, economic and cultural benefits).⁶⁹⁰ Given the critical relationship to the relevant Indigenous community, autonomy and self-determination might typically be expected to be fundamental BMS goals and,⁶⁹¹ in any event, as institutions comprise and reflect values, the processes adopted by a BMS should be consistent with its goals (including distributing benefits to Indigenous community members) and thus based on autonomy and self-determination. Design also requires regard to general matters such as efficiency, and stakeholders' motivations for acting. The different approaches within neo-institutionalism have the advantage of providing insights to these various elements of design from a range of disciplines, including anthropological perspectives on culture and intercultural circumstances, along with sensitivity to political legitimacy, economic efficiency and psychological motivation.

Employing this approach, while it is clear from the diverse circumstances in which BMSs are used (see, especially, Chapter 2) that there is no ideal BMS model, the foundations for more flexible organisational design considerations are apparent. However, before articulating those considerations, several preliminary points can be made. First, Part 3.5 noted that much of the literature from jurisdictions such as Canada, the United States and New Zealand assumed that Indigenous organisations will have a broad scope of political sovereignty. However, the extent of political authority held by a BMS is far more limited and Part 3.4 identified that we should not expect a BMS to incorporate all the rules of an Indigenous community as a political society, but that those rules form part of the institutional setting in which the BMS is found and to which it should be able to respond.

Second, neo-institutionalism suggests that within organisational fields, such as the management of Indigenous assets, organisations performing similar functions will typically tend toward homogeneity – with later organisations tending to model themselves on earlier organisations.⁶⁹² Moreover, as organisations mature, their values and goals become more rigid.⁶⁹³ So it is doubly important to get design right now.

Third, the design considerations contain inherent trade-offs and tensions as between each other. Maximising one consideration may well be at the expense of another. What should be sought is an overall adherence to the considerations, and a deliberate

⁶⁹⁰ As to BMS goals, see Part 2.3.

⁶⁹¹ As to BMS goals, see Part 2.3.

⁶⁹² Paul DiMaggio and Walter Powell, 'Institutional Isomorphism and Collective Rationality' in Walter Powell and Paul DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (University of Chicago Press, 1991) 63, especially at 69-70.

⁶⁹³ Brayden King, 'Organizational Actors, Character and Selznick's Theory of Organizations' (2015) 44 *Research in the Sociology of Organizations* 149; Walter Powell, 'Expanding the Scope of Institutional Analysis' in Walter Powell and Paul DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (University of Chicago Press, 1991) 192-4.

selection process where one consideration is calculatedly prioritised at the expense of another. The weight given to one or other of the considerations is a value judgment, about which reasonable minds will differ.⁶⁹⁴

Fourth, the proposed design considerations are influenced by Mantziaris and Martin's work in the PBC context, albeit with some amendments. That is because Mantziaris and Martin's design principles are implicitly based on neo-institutionalism and so can be employed and updated within that theoretical framework.⁶⁹⁵ It is also because the roles of BMSs and PBCs are similar in some ways. BMSs are essentially Indigenous organisations for the receipt, management and distribution of monies arising from native title rights or claimed rights and for the pursuit of purposes (for instance, cultural, economic and social) selected by the relevant Indigenous community. As discussed above, the relevant Indigenous community is typically centred on native title holders or claimants, but also extends to other Indigenous persons living in a geographic region in some circumstances (such as under the charitable trust component of a BMS). PBCs have statutory functions relating to holding and/or managing native title rights and interests⁶⁹⁶ and are hence also focussed on a particular group of native title holders. As outlined in Part 3.1.1, they also have a potential role in managing and distributing assets arising from native title rights and interests and many play roles in relation to purposes such as economic development, maintenance of cultural heritage and community welfare. Further, PBCs often feature as entities within a BMS. In addition, while trusts are typically heavily used, those trusts incorporate features more typically associated with member based associations such as corporations.

Despite these similarities, BMSs do have a broader role than PBCs, a less direct focus on management of native title and a greater focus on the general management and distribution of assets and the pursuit of purposes. BMS design considerations must also accommodate interactions between the different legal structures within a BMS, which is not often the case within a PBC.

Thus, while we have used the Mantziaris and Martin principles as a starting point, we have made a number of changes. In particular:

- **Autonomy** has been added as a design consideration. As noted above, institutions comprise and reflect values and so the processes adopted by a BMS should be consistent with its goals of individual autonomy and self-determination. Further, many subsequent researchers have proposed such a principle. For instance, Nettheim, Meyers and Craig's 'autonomy' (Part 3.4).
- **Capacity to pursue purpose** has also been added, again, given the centrality of socio-economic development goals to BMSs. Indeed, the need to set purposes

⁶⁹⁴ Although note the discussion immediately below Figure 5.1 which provides a justification for prioritising design considerations one (**Customisation**) and two (**Legal adequacy**) above the others.

⁶⁹⁵ This is most clearly evident in the treatment of Goodin's work and the discussion of broad institutional design principles: *Mantziaris and Martin's Native Title Corporations* 322-8.

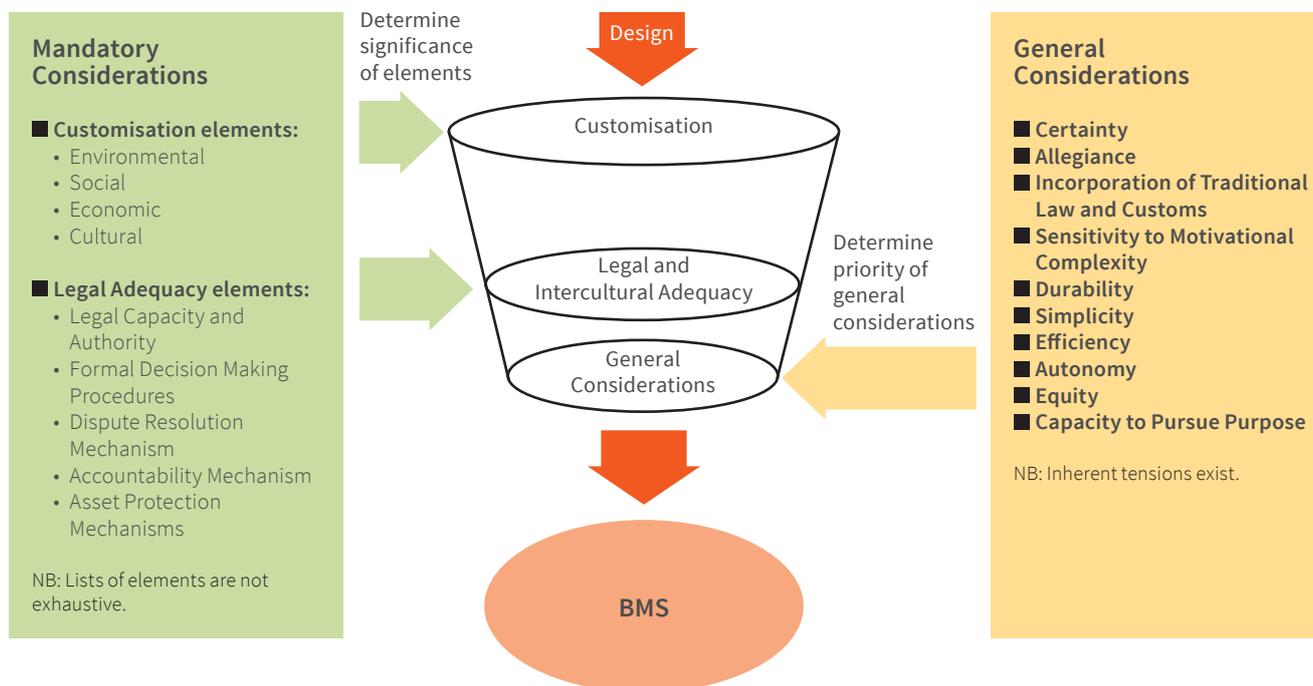
⁶⁹⁶ See generally NTA ss 56, 57, 58; *Native Title (Prescribed Body Corporate) Regulations 1999* (Cth) rr 6, 7.

and obtain information to measure pursuit of those purposes is clearly enunciated by Dodson and Smith, McKay and the Australian Collaboration and AIATSIS as outlined in Part 3.4.

- Inter and intra-generational equity (**Equity**) is another addition. It is raised, in particular, by the greater focus of BMSs on the distribution and/or accumulation of monies and the link between those monies and native title rights and interests, as well as the inclusion of charities within a BMS. As discussed in Part 4.10, equity is now often mentioned as a key issue in the BMS context.
- Mantziaris and Martin's 'revisability' and 'robustness' have been collapsed into one principle: **Durability**.
- A number of Mantziaris and Martin's principles have been infused with a greater theoretical basis and expanded to take account of the broader and less NTA-focused context of BMSs. In particular, **Allegiance** now draws on neo-institutional insight into when and why institutions emerge and change, which permits a greater acknowledgment of the role of power within BMSs than was open under Mantziaris and Martin's quite empirical approach to defining **Allegiance**. **Sensitivity to motivational complexity** was based very loosely on neo-institutionalism in the social sciences, but could draw a stronger theoretical base from the literature and could also incorporate insights from psychology by way of self-determination theory. **Efficiency** also appeared to lack a theoretical base, and could clearly draw on new institutional economic theories of transaction cost efficiency.

The 12 design considerations for BMSs are as follows:

Figure 5.1 – Design Considerations



In particular, the first two considerations must always be met; it is the remaining ten that can be balanced against each other. The reason is that all BMSs must be customised – tailored – to the particular environmental, social, cultural, economic and political conditions of the relevant Indigenous community. How else could a BMS pursue the specific aspirations of a community?

By their very nature, BMSs must operate as places where Indigenous practices and values are incorporated and transformed into practices and values that comply with the Australian legal system and, to an extent, engage with the practices and values of the broader Australian society. Accordingly, **Legal adequacy** must be satisfied in order for the BMS to exist and straddle Indigenous law and culture and the broader Australian legal system.

Stakeholders generally expressed support for, or had no proposed changes to, these design considerations,⁶⁹⁷ although a number noted that much would depend on the

⁶⁹⁷ Resource Proponent Manager 19 May 2019; Resource Proponent Agreements Team 5 September 2018 and 17 June 2019; Professional Adviser 5 March 2019; Independent BMS Facilitator 7 March 2019; Pilbara Aboriginal Corporation Executive 19 March 2019; Former Aboriginal Corporation CEO & Management Consultant 14 February 2019; Pilbara Aboriginal Corporation Executive 2 May 2018; Pilbara Aboriginal Corporation Executive 10 May 2018; Pilbara Corporation Executive 7 June 2018; Pilbara Aboriginal Corporation Director 8 May 2019; Pilbara Aboriginal Corporation Director 20 June 2018; Pilbara Aboriginal Corporation Executive 4 July 2018; Pilbara Aboriginal Corporation Executive 5 July 2018; Trustee Officer 8 March 2019; Trustee Officer 19 July 2018; Trustee Officer 28 June 2018. Cf Professional

precise way in which the considerations are implemented and balanced with each other.⁶⁹⁸ Where specific comments were made, they have been noted under the relevant design consideration along with any necessary modifications or clarifications. In addition, one stakeholder emphasised, from an aid and development perspective, the importance of ensuring ‘capability’ to arrive at a BMS (eg capacity of individuals to operate a structure) and then ‘sustainability’ once the structure is in place to keep it operating well.⁶⁹⁹

5.1 Customisation

As already stated, customisation is a ‘critical need’ for BMSs.⁷⁰⁰ The process followed in designing a BMS should be tailored to the size⁷⁰¹, geographical dispersion⁷⁰², complexity⁷⁰³, aspirations⁷⁰⁴, and organisational culture⁷⁰⁵ of the specific native title group. The design of a BMS must be sufficiently tailored to the desires of the native title group and customised to take into account their desired decision making processes⁷⁰⁶ and native title rights.⁷⁰⁷ That involves having regard to the size and composition of the native title group, as well as their aspirations as a group for community development.⁷⁰⁸ Size considerations should also have regard to BMS revenues, with the CATSI Act Corporation discussion in Part 3.1.1 emphasising the importance of tiered reporting and other compliance and administrative obligations depending on size. In respect of the size and capacity of a native title group and BMS revenues, customisation may imply that the ‘full’ BMS structure is not required.⁷⁰⁹ In this sense, **customisation** may imply either compatibility or contradiction with **simplicity**. The design of a BMS should also take into

Adviser 3 May 2019 and Professional Adviser 5 March 2019 (change proposed to split legal and intercultural adequacy).

⁶⁹⁸ Pilbara Aboriginal Corporation Executive 19 March 2019; Pilbara Aboriginal Corporation Executive 10 May 2018; Pilbara Aboriginal Corporation Executive 5 July 2018; Pilbara Aboriginal Corporation Director 8 May 2019; Trustee Officer 8 March 2019; Professional Adviser 3 May 2019. Cf Pilbara Aboriginal Corporation Officer 12 March 2019; Resource Proponent Agreements Team 5 September 2018; Resource Proponent Manager 24 January 2017; Resource Proponent Social Investment Manager 22 February 2017.

⁶⁹⁹ Pilbara Aboriginal Corporation Executive 21 May 2018.

⁷⁰⁰ Independent BMS Facilitator 21 March 2018.

⁷⁰¹ *Mantziaris and Martin’s Native Title Corporations* 263-4.

⁷⁰² Ibid 264-5. For example, a widely dispersed claim group may have internal constituency elected representatives who can attend meetings rather than all claim group members having to travel vast distances to attend meetings.

⁷⁰³ Ibid. This refers to the extent of political and social cohesiveness of the group as well as the broad socio-economic profile of the group.

⁷⁰⁴ Ibid. The aspirations may be social and economic aspirations.

⁷⁰⁵ Ibid 271-81. The organisation may involve a culture of disputation as there are internal competitions for resources and internal struggles over identity, legitimacy and authority.

⁷⁰⁶ Paul Memmott and Scott McDougall, *Holding Title and Managing Land in Cape York Indigenous Land Management and Native Title*, (National Native Title Tribunal, Perth, 2003) 80-2.

⁷⁰⁷ Professional Adviser 31 January 2018, particularly bearing in mind, according to this stakeholder, the fact that it is native title rights or traditional ownership that give rise to rights to payments. The result is that ‘this should give an emphasis to PBCs and the role of PBCs’.

⁷⁰⁸ Paul Memmott and Scott McDougall, *Holding Title and Managing Land in Cape York Indigenous Land Management and Native Title*, (National Native Title Tribunal, Perth, 2003) 80-2.

⁷⁰⁹ Pilbara Aboriginal Corporation Director 21 June 2018. This stakeholder queried whether payments might be made directly to a PBC, obviating the need for a more complex BMS, in circumstances where a group possesses sufficient capacity.

account other BMSs and other pre-existing structures of relevance to the group, particularly given the risk of over-stretching a community's leadership pool (see Part 4.15).

As part of the organisational culture, regard must be given to the appropriate balance between local and regional imperatives.⁷¹⁰ Martin and Finlayson emphasise that many Australian Indigenous communities display an 'intense localism'.⁷¹¹ Localism means prioritising individual and local-group (such as family) interests and autonomy rather than the broader and more encompassing community and regional interests and connections – see also Part 3.4.⁷¹² As noted by Martin, localism has ethical and political implications.⁷¹³ For instance, when considering ***Sensitivity to motivational complexity***, localism may mean that there are ethical and political obligations to support family members that might render a decision to vote to do so publically justifiable even if this is not other-regarding behaviour and even if it amounts to a breach of board member legal duties.⁷¹⁴ Localism may also be at odds with assumptions underlying democratic representation and accountability. It may mean that community members do not wish to elect a representative, or to be bound by decisions made by such a representative – especially when that representative is not from their family or other relevant local group.⁷¹⁵ This aspect is of particular relevance to the considerations of ***Allegiance*** and ***Incorporation of traditional law and custom & intercultural adequacy***. In any event, cultural complexities make it problematic to simply assert that institutional design should be founded in the assumption that claim groups are clearly bounded local groups.⁷¹⁶

5.2 Legal adequacy

Shaping BMS rules to fit the institutional context in which the BMS is set also means that a BMS must be consistent with the Australian legal system and standards, such as corporate governance practices. There are minimum basic legal attributes that are necessary for the legal entities that comprise the BMS to exist and to operate.⁷¹⁷

⁷¹⁰ *Mantziaris and Martin's Native Title Corporations* 281-7.

⁷¹¹ D F Martin and J D Finlayson, 'Linking Accountability and Self-determination in Aboriginal Organisations' (Discussion Paper No 116/1996, CAEPR, 1996).

⁷¹² David Martin, 'The Governance of Agreements between Aboriginal People and Resource Developers: Principles for Sustainability' in *Altman and Martin's Power, Culture, Economy* 99, 118; *Mantziaris and Martin's Native Title Corporations* 282.

⁷¹³ David Martin, 'The Governance of Agreements between Aboriginal People and Resource Developers: Principles for Sustainability' in *Altman and Martin's Power, Culture, Economy* 99, 118.

⁷¹⁴ Cf *ibid* 118-19.

⁷¹⁵ *Ibid*.

⁷¹⁶ *Mantziaris and Martin's Native Title Corporations* 268.

⁷¹⁷ Cf *ibid* 259. Mantziaris and Martin adopt a legal and anthropological perspective for such minimum facilities: at 289.

Adapting the minimum attributes or facilities from a purely native title holding context provides the following. First, a BMS must have the legal capacity to hold and manage property.⁷¹⁸ It must be the bearer of rights and be capable of entering into contracts.

Second, in the native title context, Mantziaris and Martin assert that a PBC must have a means by which legal authority is established. This means both that the PBC acts for and can bind the members of the native title group and that a person has authority to act for the PBC (corporate legal authority).⁷¹⁹ For entities within a BMS to interact with each other (eg for a charitable trust to provide funding to an incorporated BMS entity to carry out a charitable project) or with third parties (eg an agreement with a resource company as to administration of and reporting on payments made by the resource company) then the second type of authority, corporate legal authority, will obviously be required. However, it is not obvious that a BMS need display the first type of authority. That is because third parties do not need the BMS to contract with the authority of the common law native title holders as to acts affecting native title. The BMS receives and manages money arising from such dealings, but does not intrinsically need to manage native title rights and interests. While some form of authority of the native title group will be required in articulating goals for the BMS, this is a matter of internally ascertaining and adopting such goals, rather than binding the Indigenous community in dealings with third parties. It is better dealt with under accountability (discussed below) and the considerations of ***Allegiance*** and ***Capacity to pursue purpose***.

Third, assuming that assets are provided to the BMS in relation to underlying native title held or claimed by the group, the BMS must have a method for the identification of members of the Indigenous community affected by proposed dealings in the native title.⁷²⁰ This is to be understood by reference to the principles of traditional law and custom regulating group definition, recruitment and succession. Specific legal techniques include having a membership register and a codification of the rules of traditional law and custom for the identification of members, or of processes for ascertaining, accessing and reflecting those rules.⁷²¹

Fourth, to the extent that the grant of interests or activities may impact more on some native title rights than others and to the extent that it is possible to differentiate streams of payments arising from these separate impacts, then flowing from the third principle, the BMS must have a method for identifying the nature and extent of the relevant native title rights and interests.⁷²² Since identification must proceed by reference to traditional law and custom, the content of native title may differ accordingly. In relation to this, stakeholder feedback has noted the importance of taking account of differences in native

⁷¹⁸ Ibid 295; Christos Mantziaris and David Martin, *Guide to the Design of Native Title Corporations* (Commonwealth of Australia, National Native Title Tribunal, September 1999) 37.

⁷¹⁹ *Mantziaris and Martin's Native Title Corporations* 299-300; Christos Mantziaris and David Martin, *Guide to the Design of Native Title Corporations* (Commonwealth of Australia, National Native Title Tribunal, September 1999) 37-8.

⁷²⁰ *Mantziaris and Martin's Native Title Corporations* 306-7; Christos Mantziaris and David Martin, *Guide to the Design of Native Title Corporations* (Commonwealth of Australia, National Native Title Tribunal, September 1999) 40-1.

⁷²¹ *Mantziaris and Martin's Native Title Corporations* 307.

⁷²² Ibid 310-11.

title rights within a particular Indigenous community or between certain native title 'sub-areas'.⁷²³ Resource proponent desire to comply with international best practice and anti-corruption legislation will likely affect the approach to any such differential distribution of benefits by requiring rules about oppressive conduct and good governance, most especially around conflicts of interest.⁷²⁴

Fifth, the BMS must stipulate its formal decision making procedures.⁷²⁵ Those procedures should contemplate who is to be included in decision making processes and how negotiation and consultation will occur. In traditional decision making procedures, the focus may be on process rather than outcomes. That emphasis has the potential for the process to become an end in and of itself, ultimately hampering the effectiveness of decision making processes.⁷²⁶ One partial solution, as demonstrated by the pilot structures in Chapter 6 and discussed in Part 7.6, is to mandate flexible but finite timeframes after which a third party, such as a professional trustee, may act. The representativeness of decision makers, or attempts to rely upon representatives as decision makers, was identified by stakeholders as an important consideration in this context.⁷²⁷ Cultural authority is also the source of a 'big divide' in some communities, between those who possess the authority to make decisions based on traditional decision making procedures, and those who do not.⁷²⁸

Sixth, the BMS must have a means for resolving disputes both among members within the community, between the BMS and members of the community, and between BMS entities.⁷²⁹ This requires a creative balance between indigenous mechanisms for dispute resolution and non-indigenous mechanisms, such as independent mediation.

Seventh, the BMS must have a system of internal and external accountability.⁷³⁰ Internal accountability relates to individual members within the group. That may be enhanced, for example, by effective communication and reporting mechanisms, clear obligations and liabilities of decision makers, grievance procedures, consultation and possibly mediation. External accountability concerns parties external to the group, including the state, financial institutions, the public and trade creditors. The use of independents to fill decision making roles within a BMS (Part 2.2) might also be thought of as a form of accountability.

Eighth, the BMS must have a means by which liability for decisions is allocated between members of the Indigenous community, committee or board members and the BMS

⁷²³ Professional Adviser 31 January 2018.

⁷²⁴ See nn 110 and 111 and accompanying text.

⁷²⁵ *Mantziaris and Martin's Native Title Corporations* 311-15; Christos Mantziaris and David Martin, *Guide to the Design of Native Title Corporations* (Commonwealth of Australia, National Native Title Tribunal, September 1999) 42-3.

⁷²⁶ Christos Mantziaris and David Martin, *Guide to the Design of Native Title Corporations* (Commonwealth of Australia, National Native Title Tribunal, September 1999) 44.

⁷²⁷ See Part 5.4 and Resource Proponent Manager 24 January 2017.

⁷²⁸ See, eg, Trustee Officer May and June 2018.

⁷²⁹ *Mantziaris and Martin's Native Title Corporations* 315-17.

⁷³⁰ *Ibid* 317-21.

itself, as well as between these entities and third parties.⁷³¹ In practice, this may be determined by the constituent documents of the BMS entities (eg company constitutions and trust deeds).⁷³²

To add to the Mantziaris and Martin list, in the context of a BMS that manages and distributes property, there must also be principles in place that protect that property. For instance, as suggested in the second Woodward report, ‘simple provisions for control of the situation if things go wrong within an organization’.⁷³³ Such principles would be captured by Dodson and Smith’s requirements of sound corporate governance and of effective financial management (Part 3.4) and might be reflected in matters such as the use of independent persons in decision making, or the use of a future fund, as discussed in Part 2.2.⁷³⁴ This would also reflect resource proponents’ interests in complying with anti-corruption legislation.

Finally, while we have separately considered intercultural adequacy under the design consideration ***Incorporation of traditional law and custom & intercultural adequacy***,⁷³⁵ it is pertinent to bear in mind that cultural practices will inform the current and future content of many of the legal adequacy requirements.

5.3 Certainty

Mantziaris and Martin formulated the concept of ‘certainty’ in light of the express purposes of the NTA to achieve certainty for transactions affecting native title rights and interests and to achieve a measure of protection for native title rights and interests. From these purposes they reasoned that a PBC ought to have ‘legal facilities that operate in a regular and predictable way, and which are capable of legal enforcement’ so as to encourage transactions.⁷³⁶ To enhance native title protection, it ought also to incorporate notions of stability of the institution such as being an institution free from on-going disputation.⁷³⁷

BMS entities are less focussed on native title rights and interests and hence NTA purposes are less directly relevant. However, BMS entities are intended to be intercultural interfaces that permit dealings between Indigenous communities and third parties. Such dealings include the receipt of land access payments from and reporting

⁷³¹ Ibid 321-22.

⁷³² In the context of a PBC an associated consideration is the choice between an Agency PBC and a Trust PBC. An Agency PBC may put the personal assets of the holders at risk, while liability is shared by the holders comprising the principal. On the other hand, a Trust PBC does not put the personal assets of the holders at risk and there is a fairer distribution and management of the loss: Christos Mantziaris and David Martin, *Guide to the Design of Native Title Corporations* (Commonwealth of Australia, National Native Title Tribunal, September 1999) 17-18.

⁷³³ Edward Woodward, Australian Aboriginal Land Rights Commission (Second Report, April 1974) 65.

⁷³⁴ Pilbara Aboriginal Corporation Director 21 June 2018.

⁷³⁵ In accordance with comments from several interviewees that it was confusing to fully incorporate legal and cultural requirements under a heading of ‘legal and intercultural adequacy’: Professional Adviser 3 May 2019; Professional Adviser 31 January 2018.

⁷³⁶ *Mantziaris and Martin’s Native Title Corporations* 322-3.

⁷³⁷ Ibid 323.

to resource companies and the co-implementation of community programs with government. Further, BMSs are intended to receive, protect and distribute payments from third parties, for the benefit of the relevant Indigenous community. Accordingly, 'certainty' is still required so that BMS entities can deal with third parties and protect assets received, without being undermined by the weakness of the institution.

In this context **Certainty** is, from a resource proponent perspective, 'an important priority' which 'cannot be traded off with other principles because some of the issues will then wind up in court'.⁷³⁸ Addressing the concept of **Certainty** in the context of traditional decision making processes invites particular challenges, as it may not be appropriate to 'hardwire' such processes into a legal document.⁷³⁹ The so-called 'windows approach', discussed in Parts 5.5 and 7.6, provides a means for dealing with this particular challenge.

5.4 Allegiance

A BMS must be capable of inducing and maintaining the allegiance of the Indigenous community that controls, and in large part is intended to benefit from, it.⁷⁴⁰ The BMS is, after all, intended to be an institution of that group. Allegiance signifies the capacity of the BMS to exercise power and authority over the community without coercion. Thus the authority of decision making processes should be respected and supported, even where individual members or groups within the broader community disagree.⁷⁴¹

This consideration is derived from Mantziaris and Martin, who reject political science notions of political 'legitimacy' as informing its content because they construe 'legitimacy' as based on justification of the exercise of power by reference to criteria of rationality.⁷⁴² The need for justification and justificatory criteria of rationality are not necessarily compatible with Indigenous social systems for conceiving power and authority.⁷⁴³ However, neo-institutionalism, in its focus on when and why institutions emerge and change, employs broader notions of legitimacy or allegiance that look to a range of rational, cognitive and social reasons why people permit an institution to exercise power.⁷⁴⁴ These include rational choice institutionalists who suggest that change occurs where different institutional settings will better enable the relevant actors to maximize their interests,⁷⁴⁵ which obviously overlaps with **Sensitivity to motivational complexity**. For instance, sitting fees might provide committee and board members with an incentive to continue with existing arrangements. However, if sitting fees are high or members of

⁷³⁸ Resource proponent manager 10 August 2017. The importance of **Certainty** was also echoed by a trustee stakeholder: Trustee Officer 28 June 2018.

⁷³⁹ Resource Proponent Social Investment Manager 22 Feb 2017.

⁷⁴⁰ By analogy with PBCs: *Mantziaris and Martin's Native Title Corporations* 323.

⁷⁴¹ Paul Memmott and Scott McDougall, *Holding Title and Managing Land in Cape York Indigenous Land Management and Native Title*, (National Native Title Tribunal, Perth, 2003) 79.

⁷⁴² *Mantziaris and Martin's Native Title Corporations* 323-5.

⁷⁴³ *Ibid* 324.

⁷⁴⁴ Cf *Scott's Institutions and Organizations* ch 5.

⁷⁴⁵ Andre Lecours (ed), *New Institutionalism – Theory and Analysis* (2005) 12-13.

the Indigenous community feel that they do not have sufficient opportunities to take on a decision making role, this may lead to community dissatisfaction.⁷⁴⁶

From the perspective of sociological institutionalism, while institutions have an element of continuity, institutional change is warranted where it would enhance the institution's 'social legitimacy' – for instance to better align with the culture of those interacting with the institution,⁷⁴⁷ importing notions of ***Incorporation of traditional law and custom & intercultural adequacy***. However, neo-institutionalism also looks at the role of power, which might otherwise be lost from the Mantziaris and Martin approach. For instance, power plays a key role in actors' abilities to create or change institutional goals or the processes for pursuing institutional goals – to which people then commit.⁷⁴⁸ A useful insight here is that as organisations mature, their values and goals become more rigid,⁷⁴⁹ so that if clear goals are set early, there will be some resistance to later subversion even if power shifts within a community. Of relevance here is that stakeholders noted the significance of power dynamics in the context of the *creation* of BMS documents. Specifically it is important to ensure that community members feel sufficiently involved in the process of negotiating documents, independently of the adequacy of the decision making process employed.⁷⁵⁰ Doing so can have positive implications for allegiance by enhancing knowledge of structures – and input into their values and goals - at the community level and mitigating the perception that a structure is imposed.⁷⁵¹

As noted by Mantziaris and Martin, in practice, ***Certainty*** and ***Allegiance*** are typically inversely related. There is a trade-off. Procedures that maximise certainty (eg efficiency, timeliness) may reduce the acceptance of a decision within the Indigenous community. On the other hand, procedures which ensure acceptance of a decision within the native title group may be time-consuming and involve protracted negotiations and processes. For example, there is a link between acceptance of an exercise of power and (1) participation in that exercise (indirectly through appropriately representative delegates, or directly through consultation, reporting and other communication methods, along with consent mechanisms)⁷⁵² and (2) accountability (which might occur by way of disclosure

⁷⁴⁶ Pilbara Aboriginal Corporation Executive 21 May 2018.

⁷⁴⁷ Peter Hall and Rosemary Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44(5) *Political Studies* 936, 949; Andre Lecours (ed), *New Institutionalism – Theory and Analysis* (2005) 13-14.

⁷⁴⁸ *Scott's Institutions and Organizations* 137-9; Philip Selznick, *Leadership in Administration: A Sociological Interpretation* (Row, Peterson and Company, 1957) 134-42. Cf Paul DiMaggio and Walter Powell, 'Institutional Isomorphism and Collective Rationality' in Walter Powell and Paul DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (University of Chicago Press, 1991) 63, 65.

⁷⁴⁹ Brayden King, 'Organizational Actors, Character and Selznick's Theory of Organizations' (2015) 44 *Research in the Sociology of Organizations* 149; Walter Powell, 'Expanding the Scope of Institutional Analysis' in Walter Powell and Paul DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (University of Chicago Press, 1991) 192-4.

⁷⁵⁰ Trustee Officer May and June 2018

⁷⁵¹ Aboriginal Community Representatives 3 May 2018; Karratha Workshop 3 May 2018.

⁷⁵² David Martin, 'The Governance of Agreements Between Aboriginal People and Resource Developers: Principles for Sustainability', in *Altman and Martin's Power, Culture, Economy* 121; Patrick Sullivan, 'Indigenous Governance: The Harvard Project, Australian Aboriginal Organisations and Cultural Subsidiarity' (Working Paper No. 4, Desert Knowledge Cooperative Research Centre, Alice Springs, 2007) 16; Mick Dodson and Diane Smith, 'Governance for sustainable development: Strategic issues and principles for Indigenous Australian communities' (Discussion Paper 250, 2003, ANU) 13. Cf Jessica Weir and Steven Ross, 'Beyond Native Title: The Murray Lower Darling Rivers Indigenous Nations' in Benjamin Smith and

and reporting to, and in some instances participation by, the broader Indigenous community. In the context of native title representative bodies it has been suggested that this could occur by way of ‘widely publicised policies and guidelines outlining their decision making processes; procedures for assessing the merits of claims; procedures for prioritising claims; and appeal mechanisms’.⁷⁵³ Often therefore, the key question is where the balance should be struck. However, the identification and adoption of clear organisational goals may in fact assist both **Certainty** and **Allegiance**.

5.5 Incorporation of traditional law and custom & intercultural adequacy

The BMS should build on and supplement traditional law and custom, rather than supplant it.⁷⁵⁴ However, the design should not try to fully integrate traditional law and custom for two key reasons. First, there may be differences of opinion as to the precise meaning of traditional law and custom, yet there is no authoritative mechanism to confirm the validity of a particular traditional law and custom, as Australian courts are not placed to do so and there are no formal Indigenous institutions that could authoritatively make such a declaration.⁷⁵⁵ Memmott and McDougall phrase this in the sense that a PBC design should maintain the integrity of traditional decision making processes, while at the same time responding to the legal and administrative requirements of the PBC regime.⁷⁵⁶ Without an ability to obtain an authoritative declaration of custom, there is the risk that different Indigenous interests will try to take advantage of differing interpretations, which could result in institutional instability.⁷⁵⁷ Second, corporatising laws and customs has the potential for corporate governance to interfere with and to supplant traditional decision making processes, to the extent that they are irreconcilable.⁷⁵⁸ The ‘windows approach’ identified in Chapter 6 and discussed in Part 7.6, is one partial solution to these issues.

Stakeholders acknowledged the importance of striking the right balance between traditional and legal/administrative requirements, and the challenges inherent in getting this right.⁷⁵⁹ Some indicated that there is a time for more ‘lateral’ thinking in this regard, in contrast to rigid legal compliance, or for that matter excessive reliance on law and culture.⁷⁶⁰ Another consideration is BMS’ role as a vehicle for cultural continuity, and the significance of traditional decision making processes within that. **Incorporation of**

Frances Morphy (eds), ‘The Social Effects of Native Title: Recognition, Translation, Coexistence’ (Research Monograph No 27, 2007, ANU E-Press) 185, 198.

⁷⁵³ Aboriginal and Torres Strait Islander Commission, ‘Review of Native Title Representative Bodies’ (1995) 20; Part 3.4.

⁷⁵⁴ *Mantziaris and Martin’s Native Title Corporations* 325.

⁷⁵⁵ *Ibid* 39-41.

⁷⁵⁶ Paul Memmott and Scott McDougall, *Holding Title and Managing Land in Cape York Indigenous Land Management and Native Title*, (National Native Title Tribunal, Perth, 2003) vii.

⁷⁵⁷ *Mantziaris and Martin’s Native Title Corporations* 325; Pilbara Aboriginal Corporation Executive 4 July 2018.

⁷⁵⁸ Paul Memmott and Scott McDougall, *Holding Title and Managing Land in Cape York Indigenous Land Management and Native Title*, (National Native Title Tribunal, Perth, 2003) 27, 80.

⁷⁵⁹ Pilbara Aboriginal Corporation Executive 4 July 2018.

⁷⁶⁰ Pilbara Aboriginal Corporation Executive 4 July 2018; Pilbara Aboriginal corporation executive 5 July 2018.

traditional law and custom is therefore important for the maintenance of Indigenous identity.⁷⁶¹

The discussion reflects the fact that formal Indigenous organisations, such as BMSs are ‘intercultural institutions’.⁷⁶² That is, they are ‘focal sites where Aboriginal practices and values are both incorporated and simultaneously transformed through processes of engagement – appraisal, contestation, and appropriation – with those whose ultimate origins lies in the broader non-Aboriginal society’.⁷⁶³ That means BMSs must be capable not only of satisfying certain minimum Australian legal requirements, but must also incorporate traditional laws and customs and be capable of some engagement with the practices and values of the broader Australian society.⁷⁶⁴ This may include engagement with general principles on good corporate or organisational governance,⁷⁶⁵ which are also likely to influence legal duties. As, Frith notes, ‘[Indigenous organisations] must operate competently in both worlds to effect the necessary translation of decision making under Aboriginal law into rights enforceable under Australian law’.⁷⁶⁶ It goes without saying that intercultural adequacy has ramifications for other design considerations and that such adequacy is, in practice, ‘very difficult to achieve’.⁷⁶⁷ Further, as noted in the context of native title corporations by Strelein and Tran, there is a material risk that the intercultural nature of Indigenous organisations may result in the laws and culture of the broader Australian society swamping and hence colonising the governance laws and culture of the relevant Indigenous community and organisation.⁷⁶⁸

The foregoing emphasises that achieving **Incorporation of traditional law and custom & intercultural adequacy** is an ongoing process. Traditional law and custom play a ‘critical’ role during the implementation phase in navigating the relationship between BMS stakeholders and identifying and achieving priorities and the ‘intersection of Indigenous knowledge and decision making and social arrangements with Western institutions and governance arrangements is key’.⁷⁶⁹

⁷⁶¹ Pilbara Aboriginal Corporation Director 20 June 2018.

⁷⁶² David Martin, ‘The Governance of Agreements between Aboriginal People and Resource Developers: Principles for Sustainability’ in *Altman and Martin’s Power, Culture, Economy* 99, 119.

⁷⁶³ Ibid. Cf Diane Smith, ‘Cultures of Governance and the Governance of Culture: Transforming and Containing Indigenous Institutions in West Arnhem Land’ in *Hunt et al’s Contested Governance* 76, 77.

⁷⁶⁴ See, eg, David Martin, ‘The Governance of Agreements between Aboriginal People and Resource Developers: Principles for Sustainability’ in *Altman and Martin’s Power, Culture, Economy* 99, 119-20; Patrick Sullivan, ‘Indigenous Governance: The Harvard Project, Australian Aboriginal Organisations and Cultural Subsidiarity’ (Working Paper No. 4, Desert Knowledge Cooperative Research Centre, Alice Springs, 2007) 1-2.

⁷⁶⁵ As to the intercultural engagement of Indigenous organisations in the realm of governance, see, eg, Diane Smith and Janet Hunt, ‘Understanding Indigenous Australian Governance – Research, Theory and Representations’ in *Hunt et al’s Contested Governance* 1, 3-4; Jon Altman, ‘Different Governance for Difference: The Bawinanga Aboriginal Corporation’ in *Hunt et al’s Contested Governance* 177, 188.

⁷⁶⁶ Angus Frith, *Getting it Right for the Future: Aboriginal Law, Australian Law and Native Title Corporations* (PhD Thesis, University of Melbourne, 2013) 122.

⁷⁶⁷ Cf Resource Proponent Manager 24 January 2017.

⁷⁶⁸ Lisa Strelein and Tran Tran, ‘Building Indigenous Governance from Native Title: Moving away from Fitting in to Creating a Decolonised Space’ (2013) 18(1) *Review of Constitutional Studies* 19, 35-6.

⁷⁶⁹ Resource Proponent Social Investment Manager 22 Feb 2017; Pilbara Aboriginal Corporation Executive 4 July 2018.

5.6 Sensitivity to motivational complexity

In accordance with neo-institutional theory, BMSs should be designed to accommodate the range of actors' motives (and encourage other-regarding motives) and identification with organisational goals through various identified means, including separation of powers, the requirement of public or semi-public defence of institutional actions and the adoption of escalating measures to deter non-compliance.⁷⁷⁰

Most people are driven by a range of individual motives for acting, for instance: self-regarding, other-regarding, instrumental or ethically-based motives.⁷⁷¹ Strict rational choice neo-institutionalists make the largely instrumental assumption that relevant actors will behave in accordance with strategic calculation to maximise their interests.⁷⁷² At the other end of the spectrum, sociological neo-institutionalists emphasise cultural context to highlight individuals' reliance on established practices and the importance of interpretation of the relevant situation and themselves within those established practices – so as to both identify actors' interests and to constrain the range of appropriate choices that can be made.⁷⁷³ Nevertheless, under each approach, institutions affect an individual's behaviour by reducing the uncertainty about how others will act. For instance, if institutional rules provide information about other peoples' actions and enforcement mechanisms to deter certain behaviour, then they help shape the process by which a person will select their most beneficial option. Taking the more cultural approach, institutional processes help actors interpret a situation and shape the range of socially appropriate behaviour for actors. This could include by way of promoting institutional values,⁷⁷⁴ and, potentially, the internalisation of those values.⁷⁷⁵ Indeed, as noted by Hall and Taylor, both approaches are likely to be at play, in that individuals are likely to act to some extent in a strategic way to maximise their interests, but in a way that acknowledges the culturally appropriate range of actions and the relevance of non-material social interests.⁷⁷⁶

Psychological approaches, such as self-determination theory, can be complementary. Self-determination theory proposes that extrinsic and intrinsic motivations are not simply additive, but that it is only extrinsic motivation which is autonomous rather than controlled, that will add to, rather than detract from, intrinsic motivation.⁷⁷⁷ Extrinsic

⁷⁷⁰ As to sociological approaches to institutional design, see, eg, R E Goodin, 'Institutions and their Design' in R E Goodin (ed), *The Theory of Institutional Design* (Cambridge University Press, 1998) 1.

⁷⁷¹ Ibid 41; *Mantziaris and Martin's Native Title Corporations* 325.

⁷⁷² See, eg, Thomas Koelble, 'The New Institutionalism in Political Science and Sociology' (1995) 27(2) *Comparative Politics* 231, 232; Peter Hall and Rosemary Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44(5) *Political Studies* 936, 937, 939-40.

⁷⁷³ Peter Hall and Rosemary Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44(5) *Political Studies* 936, 937, 939-40. In the context of historical institutionalism, see also Thomas Koelble, 'The New Institutionalism in Political Science and Sociology' (1995) 27(2) *Comparative Politics* 231, 237.

⁷⁷⁴ Peter Hall and Rosemary Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44(5) *Political Studies* 936, 955-6.

⁷⁷⁵ See, eg, Andre Lecours (ed), *New Institutionalism – Theory and Analysis* (2005) 10-11.

⁷⁷⁶ Peter Hall and Rosemary Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44(5) *Political Studies* 936, 949, 956-7.

⁷⁷⁷ Marylene Gagne and Edward Deci, 'Self-determination Theory and Work Motivation' (2005) 26 *Journal of Organizational Behaviour* 331, 333-4.

motivation can be effected in ways that support the internalisation of values, hence increasing perceptions of autonomy, eg if acting in a way that conforms to social norms will increase a person's self-esteem or ego, or is congruent with their own sense of identity.⁷⁷⁸ To support internalisation of values, self-determination theory suggests that people should feel not just autonomous but also competent and connected to others in relation to the relevant behavior or area of activity.⁷⁷⁹

Indigenous institutional design should therefore accommodate the range of motives and be sensitive to the possibilities for internalisation of BMS values and goals. For instance by accepting that Indigenous actors may be motivated by individual self-aggrandisement as well as by the interests of the wider Indigenous community. Institutional design can account for this, for instance, by including separation of powers principles.⁷⁸⁰ However, incorporating processes based on an assumption of self-regarding motivations can introduce unnecessary rules (with consequent time and cost implications) and can even cause other-regarding actors to begin acting in a more self-regarding fashion.⁷⁸¹ Therefore, another option is to incorporate processes that seek to promote other-regarding behaviour and identification with organisational values and goals. This could be achieved through adoption of a 'publicity principle' requiring that all institutional actions be publically defensible (which would require recourse to other-regarding motives and would also align with self-determination theory in that conformity with such norms would boost the actor's self-esteem) and potentially a requirement of at least some level of public justification for actions.⁷⁸² As an example of how this could be implemented, the board of a BMS Indigenous corporation might be required (pursuant to a provision in the BMS Indigenous corporation's constitution) to provide reasons to a general meeting of native title holders if the board elects not to follow an advisory committee's recommendation.⁷⁸³ Another idea may be to link committee or board member payments to the achievement of outcomes rather than to time spent attending and preparing for meetings. However, there are real risks that linking payments in this way would result in extrinsic motivation that is controlled rather than autonomous and hence that may actually cause dissociation from organisational values and goals in the pursuit of the particular form, rather than substance, of the specified outcomes.⁷⁸⁴

Alternatively, referencing Ayres and Braithwaite's responsive regulation model, Pettit suggests a 'complier-centred strategy' for institutional design that involves escalating measures to deter non-compliance. This strategy involves the implementation of sanctions at the bottom of the hierarchy which apply to everyone and are supportive of

⁷⁷⁸ Ibid 334-5.

⁷⁷⁹ Ibid 336-7.

⁷⁸⁰ R E Goodin, 'Institutions and their Design' in R E Goodin (ed), *The Theory of Institutional Design* (Cambridge University Press, 1998) 1, 41.

⁷⁸¹ Ibid.

⁷⁸² Ibid 41-2 (Goodin notes that there is no automatic need for disclosure of reasons under the 'publicity principle', although there may well be an incentive to do so in support of the principle of autonomy and in accordance with economic theories of organisational behaviour).

⁷⁸³ M Limerick, K Tomlinson, R Taufatofua, R Barnes and D Brereton, *Agreement-making with Indigenous Groups: Oil and Gas Development in Australia* (CSR, University of Queensland, 2012) 103.

⁷⁸⁴ Cf Marylene Gagne and Edward Deci, 'Self-determination Theory and Work Motivation' (2005) 26 *Journal of Organizational Behaviour* 331.

compliance and deliberation. Higher up the hierarchy are more severe, 'big gun' sanctions which apply only to demonstrably lack any independent motivation to act in a way which is not explicitly self-interested.⁷⁸⁵ This allows for the application of rational choice theory in a manner which maintains a focus on other-regarding individuals while at the same time retaining the ability to deal decisively with outliers.

Pettit proposes three means to give effect to this approach. First, screening (in or out) of actors or options.⁷⁸⁶ This could involve screening in by way of empowering individuals to take an opportunity that they did not initially have, for instance by way of capacity building (skills and experience) for potential committee or board members. Screening out of actors could involve appointment and vetting procedures (such as an agreed panel of potential independent members or auditors), or eligibility requirements for roles such as qualification, experience and character constraints for committee or board members and experience, processes and regulatory compliance for trustee companies. It might also involve conflict of interest rules for voting. Screening of options might involve the requirement for two (or more) bodies that represent different interests to approve an action; and screening in of options could involve matters such as whistleblowing or appeals procedures and support for individuals affected by decisions of the institution.

Second, sanctioning in ways that support other-regarding motives for acting.⁷⁸⁷ For instance, requiring decision makers, such as the trustee, the BMS corporation, and boards or committees to publically justify key decisions in annual or other reports – with the intention being that decision makers will be embarrassed if they cannot provide an other-regarding justification.⁷⁸⁸ The assumption here is that decision makers and the communities receiving reports are largely comprised of persons who are motivated to act in an other-regarding fashion, or one that aligns with BMS organisational goals.⁷⁸⁹ However, some stakeholder interviews indicated that recording and releasing reasons beyond a committee or board to the broader Indigenous community would have time and cost implications (reducing **Efficiency**) and might make the validity of decisions more vulnerable to challenge (impeding **Certainty** and **Legal adequacy**), as well as potentially raising cultural difficulties.⁷⁹⁰

Pettit's third proposal is to adopt sanctions that are directed to the occasional wrongdoer but not applicable to all actors.⁷⁹¹ Such sanctions should be imposed in an

⁷⁸⁵ Philip Pettit, 'Institutional Design and Rational Choice' in R E Goodin (ed), *The Theory of Institutional Design* (Cambridge University Press, 1998) 54, 86.

⁷⁸⁶ Ibid 79-81.

⁷⁸⁷ Ibid 81-5.

⁷⁸⁸ Ibid 83-4.

⁷⁸⁹ This assumption appeared largely consistent with stakeholder feedback and with the purposes of BMSs discussed in Part 2.3.

⁷⁹⁰ See, eg, Independent BMS Facilitator 21 March 2018; Trustee Officer 18 May 2017. Altman, by contrast, has suggested that public embarrassment can be an effective strategy in the context of Indigenous organisations generally: Jon Altman, 'Different Governance for Difference: The Bawinanga Aboriginal Corporation' in *Hunt et al's Contested Governance* 177, 194.

⁷⁹¹ Philip Pettit, 'Institutional Design and Rational Choice' in R E Goodin (ed), *The Theory of Institutional Design* (Cambridge University Press, 1998) 54, 85-7.

‘escalating hierarchy’, as mentioned above, so as to retain a light-touch, supportive approach for the majority of persons acting in an other-regarding manner.⁷⁹²

5.7 Durability

This consideration incorporates notions of ‘revisability’ and ‘robustness’.⁷⁹³ In this regard, it is preferable to delineate principles, rather than specifying particular forms or structures.⁷⁹⁴ Although Indigenous institutions should be adaptive, they should only adapt as necessary and appropriate to the particular altered circumstances, and they must be robust.⁷⁹⁵ In other words, the degree and nature of change should respond to the extent and type of the altered circumstances and be only as much as is required. They must only change fundamentally when there has been a fundamental change in their environment and should not be vulnerable to factors such as constant policy changes and the destructive instrumental behaviour of institutional participants.⁷⁹⁶ Obviously, there will be some scope for reasonable disagreement about whether a particular change is necessary and appropriate.

Another factor of relevance to **Durability** is the need to keep constituent documents relevant and effective over time.⁷⁹⁷

[t]hese [documents] are heavily negotiated and complex ... but how we keep the agreements ‘alive’ is crucial.

This stakeholder feedback touches not only on the nexus between **Customisation** over time and **Durability**, but also on the need to keep documents ‘alive’ by communicating effectively about them: it may be that amendment is not required because an option already exists within the existing scope of a document (which was otherwise forgotten or unknown).⁷⁹⁸

The importance of this consideration is emphasised by the long-term nature of many land use agreements.⁷⁹⁹

⁷⁹² Ibid 86.

⁷⁹³ See R E Goodin, ‘Institutions and their Design’ in R E Goodin (ed), *The Theory of Institutional Design* (Cambridge University Press, 1998) 1, 40-1.

⁷⁹⁴ Christos Mantziaris and David Martin, *Guide to the Design of Native Title Corporations* (Commonwealth of Australia, National Native Title Tribunal, September 1999) 47.

⁷⁹⁵ *Mantziaris and Martin’s Native Title Corporations* 326-327. Ibid 47-49.

⁷⁹⁶ Christos Mantziaris and David Martin, *Guide to the Design of Native Title Corporations* (Commonwealth of Australia, National Native Title Tribunal, September 1999) 49.

⁷⁹⁷ Resource Proponent Manager 10 August 2017. See also Pilbara Aboriginal Corporation Director 8 May 2019.

⁷⁹⁸ Resource Proponent Manager 24 January 2017.

⁷⁹⁹ As to the long-term nature of many such land use agreements and the consequent need for long term planning and long term approaches to relationships, see, eg, Resource Proponent Manager 10 August 2017: ‘Just like a truck, it will require people to keep it going, and may need to be repaired or changed from time to time’; Resource Proponent Manager 24 January 2017.

5.8 Simplicity

Indigenous organisations should be as structurally and functionally simple as possible.⁸⁰⁰ First, a complex institution would require significant human resources to administer and control. Resources are scarce among such institutions. Second, there are significant ongoing capital resource implications for a complex institution. Third, while Indigenous organisations must be able to perform their functions adequately, complexity should not itself become a cause of failure.⁸⁰¹ They should be as simple as possible, while taking into account the diversity necessitated by the systems of customary law and the wide range of socio-political circumstances in which they exist.⁸⁰² There is a positive correlation between **Simplicity** and **Certainty**.⁸⁰³

5.9 Efficiency

BMSs should be designed so as to minimise the economic cost of transactions occurring both within the BMS and between the BMS and external parties.⁸⁰⁴ Mantziaris and Martin advocated this approach, while also explicitly rejecting economic contractarian and agency cost theories as providing overarching rules for the design of the legal facilities of PBCs.⁸⁰⁵ However, the Mantziaris and Martin concept of **Efficiency** appears to lack a strong theoretical base. We have sited **Efficiency** within a neo-institutional framework and draw on new institutional economic theories of transaction cost efficiency to give the concept a clear meaning. Both of these theoretical bases are consistent with, and indeed implicit in, Mantziaris and Martin's approach.

Transaction cost efficiency involves looking at what kind of institutions minimise the cost of an economic activity –whether transaction costs are minimised by performing economic tasks outside an organisation, utilising the institution of the market, or, to the extent within, examining what type of organisation will reduce costs.⁸⁰⁶ Further, as a neo-institutional economics approach, transaction cost economics does not assume the hyperrationality criticised by Mantziaris and Martin. Instead, parties are viewed as rational actors, but with 'bounded rationality', in that they are subject to a range of cognitive limits.⁸⁰⁷ Further, it is not assumed that all actors will always act in a self-

⁸⁰⁰ Mantziaris and Martin's *Native Title Corporations* 326-7. Christos Mantziaris and David Martin, *Guide to the Design of Native Title Corporations* (Commonwealth of Australia, National Native Title Tribunal, September 1999) 49.

⁸⁰¹ Mantziaris and Martin's *Native Title Corporations* 327.

⁸⁰² Christos Mantziaris and David Martin, *Guide to the Design of Native Title Corporations* (Commonwealth of Australia, National Native Title Tribunal, September 1999) 49.

⁸⁰³ Mantziaris and Martin's *Native Title Corporations* 327.

⁸⁰⁴ Cf Christos Mantziaris and David Martin, *Guide to the Design of Native Title Corporations* (Commonwealth of Australia, National Native Title Tribunal, September 1999) 49.

⁸⁰⁵ Mantziaris and Martin's *Native Title Corporations* 290.

⁸⁰⁶ Oliver Williamson 'The Economics of Organization: The Transaction Cost Approach' (1981) 87(3) *American Journal of Sociology* 548, 548-50; Christopher Bell, 'Transaction Cost Economics' in Rhona C Free (ed), *21st Century Economics: A Reference Handbook* (SAGE, 2010) 193, 196.

⁸⁰⁷ See, eg, Eirik G Furubotn and Rudolf Richter, *Institutions and Economic Theory: The Contribution of the New Institutional Economics* (University of Michigan Press, 2nd ed, 2005) (especially at 27-8, 35-6); Christopher Bell, 'Transaction Cost Economics' in Rhona C Free (ed), *21st Century Economics: A*

interested fashion, but rather that some will act opportunistically – that is, in a self-interested and dishonest fashion.⁸⁰⁸ Finally, while many neo-institutional economists interpret bounded rationality as involving an intention to maximise utility, many also accept that social and cultural norms may well bound the range of options to which the maximisation choice applies and possibly the scope of utility.⁸⁰⁹

Transaction cost economics focuses on the factors that increase transaction costs and on selecting organisational structures that better address those factors and hence minimise the costs. The critical factors are the uncertainty of transactions, regularity of the transactions and ‘asset specificity’.⁸¹⁰ Asset specificity goes to how specialised to the transaction are investments in assets, such as unique equipment or systems, land at a particular site and human capital in the form of specialised skills.⁸¹¹ Funds received by BMSs may typically be invested or distributed for very wide arrays of purposes and over many decades. There is clearly potential for significant uncertainty and regularity of transactions. In addition, given the unique position of each Indigenous community and its discrete law and culture, combined with the relatively unique nature of some aspects of BMSs, such as trust committees (Decision Making Committee and Traditional Owner Council) and the somewhat unique (but becoming less so) community development and service delivery aspects of BMSs,⁸¹² there is some degree of asset specificity exhibited by BMSs. The geographic location of many BMSs away from major metropolitan areas and the geographic dispersion of the communities that they serve also result in a degree of site specificity. Essentially, these all affect parties’ vulnerability to opportunistic behaviour, which is what results in greater costs than would otherwise be incurred.⁸¹³

Given these factors, transaction cost economics explains why an organisational structure such as a BMS is used rather than relying on the open market to purchase all required

Reference Handbook (SAGE, 2010) 193, 195. Bounded rationality means that while people are assumed to try and act rationally, they are subject to cognitive constraints that reduce their ability to do so. For instance, limits upon the amount and relevance of the information that they possess, upon their processing of that information, or in quantifying information.

⁸⁰⁸ Oliver Williamson ‘The Economics of Organization: The Transaction Cost Approach’ (1981) 87(3) *American Journal of Sociology* 548, 553-4.

⁸⁰⁹ Cf Oliver Williamson, *The Mechanisms of Governance* (Oxford University Press, 1996) 246-7; Richard Langlois, ‘Rationality, Institutions and Explanations’ in Richard Langlois (ed), *Economics as a Process: Essays in the New Institutional Economics* (Cambridge University Press, 1986) 225, 252 (framing this as reasonableness of action). See also Mark Granovetter, ‘Economic Action and Social Structure – The Problem of Embeddedness’ (1985) 91 *American Journal of Sociology* 481.

⁸¹⁰ See, eg, Oliver Williamson ‘The Economics of Organization: The Transaction Cost Approach’ (1981) 87(3) *American Journal of Sociology* 548, 555-6; Lyda Bigelow ‘Beyond Make-or-Buy: Advanced in Transaction Cost Economics’ in Rhona Free (ed), *21st Century Economics: A Reference Handbook* (SAGE, 2010) 941, 943.

⁸¹¹ See, eg, Oliver Williamson, ‘The Economics of Governance’ (2005) 95(2) *American Economic Review* 1, 8-9. As to human asset specificity, see also Didier Chabaud, ‘Asset Specificity, Work Organization and Mode of Command: First Insights from the Automotive Industry’ in Claude Ménard (ed), *Institutions, Contracts and Organizations: Perspectives from New Institutional Economics* (Edward Elgar, 2000) 349, 350-2.

⁸¹² Eg Professional Trustee or corporation costs of setting up procedures and people to be able to gather views and provide services.

⁸¹³ See, eg, *Scott’s Institutions and Organizations* 136.

services (which will pose some limits to a BMS's ability to purchase in specialist expertise). However, it is also relevant to the internal structure of an organisation.

In the context of operating an organisation (ie internal transactions), transaction costs are often grouped as establishment and maintenance of organisation costs (including the costs of constituent document preparation); costs of varying the organisation to take account of changing circumstances; information costs of running the organisation, which include 'the costs of controlling the managers', 'costs of managerial decision making', 'of monitoring the execution of orders, and measuring the performance of workers', costs of monitoring and enforcement; and costs associated with the direct transfer of goods and services (such as transport costs).⁸¹⁴ The creation of interpersonal trust may be particularly beneficial to reducing the size of the information costs of running an organisation.⁸¹⁵ However, as noted by Levi while transaction costs can be reduced by increasing interpersonal trust, it may sometimes be more efficient to use institutional mechanisms to reduce opportunism, such as providing rules and enforcement processes in areas of uncertainty, or using an independent mediator to help focus and resolve disputes.⁸¹⁶ Another institutional response might, in complex organisations, be to separate strategic from operational decisions so that those at the strategic level have the mandate and time for long-term planning in the allocation of resources and to undertake monitoring of operations.⁸¹⁷

It has been suggested that achieving transaction cost efficiency typically involves a trade-off with **Allegiance**, because attracting greater allegiance, through comprehensively integrated traditional decision making processes, increases transaction costs.⁸¹⁸ However, if greater communication and participation reduces uncertainty and opportunism, while this has a cost, it may actually reduce the transaction costs that would otherwise arise. Typically though, it is the case that **Efficiency** and **Simplicity** are positively related. The simpler a BMS structure, the more certain are roles and transactions, thus reducing transaction costs. The corollary is that as a BMS becomes more complex, the transaction costs increase.

5.10 Autonomy

The need for the members of Indigenous communities to participate in the creation and operation of organisations has been emphasised in Parts 2.3 and 3.4, particularly by

⁸¹⁴ See, eg, Eirik G Furubotn and Rudolf Richter, *Institutions and Economic Theory: The Contribution of the New Institutional Economics* (University of Michigan Press, 2nd ed, 2005) 54-7.

⁸¹⁵ See, eg, *ibid* 57. See also Lyda Bigelow 'Beyond Make-or-Buy: Advanced in Transaction Cost Economics' in Rhona Free (ed), *21st Century Economics: A Reference Handbook* (SAGE, 2010) 941, 946.

⁸¹⁶ Margaret Levi, 'When Good Defenses Make Good Neighbors: A Transaction Cost Approach to Trust, the Absence of Trust and Distrust' in Claude Ménard (ed), *Institutions, Contracts and Organizations: Perspectives from New Institutional Economics* (Edward Elgar, 2000) 137. See also Oliver Williamson, *The Mechanisms of Governance* (Oxford University Press, 1996) 245-6, ch 10.

⁸¹⁷ Oliver Williamson, *The Mechanisms of Governance* (Oxford University Press, 1996) 81-3.

⁸¹⁸ *Mantziaris and Martin's Native Title Corporations* 327; Paul Memmott and Scott McDougall, *Holding Title and Managing Land in Cape York Indigenous Land Management and Native Title*, (National Native Title Tribunal, Perth, 2003) 79.

Nettheim, Meyers and Craig, and by McCrae and by McKay.⁸¹⁹ More broadly, Behrendt, Cunneen and Libesman note, in the context of Indigenous governance, that 'being able to make decisions for themselves is a key aspiration for Indigenous people and their communities'.⁸²⁰ We consider this emphasis on participation and engagement to be a desire for autonomy, being 'self-determining exercises of [a person's] will' which are usually in the form of choices.⁸²¹ As enunciated by Raz, philosophical conceptions of autonomy suggest that, to be in a position to make a self-determining exercise of will, certain conditions must exist.⁸²² First, a person must have 'inner capacities' that enable them to exercise their will: ie health, a basic intellectual ability, the ability to form intentions and make commitments etc. Second, the person must be free from coercion. Third, the person must have an 'adequate range' of options to choose from.

These broad philosophical notions of autonomy are also reflected in international human rights of self-determination. Article 1 of each of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* states (in identical terms) that:

1. All peoples have the right of self-determination, By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources...

The right to self-determination is also reflected in the *United Nations Declaration on the Rights of Indigenous Peoples*, which provides, in particular in articles 3, 4, 18, 20, 33 and 34:

3. Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
4. Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
18. Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
- 20.1 Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of

⁸¹⁹ See also Paul Memmott and Scott McDougall, *Holding Title and Managing Land in Cape York Indigenous Land Management and Native Title*, (National Native Title Tribunal, Perth, 2003) 86.

⁸²⁰ Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (Oxford University Press, 2009) 275.

⁸²¹ See, eg, John Christman, 'Autonomy in Moral and Political Philosophy', in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2015 Edition) <<https://plato.stanford.edu/archives/spr2015/entries/autonomy-moral/>>.

⁸²² Joseph Raz, *The Morality of Freedom* (Clarendon Press, Oxford, 1986) 372-8.

subsistence and development, and to engage freely in all their traditional and other economic activities...

- 33.1 Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
- 33.2 Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.
34. Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

The World Summit for Social Development produced the Copenhagen Declaration on Social Development, which also includes commitments to '[r]ecognise and support indigenous people in their pursuit of economic and social development, with full respect for their identity, traditions, forms of social organisation and cultural values'.⁸²³

Such international standards encapsulate broadly agreed principles applicable to interactions between persons and their government, as well as – through the frameworks created by the government for the formation and operation of economic and social institutions – between people within society. They are therefore relevant to the design of Indigenous institutions as they articulate broadly agreed or aspirational principles that might apply to interactions between Indigenous communities and government and between Indigenous persons and non-government institutions.⁸²⁴ They also reflect a point made by some BMS stakeholders, that autonomy can be expressed at the community level as distinct from individual autonomy.⁸²⁵ We conceptualise this community-level autonomy as 'self-determination' of the relevant Indigenous community.

To exercise such a right to self-determination requires the:⁸²⁶

effective participation of Indigenous peoples in decisions which affect them, their territories and resources and their cultures. It thus presupposes interactions on such matters between Indigenous peoples and the dominant non-Indigenous society, but requires that such interactions be based on proper respect for the rights of Indigenous peoples in terms of their own law, traditions and culture.

⁸²³ United Nations, A/CONF 166/9 (14 March 1995) Art 26(m).

⁸²⁴ *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 9, 14-18. As to the link between self-determination and decolonisation, see Lisa Strelein and Tran Tran, 'Building Indigenous Governance from Native Title: Moving away from Fitting in to Creating a Decolonised Space' (2013) 18(1) *Review of Constitutional Studies* 19, 22-4. The ALRC has also suggested that UNDRIP principles might act as principled guidance for engagement between Indigenous and non-Indigenous persons over matters relating to native title such as providing content for obtaining free and informed consent: ALRC, 'Connection to Country: Review of the Native Title Act 1993 (Cth)' (Report No 126, June 2015) [2.120]-[2.121].

⁸²⁵ Resource Proponent Manager 24 January 2017.

⁸²⁶ *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 14.

However, the existence of interactions will mean that while proper regard must be had to traditional law and culture, some regard must also be had to the practices of the broader Australian society.

A BMS should thus seek to empower community members to make informed decisions concerning the BMS.

Supporting autonomy is also likely to bolster identification with organisational goals by committee members and directors and so assist **Sensitivity to motivational complexity**.⁸²⁷

5.11 Inter and intra-generational equity (*Equity*)

One way of thinking about intragenerational equity, is to think of justice between contemporaries, as conceived in political philosophy. If considered in terms of 'distributive justice', this would provide some guidance on the extent of distribution between people within the same generation, based on the degree to which this would satisfy their fundamental social and economic needs. It is also possible to think of distributive justice as specifically applied to autonomy and hence tie in to the consideration of **Autonomy** – that is, how are the conditions necessary for autonomy distributed amongst the relevant group.

In terms of intergenerational equity, there are a range of philosophical theories that attempt to articulate what obligations are owed by the present generation in relation to past and future people. While the content and concept of 'intergenerational justice' remain debated, it is a term that is often used for such theories, as they typically apply notions of 'justice' from political philosophy to relations between non-contemporaneous persons.⁸²⁸ For instance, intergenerational justice may mean that the current generation owes a duty grounded in 'distributive justice' to redistribute resources, to some extent, to persons, whether in the same or in future generations, based on the degree to which this would satisfy their needs as discussed above for intragenerational equity.⁸²⁹ Indeed, while Rawls conceived of intergenerational savings obligations⁸³⁰ as a constraint on (rather than application of) the difference principle,⁸³¹ subsequent philosophers have demonstrated that distributive principles can be applied to some extent between

⁸²⁷ Marylene Gagne and Edward Deci, 'Self-determination Theory and Work Motivation' (2005) 26 *Journal of Organizational Behaviour* 331, 333-4, 338-40.

⁸²⁸ See, eg, Axel Gosseries and Lukas Meyer (eds), *Intergenerational Justice* (Oxford University Press, 2009) 1-4; Joerg Tremmel (ed), *Handbook of Intergenerational Justice* (Edward Elgar, 2006).

⁸²⁹ See, eg, Frederic Gaspart and Axel Gosseries, 'Are Generational Savings Unjust?' (2007) 6(2) *Politics, Philosophy and Economics* 193, 201-4, 209, 211-12; Dieter Birnbacher, 'Responsibility for Future Generations – Scope and Limits' in Joerg Tremmel (ed), *Handbook of Intergenerational Justice* (Edward Elgar, 2006), 34. Welfare economics adopts this basis when using certain social welfare functions: cf Robin Boadway and Michael Keen, 'Redistribution' in Anthony Atkinson and François Bourguignon (eds), *Handbook of Income Distribution* (North Holland, Vol 1, 2000) 677, 680-3.

⁸³⁰ To enable the establishment and then maintenance of just institutions.

⁸³¹ John Rawls, *A Theory of Justice* (Clarendon Press, 1972) 285.

generations, that cooperation can take place between generations and that it is possible to transfer resources between generations, even if there are difficulties.⁸³²

Intergenerational justice has also been interpreted as requiring that the current generation avoid the pursuit of benefits that would impose costs on future generations, where to do so would result in the world being handed on in a lesser state to future generations, or in a state that fails to meet 'sufficientarian' standards for members of future generations.⁸³³ This potentially resonates with the importance for many Indigenous communities of maintaining culture and connection to country.⁸³⁴ This interpretation of intergenerational justice resonates with the Brundtland Commission's 1987 definition of sustainability, namely, '[s]ustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.⁸³⁵ The above approach to international justice may thus be based on distributive justice or on notions of sustainability – as highlighted by the commonality with the Brundtland Commission's findings. However, sustainability principles can themselves be conceived of in distributional terms, or otherwise incorporate distributional matters.⁸³⁶

Conceptions of intra- or intergenerational justice that derive from Rawlsian notions of justice are concerned with the rules for society's basic structure and hence do not directly apply to actions taken by societal associations such as BMS entities. Accordingly, if guidance was to be obtained from a Rawlsian notion of justice, then those requirements may need to shape the relevant association's law or charity law itself – if viewed as part of the basic structure.⁸³⁷ Alternatively, they may provide guidance on the principles of 'local justice'⁸³⁸ that ought to be considered by BMS entity controllers.

Clearly, the above notions of equity are based in liberal philosophy and the common law, not traditional law and culture. Stakeholders therefore acknowledged that some balancing is required against the consideration of ***Incorporation of traditional law and custom & intercultural adequacy*** as well as with ***Autonomy***.⁸³⁹ A practical example supplied by one stakeholder is that 'there is a cultural concept of sharing assets, but the

⁸³² See, eg, Janna Thompson, *Intergenerational Justice: Rights and Responsibilities in an Intergenerational Polity* (Routledge, 2009) 117; Joerg Tremmel (ed), *Handbook of Intergenerational Justice* (Edward Elgar, 2006), 34.

⁸³³ See, eg, Lukas Meyer, 'Intergenerational Justice', in Edward Zalta (ed), *Stanford Encyclopedia of Philosophy* (Summer 2016 Edition) <<http://plato.stanford.edu/archives/sum2016/entries/justice-intergenerational/>> (sufficientarianism relates to whether persons are below a threshold of harm); Peter Laslett, 'Is There a Generational Contract?' in Peter Laslett and James S Fishkin (eds), *Justice Between Age Groups and Generations* (Yale University Press, 1992) 24, 29-30, 44-5.

⁸³⁴ Indeed, Weiss suggests that any theory of intergenerational equity must be informed by the fact that '[a]ll generations are linked by the ongoing relationship with the earth' and its condition: Edith Weiss, 'In Fairness To Future Generations and Sustainable Development' (1992) 8(1) *American University International Law Review* 19, 20-1.

⁸³⁵ World Commission on Environment Development, 'Our Common Future', (Report, 1987) <www.un-documents.net/our-common-future.pdf>.

⁸³⁶ Joerg Tremmel (ed), *Handbook of Intergenerational Justice* (Edward Elgar, 2006), 34, 7-9, ch 1, ch 2.

⁸³⁷ Cf John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001) 10-12.

⁸³⁸ See, eg, Jon Elster, 'Local Justice: How Institutions Allocate Scarce Goods and Necessary Burdens' (1991) 35(2-3) *European Economic Review* 273.

⁸³⁹ Resource Proponent Manager 24 January 2017.

trust does not contemplate that this will be occurring'.⁸⁴⁰ However, liberal philosophical notions of equity are also relevant given the role of BMSs as intercultural institutions that exist in the wider Australian society.⁸⁴¹ Liberal philosophical notions of equity have also been proposed in the (admittedly different) context of the interaction between Indigenous peoples and state systems of land and resource ownership and are thus not entirely alien.⁸⁴² ***Incorporation of traditional law and custom & intercultural adequacy*** and ***Autonomy*** may mean that custom influences the manner in which distributive justice is pursued. However, notions of distributive justice still have a role to play in setting some broad 'limits' to the impact of custom.⁸⁴³

Finally, to the extent that land use payments received by a BMS are linked with the impairment of native title rights or interests of a subset of the native title holders (as discussed in Part 5.2), there may be a role for corrective justice in allocating those payments to that subset before distributive justice principles come into play.⁸⁴⁴

5.12 Capacity to pursue purpose

BMSs are more than just asset pools that are intended to achieve and distribute financial returns. They are also vehicles for pursuing cultural, economic, social and other purposes. Without the ability to articulate, encourage behaviour supportive of and measure achievement of purpose, BMS decisions are likely to be suboptimal. This point is emphasised by Indigenous Business Australia in the context of purpose for investment decisions.⁸⁴⁵ It is also emphasised in the *Organising for Success* report discussed above. The notion of ***Capacity to pursue purpose*** also often appears to be assumed in Indigenous governance literature and is expressly stated by McKay. It is also reflected to some degree in the consideration of ***Customisation***, although our focus here is not on the particular end chosen, but the capacity of the BMS to pursue non-financial ends. The consideration would typically also be positively linked with ***Allegiance*** in that articulating, encouraging and measuring achievement of purposes should build allegiance of the native title group.

⁸⁴⁰ Independent BMS Facilitator 21 March 2018.

⁸⁴¹ As to the relevance of liberal principles and to acknowledgment of human and civil rights, see, eg, Patrick Sullivan, 'Indigenous Governance: The Harvard Project, Australian Aboriginal Organisations and Cultural Subsidiarity' (Working Paper No. 4, Desert Knowledge Cooperative Research Centre, Alice Springs, 2007) 2, 15-16.

⁸⁴² Lee Godden and Maureen Tehan, 'Introduction: A Sustainable Future for Communal Lands' in Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Routledge, 2010) 1, 10-14.

⁸⁴³ In the context of a principle of 'cultural subsidiarity', see, eg, Patrick Sullivan, 'Indigenous Governance: The Harvard Project, Australian Aboriginal Organisations and Cultural Subsidiarity' (Working Paper No. 4, Desert Knowledge Cooperative Research Centre, Alice Springs, 2007) 15-16.

⁸⁴⁴ As to corrective justice, see Ernest Weinrib, 'The Gains and Losses of Corrective Justice (1994) 44 *Duke Law Journal* 277; David Miller, 'Justice' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (The Metaphysics Research Lab, 2017) <<https://plato.stanford.edu/entries/justice/#CorrVersDistJust>>.

⁸⁴⁵ Indigenous Business Australia, *Indigenous Investment Principles* (Brochure, 2015) <www.iba.gov.au/wp-content/uploads/IB7158_IPP-brochure_FA4.pdf> 15.

We have included it as a separate consideration for two reasons. First, achievement of cultural, economic and social purposes is a critically important function for BMSs. Second, unlike the pursuit of profit, cultural, economic and social purposes are difficult to state and measure. Guidance from the not-for-profit sector literature therefore has the potential to make a large positive impact on BMS institutional design. This is even more so in the very many cases that BMS entities include for-purpose entities such as charitable trusts or the PBC as a charity. Literature on social enterprises also has the potential to provide guidance on processes to combine the pursuit and distribution of profits with the pursuit of purpose.⁸⁴⁶

Measuring achievement of purpose

There is a range of literature on measuring the achievement of purposes by not-for-profits or by organisations that pursue both profit and purpose.⁸⁴⁷ Although terminology is not universally adopted, there is some consensus that performance measurement must be multidimensional.⁸⁴⁸ In addition, most measurement approaches seek to track, in some way, the flow of resources used by an organization, the activities that it undertakes using those resources and the results of those activities. Therefore there is some degree of commonality in that most measurement frameworks look to dimensions such as:⁸⁴⁹

- *Inputs*: being the resources used by the organization in carrying out its activities.
- *Outputs*: consisting of the direct product of the organisation's activities, such as the goods or services provided.
- *Results*: comprising *outcomes* which are the direct costs and benefits to the activity participants and *impacts*, which measure the longer-term net benefit obtained by the participants, and other 'spill over' benefits to the wider community.

The literature is not always consistent in the use of these terms. Metcalf notes that there remains considerable contestation over the vocabulary and concepts related to evaluation practices.⁸⁵⁰ To this end, the term 'impact measurement' is used here not in the narrow sense it is sometimes used but to the measurement of net benefits to both the entity (including questions of viability) and to the wider community.

⁸⁴⁶ See, eg, Chris Mason and Bob Doherty, 'A Fair Trade-off? Paradoxes in the Governance of Fair-trade Social Enterprises' (2015) 136(3) *Journal of Business Ethics* 451.

⁸⁴⁷ Australian Government Productivity Commission, *Contribution of the Not-for-Profit Sector: Productivity Commission Research Report* (January 2010) 29, 34, 48-52.

⁸⁴⁸ Michelle D Lane and Maureen Casile, 'Angels on the Head of a Pin: The SAC Framework for Performance Measurement in Social Entrepreneurship Ventures' (2011) 7 *Social Enterprise Journal* 238, 241. Cf Alan Sefton, 'Report on Njamal People's Trust' (Inquiry under Section 20 of the *Charitable Trusts Act 1962* (WA), 1 November 2018) 12.

⁸⁴⁹ Australian Government Productivity Commission, *Contribution of the Not-for-Profit Sector: Productivity Commission Research Report* (January 2010) 29, 33-5.

⁸⁵⁰ Lindsey Metcalf, *Measuring Impact: How Can Third Sector Organisations Make Sense of a Rapidly Expanding Marketplace of Tools?* (Third Sector Research Centre (UK), Working Paper 111, October 2013) 4.

For an example of the practical implementation of such approaches, the 'social return on investment' method is widely used in the not-for-profit and social enterprise sectors and looks to the net social, environmental and economic value of activities.⁸⁵¹ The SROI method is based on cost benefit analysis.⁸⁵² However, SROI adopts a much broader approach to the range of costs and benefits to be valued than is typically the case.⁸⁵³

Differences do arise between the varying measurement approaches in that they provide for different ways of measuring and quantifying the relevant dimensions, as well as the significance of external factors.⁸⁵⁴ Further, across all approaches, there may often be measurement difficulties due to the fact that results are partly dependent upon factors outside the organisation's control, such as the personal characteristics of an individual service recipient or the socio-economic status of the relevant area. In addition, there are often a range of causal factors at play when considering impacts.⁸⁵⁵

Importantly, stakeholders noted that measurement approaches need to be responsive to change in purposes. That is because, in an ideal world, BMS members should have 'an improved lot' over time, so 'theoretically your program priorities should change over time to reflect the improving or changing needs of members'.⁸⁵⁶ The Regional Implementation Committee report into indicators of Aboriginal wellbeing in the Pilbara demonstrates how needs might change over time, for instance, due to an increasing population or to achievement of employment goals resulting in an over-reliance on mining employment and a need to think about strategies for diversification.⁸⁵⁷

Balancing pursuit of purpose and of profit

There are unfortunately no clear-cut answers in the literature on how the combined pursuit of profit and purpose might be achieved. The question of impact measurement of so-called 'hybrid organisations'⁸⁵⁸, or social enterprises, which pursue both purposes and profits has, however, attracted growing attention.⁸⁵⁹ The heightened 'urgency' in

⁸⁵¹ See, eg, Jeremy Nicholls, Eilis Lawlor, Eva Neitzert and Tim Goodspeed, 'A Guide to Social Return on Investment' (Guide, SROI Network, January 2012). For further tools and methods, see also the Tools and Resources for Assessing Impact online database, at <http://trasi.foundationcenter.org/>.

⁸⁵² As to economic cost benefit analysis and its scope, see, eg, Mikael Svensson, 'Cost-Benefit Analysis' in Rhona C Free (ed), *21st Century Economics: A Reference Handbook* (SAGE, 2010) 275, 276-9.

⁸⁵³ Cf Jeremy Nicholls, Eilis Lawlor, Eva Neitzert and Tim Goodspeed, 'A Guide to Social Return on Investment' (Guide, SROI Network, January 2012) 45-52.

⁸⁵⁴ See, eg, Australian Government Productivity Commission, *Contribution of the Not-for-Profit Sector: Productivity Commission Research Report* (January 2010) 50.

⁸⁵⁵ See, eg, Jeremy Nicholls, Eilis Lawlor, Eva Neitzert and Tim Goodspeed, 'A Guide to Social Return on Investment' (Guide, SROI Network, January 2012) 28-62; Mikael Svensson, 'Cost-Benefit Analysis' in Rhona C Free (ed), *21st Century Economics: A Reference Handbook* (SAGE, 2010) 275, 276-9.

⁸⁵⁶ Pilbara Corporation Executive 7 June 2018.

⁸⁵⁷ John Taylor, 'The RIC Report: Change in Wellbeing Indicators of Pilbara Aboriginal People: 2001 – 2016' (Commissioned Report, September 2018).

⁸⁵⁸ Alnoor Ebrahim, Julie Battilana and Johanna Mair, 'The Governance of Social Enterprises: Mission Drift and Accountability Challenges in Hybrid Organizations' (2014) 34 *Research in Organizational Behaviour* 81.

⁸⁵⁹ A number of reasons for the growing interest in impact measurement are highlighted in Lindsey Metcalf, *Measuring Impact: How Can Third Sector Organisations Make Sense of a Rapidly Expanding Marketplace of Tools?* (Third Sector Research Centre (UK), Working Paper 111, October 2013) 3. See also Centre for Social Impact, *A Shared Outcomes Measurement Blueprint for Australia* <www.csi.edu.au/research/project/shared-outcomes-measurement-blueprint-australia/>.

resolving the question of impact measurement has drawn particular impetus from more recent writing highlighting that the not-for-profit sector literature has, until recently, emphasized the success of social enterprises at the expense of identifying reasons where their impact has been limited.⁸⁶⁰

In addition to the tension between pursuit of a social mission and of profit, lies the difficulty of quantifying pursuit of purpose, and success therein.⁸⁶¹ Literature reviews indicate that the research is predominantly qualitative, the shortfall in quantitative analyses arguably stemming from lack of agreement over the features of for-purpose not-for-profit entities, and the consequent problems associated with creating a sizeable population database, identifying valid and reliable analytical variables.⁸⁶² However, approaches such as SROI go a long way to addressing this issue.

Attempts to address balance between pursuit of purpose and profit have varied in their approach, and are necessarily, in some instances, specific to the legal structure adopted for the for-purpose entity - such as community interest companies in the United Kingdom,⁸⁶³ or benefit corporations (B-Corps), in the United States.⁸⁶⁴

Some commentators have sought to design their own frameworks with which to measure performance. Lane and Casile, for example, seek to link firm viability (Survival), direct social action (Action) and long-term social impact on technical, political and cultural aspects of society (Change).⁸⁶⁵ The 'SAC framework', as they term it, is ultimately less a quantitative tool than a broad, qualitative guide to the aspects of performance requiring attention; it is conceded that 'the identification of these three levels of performance does not provide clear instruction on what to measure'.⁸⁶⁶

McLoughlin et al propose a similar, systematic process in their conception of an impact measurement model referred to as SIMPLE (Social IMPAct for Local Economies).⁸⁶⁷ The process entails identifying the broad social objective ('Scope it'), prioritising the items for measurement ('Track it'), conducting measurement and reporting results ('Tell it'), and

⁸⁶⁰ Michelle D Lane and Maureen Casile, 'Angels on the Head of a Pin: The SAC Framework for Performance Measurement in Social Entrepreneurship Ventures' (2011) 7 *Social Enterprise Journal* 238, 238; Sophie Bacq, Kimberly A Eddleston, 'A Resource-Based View of Social Entrepreneurship: How Stewardship Culture Benefits Scale of Social Impact' [September 2016] *Journal of Business Ethics*.

⁸⁶¹ Alnoor Ebrahim, Julie Battilana and Johanna Mair, 'The Governance of Social Enterprises: Mission Drift and Accountability Challenges in Hybrid Organizations' (2014) 34 *Research in Organizational Behaviour* 81, 82.

⁸⁶² Bob Doherty, Helen Haugh and Fergus Lyon, 'Social Enterprises as Hybrid Organizations: A Review and Research Agenda' (2014) 16 *International Journal of Management Reviews* 417, 419-20.

⁸⁶³ See generally, Community Interest Company Regulator, 'Chapter 4: Creating a CIC' (April 2013).

⁸⁶⁴ Directors of a company with B-Corp status are required to consider the interests of non-shareholder stakeholders, pursue a public benefit purpose beyond profit-making, and must issue an annual benefit report to shareholders and the public. See generally Dana Brakman Reiser, 'Benefit Corporations – Sustainable Form of Organization?' (2011) 46 *Wake Forest Law Review* 591; Kathleen Wilburn and Ralph Wilburn, 'The Double Bottom Line: Profit and Social Benefit' (2014) 57 *Business Horizons* 11.

⁸⁶⁵ See generally Michelle D Lane and Maureen Casile, 'Angels on the Head of a Pin: The SAC Framework for Performance Measurement in Social Entrepreneurship Ventures' (2011) 7 *Social Enterprise Journal* 238.

⁸⁶⁶ *Ibid* 252.

⁸⁶⁷ See Jim McLoughlin et al, 'A Strategic Approach to Social Impact Measurement of Social Enterprises: The SIMPLE Methodology' (2009) 5(2) *Social Enterprise Journal* 154.

integrating the results into future programming ('Embed it'). Again, however, the authors note that the SIMPLE model is ultimately a tool which managers of for-purpose entities must adapt, providing an 'approach to developing ... criteria, methodology, selection guidance and implementation'.⁸⁶⁸ To the extent that SIMPLE focuses on social impact measurement, moreover, it fills only part of the gap in measuring capacity to pursue purpose – necessarily applied in conjunction with methods of measuring economic sustainability and / or profitability.

Others have seen third-party 'umpires' as a way forward, offering for-purpose not-for-profit entities performance assessment and evaluation programs. These initiatives have gained especial ground in the United States,⁸⁶⁹ where independent third parties – such as the private, not-for-profit 'B Lab' – set the standards used by B-Corps to define, report and assess their environmental and social performance. Whilst organisations meeting B Lab's standards may use the B-Corp mark, subject to ongoing audits by B Lab,⁸⁷⁰ it is the entity seeking B-Corp status⁸⁷¹ which applies those standards to itself.

Through B Lab's online 'B Impact Assessment', potential B-Corps are evaluated and audited against certain benchmarks – including corporate accountability, employee policy, benefit of the product or service to consumers, the company's relationship with its community, and its environmental impact⁸⁷² – with these benchmarks changing based on the geography, sector and (employee) size of the company.⁸⁷³ Critically, however, no enforcement provisions exist to compel B-Corp directors to balance dual performance objectives; they are only required to consider them.⁸⁷⁴

CIC directors, in contrast, *must* consider the stated social purpose of the company, and are required to prepare an annual report to file with their accounts, demonstrating that this purpose is being satisfied, and that appropriate stakeholder engagement is being undertaken to this end.⁸⁷⁵ In addition, the CIC legislation aims to reduce the tension

⁸⁶⁸ Ibid 168.

⁸⁶⁹ See, eg, Kathleen Wilburn and Ralph Wilburn, 'The Double Bottom Line: Profit and Social Benefit' (2014) 57 *Business Horizons* 11. Third-party standard setters have also gained growing traction in the United Kingdom, where a burgeoning 'tools marketplace' has sought to support third sector impact and quality measurement work: generally Lindsey Metcalf, *Measuring Impact: How Can Third Sector Organisations Make Sense of a Rapidly Expanding Marketplace of Tools?* (Third Sector Research Centre (UK), Working Paper 111, October 2013).

⁸⁷⁰ Dana Brakman Reiser, 'Benefit Corporations – Sustainable Form of Organization?' (2011) 46 *Wake Forest Law Review* 591, 594.

⁸⁷¹ Note the certification by B Lab has no legal standing, but allows the company to make a statement about its commitment to social goals and to submit annual reports detailing these goals, potentially influencing and attracting individual and institutional investors: Kathleen Wilburn and Ralph Wilburn, 'The Double Bottom Line: Profit and Social Benefit' (2014) 57 *Business Horizons* 11, 13.

⁸⁷² Dana Brakman Reiser, 'Benefit Corporations – Sustainable Form of Organization?' (2011) 46 *Wake Forest Law Review* 591, 602.

⁸⁷³ B Impact Assessment, 'Frequently Asked Questions' <<http://bimpactassessment.net/how-it-works/frequently-asked-questions/the-standards>>.

⁸⁷⁴ Alnoor Ebrahim, Julie Battilana and Johanna Mair, 'The Governance of Social Enterprises: Mission Drift and Accountability Challenges in Hybrid Organizations' (2014) 34 *Research in Organizational Behaviour* 81, 86.

⁸⁷⁵ Department for Business Innovation & Skills, Office of the Regulator of Community Interest Companies (UK), *Information and Guidance Notes - Chapter 8: Statutory Obligations* (May 2016) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/524156/13-711-community-interest-companies-guidance-chapters-8-statutory-obligationstions.pdf>.

between social mission and accountability to investors by easing concerns of dual objectives and stakeholders.⁸⁷⁶ Like a private company, a CIC is typically comprised of shareholder members who have the right to elect and remove directors and to receive some profit distributions. Unlike private companies that may consider non-financial interests, however, the primary responsibility of a CIC's directors is to the stated social purpose of the company. To this end, CICs are subject to legislative restrictions, including the amount they can pay in dividends to their members, and their ability to transfer company assets (described as 'asset locks').⁸⁷⁷ Practically, CICs typically also need to have a clause in their constitution outlining the entity's social purpose, so as to satisfy the community interest test and any such clause can then only be changed subsequently with the approval of the CIC regulator ('purpose lock').⁸⁷⁸ However, the annual CIC reporting requirements appear to focus on a CIC's activities and distributions (ie on outputs), not on outcomes or impact.⁸⁷⁹

Summary

As discussed, it is key that any performance evaluation system distinguishes between short-term, client-specific service delivery (ie, *outputs*), short-term client-specific effects (ie, *outcomes*) and longer-term social change goals (ie, *impacts*). Metcalf suggests that for-purpose organisations might begin by identifying what impacts and outcomes they hope to achieve through impact measurement processes, then considering their preference for quantitative or qualitative information (or a mix of both), and the extent to which any given tool might meet this requirement.⁸⁸⁰ This would likely involve BMSs measuring their goals by reference to activities or processes for the production of goods

⁸⁷⁶ Julie Battilana, Alnoor Ebrahim & Johanna Mair, 'The Governance of Social Enterprises: Mission Drift and Accountability Challenges in Hybrid Organizations' (2014) 34 *Research in Organizational Behavior* 81, 94.

⁸⁷⁷ See generally, *Companies (Audit, Investigations and Community Enterprises) Act 2004* c27 (UK), ss 30-35; Susan Woodward, "'Not-For-Profit' Motivation in a "For-Profit" Company Law Regime – National Baseline Data' (2003) 21 *Company and Securities Law Journal* 102, 105; Community Interest Company Regulator, 'Chapter 4: Creating a CIC' (April 2013); CIC Association, 'What is a CIC?' <<http://www.cicassociation.org.uk/about/what-is-a-cic>>; Alnoor Ebrahim, Julie Battilana and Johanna Mair, 'The Governance of Social Enterprises: Mission Drift and Accountability Challenges in Hybrid Organizations' (2014) 34 *Research in Organizational Behaviour* 81, 94

⁸⁷⁸ See, eg, Susan Woodward, "'Not-For-Profit' Motivation in a "For-Profit" Company Law Regime – National Baseline Data' (2003) 21 *Company and Securities Law Journal* 102, 105; Department for Business Innovation & Skills, Office of the Regulator of Community Interest Companies (UK), 'Information and Guidance Notes – Chapter 5 Constitutional Documents' <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/524153/12-1337-community-interest-companies-chapter-5-constitutional-documents.pdf> [5.5].

⁸⁷⁹ Department for Business Innovation & Skills, Office of the Regulator of Community Interest Companies (UK), *Information and Guidance Notes - Chapter 8: Statutory Obligations* (May 2016) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/524156/13-711-community-interest-companies-guidance-chapters-8-statutory-obligations.pdf> [8.1.3].

⁸⁸⁰ Lindsey Metcalf, *Measuring Impact: How Can Third Sector Organisations Make Sense of a Rapidly Expanding Marketplace of Tools?* (Third Sector Research Centre (UK), Working Paper 111, October 2013).

and services (eg, health services, job training etc), client-specific benefits and longer-term benefits such as improved outcomes in the lives of indigenous beneficiaries.⁸⁸¹

Further, the monitoring of the relationship between for-purpose and for-profit activities will remain an on-going governance challenge. To the extent that the function and roles of a BMS may span both forms of activity, management and monitoring is key.

Further application

Some data on baseline measures of socio-economic matters has been and is being collected in the Pilbara. For instance, Taylor and Scambary's baseline data⁸⁸² and Seivwright, Callis, Flatau and Isaachsen's report into mapping service expenditure and outcomes in the Pilbara and Kimberley.⁸⁸³ Also, the more recent Regional Implementation Committee report into indicators of Aboriginal wellbeing in the Pilbara.⁸⁸⁴ Rio Tinto is also working with the CSIRO to conduct a socio-economic anchor data survey for the Pilbara, potentially with data at the language-group level.⁸⁸⁵ Nevertheless, the generation of baseline data and its use to measure BMS outcomes remains a key challenge in the Pilbara.⁸⁸⁶

⁸⁸¹ Alnoor Ebrahim, Julie Battilana and Johanna Mair, 'The Governance of Social Enterprises: Mission Drift and Accountability Challenges in Hybrid Organizations' (2014) 34 *Research in Organizational Behaviour* 81, 87.

⁸⁸² J Taylor and B Scambary, 'Indigenous People and the Pilbara Mining Boom: A Baseline for Regional Participation' (Research Monograph No 25, CAEPR, 2005).

⁸⁸³ A Seivwright, Z Callis, P Flatau and P Isaachsen, *Overcoming Indigenous Disadvantage Across the Regions: Mapping Service Expenditure and Outcomes in the Pilbara and Kimberley* (Regional Services Reform Unit, 2017).

⁸⁸⁴ John Taylor, 'The RIC Report: Change in Wellbeing Indicators of Pilbara Aboriginal People: 2001 – 2016' (Commissioned Report, September 2018).

⁸⁸⁵ Resource Proponent Manager 10 August 2017.

⁸⁸⁶ Resource Proponent Social Investment Manager 22 February 2017.

6. Pilot Structure: Applying the Design Considerations to Identify Specific Best Practice & Room for Improvement

Rather than applying the design considerations to a specific BMS, we have adopted a pilot structure in Part 6.2 below that is based on an amalgam of several recently established Pilbara BMSs. The chief reasons for doing so are that:

- The design of the overall structure of many of the recent Pilbara BMSs is quite similar. Of course, particular differences occur and these have been noted and commented upon.
- There are a relatively small number of Aboriginal stakeholders involved in operating the Pilbara BMSs and they have many demands on their time. Rather than over-burdening any single BMS group of stakeholders, by using a pilot structure amalgam based on several Pilbara BMSs, we were able to spread our interviews and focus groups over a few representatives of each BMS.
- It better enabled the incorporation of comments from a number of stakeholders who were interested in the research project and wanted to be interviewed but who were not linked to a specific structure that we had initially contemplated.
- It better enabled the incorporation of comments from resource proponents as only a very small number of specific structures involved all major resource proponents as contributors. For a similar reason, looking at an amalgam of several structures also helped with capturing a broader range of professional trustee views.
- Due to the different establishment dates of Pilbara BMSs, this approach also permits some insight into how the duration of a BMS might impact on its operation.
- It is more supportive of an emerging Pilbara regional approach to supporting the establishment and operation of BMSs.

As to why we have selected recent Pilbara BMSs, the reasons are essentially pragmatic:

- The recent Pilbara BMSs have involved multi-year negotiations between international resource proponents and Aboriginal communities. All stakeholders, including professional trustee companies, have received legal and financial advice and have given serious and considered thought to the structures and to previous experience with BMSs. The recent Pilbara BMSs are thus potentially fertile examples of best practice.
- As demonstrated by the Gumala Foundation case study in Chapter 4, there is literature on older Pilbara structures, which is relevant to evaluating the more recent BMSs.

- As researchers based in Western Australia and having received funding support for this research project from BHP and Rio Tinto, the Pilbara BMSs are accessible and relevant structures to these resource proponents, while at the same time being of national interest and involving a range of other resource proponents.

A potential drawback to adopting an amalgam pilot structure is that it is too imprecise to permit analysis, or that imprecision will create uncertainty for readers. We have sought to address this by referring to specific agreements, trust deeds and corporate constitutions. We do so in footnotes and in the text for specific points. In addition, Part 6.2 sets out the documents that we reviewed in creating the amalgam pilot structure. As the subsequent specific references demonstrate, we have leaned particularly heavily on the Banjima and Nyiyaparlia BMS documents to provide exemplars of provisions.

The analysis of the pilot structures is largely limited to publicly available documents. Subject to confidentiality restrictions, we have also reviewed and considered some private documents and have been given information in interviews relating to land use agreements, BMS sub funds and procedures and policies. While we have also been given some information about BMS discretionary trusts, we have not been provided with copies of the discretionary trust deeds. Accordingly, our working assumption has been that discretionary trust provisions largely mirror charitable trust provisions, except when it comes to trust objects and to the distribution and accumulation of trust funds.

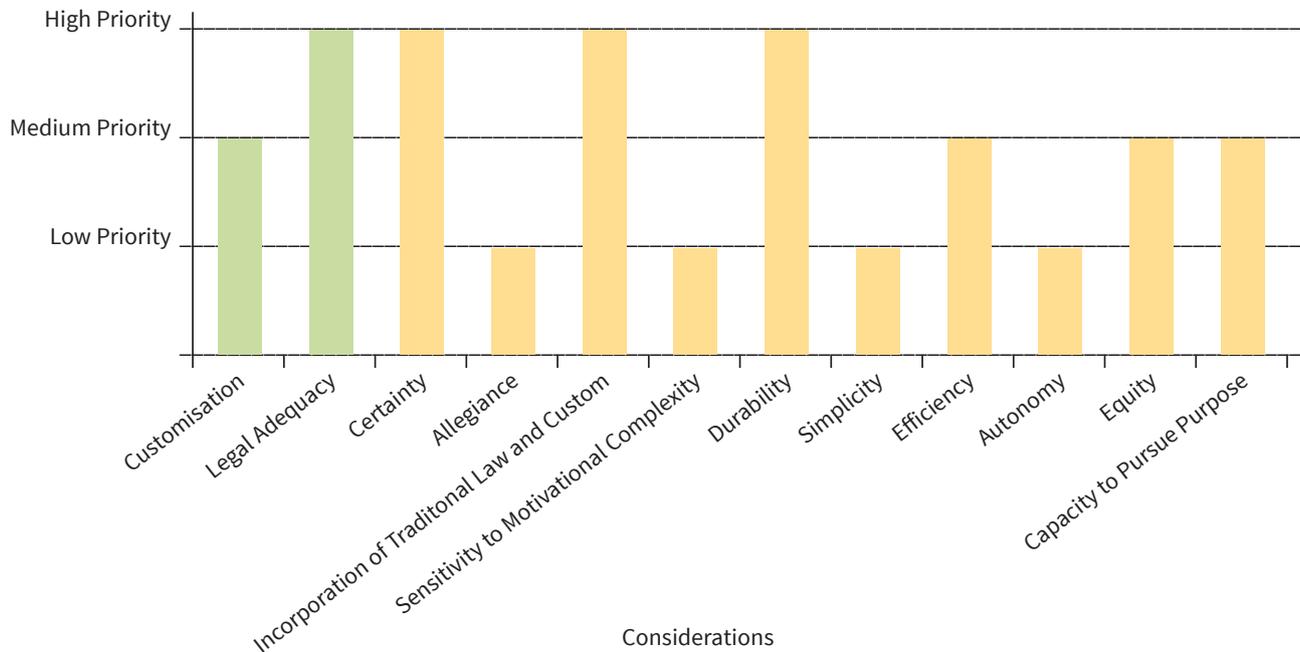
6.1 Summary

As set out in Figure 6.1, the pilot BMS does relatively well at satisfying **Customisation** and **Legal adequacy**. It also prioritises 6 of the remaining 10 considerations highly or moderately: **Certainty**, **Incorporation of traditional law and custom & intercultural adequacy**, **Durability**, **Efficiency**, **Equity** and **Capacity to pursue purpose**. Accordingly, the features of the pilot BMS relevant to these considerations are identified as beneficial features and provide potential examples of best practice. In particular, the pilot BMS adopts:

- The ‘windows approach’ of providing mechanisms to support and recognise, but not codify or internalise, traditional law and custom. Recognition of traditional law and custom is subject to limits that are both temporal and derived from substantive norms in the broader Australian community such as compliance with Australian law and no oppression of minority members. This helps maintain a balance between **Certainty** and **Incorporation of traditional law and custom & intercultural adequacy**.
- A charitable trust, incorporating a future fund, alongside a discretionary trust, which works fairly well to ensure some financial saving for future generations, a broad range of benefits to individuals from the current generation and broader and development-focussed community projects that are sensitive to traditional law and culture and to levels of need within the current generation. These represent best practice features in aid of **Equity**, albeit some improvements

could be made to better acknowledge non-monetary benefits for future generations and the need to prioritise those in need in the present generation.

Figure 6.1 – Design Consideration Priorities



Nevertheless, there are some areas where there is room to improve and recommendations for improvement are set out in Table 6.1. In particular, the pilot BMS could perform better against the consideration of **Allegiance**, especially by improving information flows and creating greater potential for direct involvement in decision making by members of the relevant Aboriginal community. These processes, combined with capacity building (which should be made a more express and extensive requirement under the pilot BMS documents), would also improve performance against **Autonomy**, as well as **Capacity to pursue purpose** and **Legal adequacy**. To ensure that the consultation and information flow processes do not undermine the timeliness and validity of BMS decisions (detracting from **Certainty**), there would need to be limits on the time for processes and on the extent to which process deficiencies can impact decisions made by the relevant BMS decision maker. The ‘windows approach’ limits referred to above provide some examples for how this might be achieved.

The pilot BMS contains a number of provisions that permit the Aboriginal community to select a lesser or greater scope of matters over which it wishes to make decisions. There are also various provisions that require or enable communities to purchase assistance in operating a BMS so as to progressively build capacity and organisation over time. These provisions represent best practice and should be included and strengthened where possible in further support of **Autonomy**. In particular, enabling a transition from a professional trustee company to an Aboriginal community-controlled trustee over time is a key example and should ideally be included in the pilot BMS.

In addition, there is scope to enhance **Sensitivity to motivational complexity**, especially by applying this consideration to trustees so as to screen out some options, impose sanctions and encourage internalisation of BMS goals.

Simplicity is not satisfied by the pilot BMS. However, lack of simplicity is not easy to address as much of the complexity brings other advantages, in particular significant scope and flexibility to address factors such as the size and capacity, complexity, aspirations and organisational culture of the relevant Aboriginal community – in aid of **Customisation**. However, the complexity of the BMS documents employed to achieve this flexibility, has the potential to impede the practical achievement of that flexibility and so **Customisation** could be improved by supporting or simplifying implementation processes contained within or contemplated by the pilot BMS documents.

The pilot BMS also features multiple decision making bodies with overlapping functions. While this can be useful for separation of powers (**Sensitivity to motivational complexity**), uncertainty about roles, responsibilities and liabilities can reduce **Legal adequacy** and **Efficiency** and hinder achievement of BMS goals (**Capacity to pursue purpose**). There is scope to reduce uncertainty through institutional mechanisms and reduce opportunism by building interpersonal trust.

Additionally, while the pilot BMS provides an ability to articulate the precise purposes within the broad possibilities enabled by the BMS, articulation of those purposes and measuring achievement of outcomes against those purposes could be improved via better strategic planning for **Capacity to pursue purpose**.

Table 6.1 - Summary of pilot BMS Recommendations:

Summary and Recommendation	In support of these considerations	Potentially contrary to these considerations
The features of the pilot BMS relevant to the following considerations are identified as beneficial features and provide examples of best practice.	Customisation, Legal adequacy, Certainty, Incorporation of traditional law and custom & intercultural adequacy, Durability, Efficiency, Equity and Capacity to pursue purpose	N/A
The pilot BMS permits significant scope and flexibility to address factors such as the size and capacity, complexity, aspirations and organisational culture of the relevant Aboriginal community. However, the complexity of the BMS documents employed to	Customisation, Simplicity, Autonomy	The potential impact on Efficiency will depend on the form of measures adopted. Many of the measures raise cost considerations, but can also reduce uncertainty and opportunism, so aiding Efficiency .

Summary and Recommendation	In support of these considerations	Potentially contrary to these considerations
<p>achieve this flexibility, has the potential to impede the practical achievement of that flexibility. Part 7.5 therefore contains a number of suggestions on how the implementation processes contained within or contemplated by BMS documents might be supported or simplified, while retaining optionality: capacity building; operational guides and procedures; and purchasing, partnering or building specialist expertise on matters fundamental to operating a BMS.</p>		<p>Ultimately, it may be more Efficient to have a less Customised structure, but that would involve sacrificing the key consideration of Customisation and so is not recommended.</p>
<p>Stakeholder comments on BMSs akin to the pilot BMS suggested that far greater regard could be had to the individual circumstances of each member of the Aboriginal community. In particular when carrying out capacity building or in the provision of services. It is therefore recommended that the pilot BMS documents give greater encouragement to the adoption of individualised processes where possible and Efficient.</p>	<p>Customisation, Autonomy, Capacity to pursue purposes</p>	<p>An individualised approach has the potential to increase costs and reduce Efficiency, although as discussed in Part 7.2.2, providers such as Illuminance Solutions are starting to develop IT products that would enable tracking of social, economic and cultural outcomes for individual community members.</p>
<p>The pilot BMS does reasonably well at satisfying the elements of Legal adequacy. However, the BMS relies heavily on large meetings for direct participation by Aboriginal community members in decision making and on representatives for indirect participation by Aboriginal community members. Much reliance is also placed on representatives to communicate information to community members. Large meetings are not good fora for decision making. Representatives have not worked as well in practice at consulting and communicating as theory might predict.</p> <p>It is recommended that consultation and communication with and participation in decision making by Aboriginal community members therefore be modified,</p>	<p>Legal adequacy, Allegiance, Autonomy, Capacity to pursue purpose</p>	<p>Certainty: Would need to ensure that consultation and information flow processes do not undermine the timeliness and validity of BMS decisions, so there would need to be limits on the time for processes and on the extent to which process deficiencies can impact decisions made by the relevant BMS decision maker.</p> <p>Simplicity</p> <p>Efficiency may be decreased due to the costs of providing such information, but may also be improved by a resulting reduction in monitoring and enforcement transaction costs through the increased interpersonal trust and certainty generated by communication and consultation procedures.</p>

Summary and Recommendation	In support of these considerations	Potentially contrary to these considerations
<p>with some suggestions set out in Part 7.1. In particular, reporting mechanisms to ensure trustees are motivated to pursue communication and consultation; other procedural mechanisms to motivate communication and consultation such as communication protocols and general board/committee coordination processes; capacity building about the opportunities for communication and participation; and exploring alternative consultation and communication approaches such as family group meetings and electronic communications (for instance, to disseminate strategic plans). Note that this does not mean that all Aboriginal community members should be asked to vote on every BMS issue.</p>		
<p>The pilot BMS features multiple decision making bodies with overlapping functions. While this can be useful for separation of powers (Sensitivity to motivational complexity), uncertainty about roles, responsibilities and liabilities can reduce Legal adequacy, Efficiency and hinder achievement of BMS goals (Capacity to pursue purpose).</p> <p>The uncertainty is heightened by the relatively unique nature of some decision making bodies, especially the Traditional Owner Council and Decision Making Committee. Part 7.3 investigates ways of reducing uncertainty through institutional mechanisms and reducing opportunism by building interpersonal trust. In particular, through enhanced coordination and communication processes; clarifying or changing the functions of decision making bodies (such as merging the Decision Making Committee and Traditional Owner Council); training more potential committee</p>	<p>Legal adequacy, Certainty, Efficiency</p>	<p>There are cost implications to many of the measures, but if they reduce uncertainty and build trust, they may actually result in a net gain for Efficiency.</p> <p>Amalgamating the Decision Making Committee and Traditional Owner Council may reduce Customisation and Incorporation of traditional law and custom & intercultural adequacy and so would need to be approached sensitively. However, changes such as reducing the role of the Traditional Owner Council to purely strategic matters might materially improve certainty without eliminating the Traditional Owner Council. Alternatively, given the greater prevalence of PBCs, the Decision Making Committee could itself be replaced by a PBC board, leaving the Council intact. Indeed, even for Efficiency reasons, it may be preferable to leave two committees in place, but with a better delineation of responsibilities. Such approaches could also be twinned with an</p>

Summary and Recommendation	In support of these considerations	Potentially contrary to these considerations
members; reporting measures; and greater resourcing of dispute resolution processes.		expansion of the functions of the Local Aboriginal Corporation/BMS Indigenous corporation and a reduction in the functions of the trusts – where capacity permits, which would help reduce the areas of overlap.
Dispute resolution mechanisms in the pilot BMS reflect many of the features suggested in the literature, but were little used by stakeholders and, where used, were viewed by some stakeholders as ineffective. It is therefore recommended that dispute resolution be better resourced and supported, including by way of the development and adoption of a code of conduct by BMS stakeholders and capacity building aimed at creating interpersonal trust.	Legal adequacy, Certainty	There are cost implications for Efficiency , but also the potential for more certainty and so Efficiency gains too.
The pilot BMS adopts the ‘windows approach’ of providing mechanisms to support and recognise, but not codify or internalise, traditional law and custom. Recognition of traditional law and custom is subject to limits that are both temporal and derived from substantive norms in the broader Australian community such as compliance with Australian law and no oppression of minority members.	This is recommended as a way to help maintain a balance between Certainty and Incorporation of traditional law and custom & intercultural adequacy .	NA
Durability is satisfied reasonably well in that there is some flexibility while at the same time maintaining some robustness in limiting the extent and ease of changes. However, to ensure that BMS documents remain ‘alive’, stakeholder understanding of BMS documents and why they have been fashioned as they are could be better maintained and transferred to new stakeholder representatives over time. A number of the measures aimed at combatting complexity (such as operational guides) would help, as would fora such as the Rio Tinto	Durability, Allegiance	N/A

Summary and Recommendation	In support of these considerations	Potentially contrary to these considerations
Karratha BMS operational excellence workshop held in May 2018.		
<p>The pilot BMS broadly appears to be structured on the assumption that stakeholders will have different motivations for acting, but that the measures adopted should generally encourage internalisation of BMS goals and other-regarding behaviour. However, various improvements could be made.</p> <p>In particular, there is material scope to better apply Sensitivity to motivational complexity to trustees. For instance, there could be further screening of options (by removing the investment mandate from professional trustees and removing the change of trustee process), further ‘sanctions’ (by way of better public justification of trustee actions) and greater internalisation of BMS goals (through participatory strategic planning processes). Part 7.7 examines these in more detail.</p> <p>Additionally, there is scope to improve:</p> <ul style="list-style-type: none"> • Screening in of actors and options, as well as enhancing internalisation of BMS goals, by way of greater capacity building for current and potential committee and board members – especially in relation to conflict of interest rules, along with more inclusive communication and consultation. This would help ensure that committee members are enabled to comply with and apply the conflict of interest provisions. • ‘Sanctions’ through broader requirements to record conflicts of interest and through a requirement that each decision maker state their reasons for voting in board and committee 	<p>Sensitivity to motivational complexity, Autonomy, Legal adequacy</p>	<p>Efficiency, although the direct costs may be outweighed by a reduction in enforcement and monitoring costs achieved by an increase in mutual trust and greater certainty.</p> <p>Certainty and Incorporation of traditional law and custom & intercultural adequacy may be affected, in particular, by a requirement to provide reasons, although the impact on Certainty should be reduced if reasons are not required to be provided to the broader Aboriginal community.</p>

Summary and Recommendation	In support of these considerations	Potentially contrary to these considerations
meetings, though not to disclose those reasons to the broader community.		
External and internal reporting is relatively pronounced and increases administration costs for the pilot BMS and so areas where reporting is duplicated or where reporting is focussed on matters that are less important (eg BMS activities rather than BMS outcomes) bear further consideration and are examined in Part 7.2.	Efficiency	Legal adequacy
The pilot BMS contains a number of provisions that permit the Aboriginal community to select a lesser or greater scope of matters over which it wishes to make decisions. There are also various provisions that require or enable communities to purchase assistance in operating a BMS so as to progressively build capacity and organisation over time. These provisions represent best practice and should be included and strengthened where possible. In particular, enabling a transition from a professional trustee company to an Aboriginal community-controlled trustee over time is a key example and should ideally be included.	Autonomy, Customisation	<p>A robust independent compliance check in the form of a professional trustee company is likely to aid accountability for Legal adequacy, Certainty and Sensitivity to motivational complexity by providing for a separation of powers. Similar comments could be made about many external service providers.</p> <p>However, the transition need not pose a significant risk to asset protection (under Legal adequacy) as a custodian trustee could fill this role. In addition, a transition might also improve allocation of liability for decisions if the functions of decision making bodies are more clearly delimited and as the duties of company directors are likely to be better understood than the duties of a Decision Making Committee member.</p> <p>Even following capacity building, removing an independent decision maker is likely to reduce the effectiveness of a number of the Certainty-enhancing limits on decision making. However, conflicts of interest will not necessarily increase. They may simply change, as professional trustee companies themselves raise a range of potential conflicts of interest that differ from those raised by an Aboriginal-community controlled trustee.</p>

Summary and Recommendation	In support of these considerations	Potentially contrary to these considerations
		<p>The lack of a transition may also improve Simplicity – especially as it may permit other compliance checks to be removed, although once an Aboriginal community-controlled trustee company is in place, there could be some reduction in operative provisions as there would no longer be any need for a Decision Making Committee.</p>
<p>An adequate understanding of the pilot BMS and of its administration is vital to enable the exercise of free will by Aboriginal community members in participating in BMS decision making. Capacity building is thus vital, yet the pilot BMS trust deeds and constitutions contain only general statements in relation to the Aboriginal community and only some specific training about BMS governance for board and committee members. Capacity building should be made more express and extensive, but will need to be individualised.</p> <p>This will become more important if participation in decision making is expanded as suggested above.</p>	<p>Autonomy</p>	<p>Efficiency, although greater understanding of BMS processes should also reduce uncertainty and so aid Efficiency too.</p>
<p>There is scope to reduce some limits on Indigenous decision making, such as the need to obtain resource proponent contributor consent to changes in investment policies,⁸⁸⁷ at least where a professional trustee is in place, since it is unlikely that resource proponents would have the expertise required to meaningfully review investment policies, such that there is no design consideration being furthered to balance the loss in Autonomy.</p>	<p>Autonomy</p>	<p>N/A</p>
<p>The use by the pilot BMS of a charitable trust, incorporating a future fund, plus a discretionary trust works fairly well to ensure some financial saving for future</p>	<p>Equity</p>	<p>Creating more flexibility to better achieve Equity will reduce Simplicity and, potentially, Efficiency. Social impact investing also raises risks for asset</p>

⁸⁸⁷ See, eg, Nyiyaparli Charitable Trust Deed cl 7.2(c)(iii); Banjima Charitable Trust Deed cl 7.2(c)(iii).

Summary and Recommendation	In support of these considerations	Potentially contrary to these considerations
<p>generations, a broad range of benefits to individuals from the current generation and broader and development-focussed community projects that are sensitive to traditional law and culture and to levels of need within the current generation. These represent best practice features in aid of Equity.</p> <p>However, some improvements could still be made. For instance, the approach could be adjusted to better acknowledge non-monetary benefits for future generations. In particular, the maintenance and transmission of culture. It could also be adjusted to permit interpretations of intergenerational justice that contemplate more priority for those in need now, rather than requiring generational neutrality, as is required by the pilot BMS definition of 'Target Capital Base'. One way of doing so, without losing the benefits of a future fund would be to permit some degree of social impact investment, as explored in Part 7.4 There also appears to be capacity to pursue development projects under the pilot BMS Charitable Trust to a greater degree.</p> <p>A further minor improvement would be for the Distribution Policy equity considerations to more explicitly require decision makers to consider (a) the distribution of resources; and (b) future generations, as well as just those in the current generation of potential recipients.</p>		<p>protection and hence Legal adequacy. However, some of the measures suggested below for strategic planning may assist in balancing pursuit of purpose and pursuit of monetary returns.</p>
<p>The pilot BMS provides an ability to articulate the precise purposes within the broad possibilities enabled by the BMS, especially by way of the strategic and annual plans and the 'vision statement'. However, stakeholder interviews suggested that annual and strategic plans generally focused on expenditure and on BMS</p>	<p>Capacity to pursue purpose and, as a result of improved outcomes, Allegiance</p>	<p>Better strategic planning will reduce Efficiency as measuring outcomes and impacts is not easy. However, much current measurement of expenditure and activities appears less useful and so there may be some savings from reducing current reporting and replacing it with outcomes-</p>

Summary and Recommendation	In support of these considerations	Potentially contrary to these considerations
governance and administrative systems, with broader outcomes and impacts only considered to a limited extent. In terms of measuring achievement of outcomes, while the Trustee's Annual Report requires the trustee to report generally on achievement of outcomes against the annual and strategic plans, the specific foci are BMS costs, activities and distributions – not the effect of these actions. Part 7.2 thus considers how strategic planning might be improved.		focussed measurement and reporting. Measuring less tangible things may also increase risks to Legal adequacy because there may be far more scope for decision makers to manipulate accountability mechanisms. On the other hand, decision makers will at least be held accountable for things that matter.
Neo-institutionalism also suggests that organisational goals and values become more rigid over time, emphasising the importance of focussing on BMS goal setting early in the life of the BMS. However, for BMSs akin to the pilot BMS, a substantial focus on BMS goal setting appeared to occur only after some years of operation.	Capacity to pursue purpose, Allegiance	Customisation may be affected as some communities may need time to build capacity.

6.2 Pilot structure

Approximately 23 groups of Aboriginal peoples have asserted traditional ownership of, claimed native title over, or received a native title determination over country in the Pilbara,⁸⁸⁸ much of which is relevant to mining operations. This has resulted in the execution of land use agreements and the payment of contributions to BMSs for a number of Aboriginal communities in the Pilbara, including in circumstances where native title has not yet been determined. These include Rio Tinto's claim wide native title agreements, entered into with nine traditional owner groups over the last decade,⁸⁸⁹ and BHP's three recent comprehensive and project agreements.⁸⁹⁰

The pilot BMS context, legal structure and operation is drawn from these recent arrangements. The Banjima and Nyiyaparli BMS arrangements have been used as

⁸⁸⁸ National Native Title Tribunal, 'Pilbara: Native Title Claimant Applications and Determination Areas' (Map, 30 September 2018).

⁸⁸⁹ Rio Tinto, 'Land Agreements' (3 December 2018) <<https://www.riotinto.com/australia/pilbara/land-agreements-9619.aspx>>: Banjima, Eastern Guruma, Kuruma Marthudunera, Ngarlawangga, Ngarluma, Nyiyaparli, Puutu Kunti Kurrama and Pinikura, Yinhawangka and Yindjibarndi traditional owner groups.

⁸⁹⁰ Banjima, Nyiyaparli and Yinhawangka groups. YMAC, 'Yinhawangka BHP Billiton Project Agreement' (Media Release, 19 October 2016) <<http://ymac.org.au/wp-content/uploads/2016/10/161019-Media-release-YAC-agreement-1.pdf>>.

particular exemplars to help illustrate the discussion and the amalgam, but there are many similarities to other BMSs and those other BMSs are also referred to in a number of places.

6.2.1 Examples of context

Agreements with the Niyiyaparli People and the Banjima People, provide some examples of context.

There are around 300 Niyiyaparli People, mainly living in Port Hedland, but with significant numbers spread across the whole Pilbara region.⁸⁹¹ The Niyiyaparli People have lodged several native title claims (including WAD6280/98 and WAD196/2013) in relation to several areas in the Pilbara region of Western Australia.⁸⁹² The claims were determined in September 2018.⁸⁹³ Prior to this, in and from March 2011, Rio Tinto and the Niyiyaparli People entered into native title agreements in relation to Rio Tinto's existing and future iron ore mining operations within the Niyiyaparli claim area, including the Hope Downs mine (**Rio Tinto-Niyiyaparli Agreements**).⁸⁹⁴ The Rio Tinto-Niyiyaparli Agreements are intended to:⁸⁹⁵

- provide Rio Tinto with the consents and cooperation it requires from the Niyiyaparli People and Karlka in order to conduct and potentially further develop Rio Tinto's iron ore mining, exploration and infrastructure; and
- provide the Niyiyaparli People with financial and non-financial benefits (eg support for jobs and training); and
- provide agreed processes for Rio Tinto and the Niyiyaparli People to work together on matters such as cultural, community participation, commercial development, environmental management, education, health and employment activities.

Following execution of the Rio Tinto-Niyiyaparli Agreement, the Niyiyaparli People were given the opportunity to opt into a 'Regional Framework Deed'.⁸⁹⁶ The

⁸⁹¹ See eg Wangka Maya Pilbara Aboriginal Language Centre, 'Niyiyaparli' (accessed 6 December 2018) <www.wangkamaya.org.au/pilbara-languages/nyiyaparli-overview>; ATNS, *Rio Tinto Iron Ore Niyiyaparli Agreement* (28 March 2012) <<http://www.atns.net.au/agreement.asp?EntityID=5601>>.

⁸⁹² See Commonwealth Courts Portal, 'Applications for file – Native Title' (filed 30 September 1998) <<https://www.comcourts.gov.au/file/Federal/P/WAD6280/1998/actions>>; National Native Title Tribunal list of applications and determinations <http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/details.aspx?NTDA_FileNo=WC2005/006>, <<http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/default.aspx>>.

⁸⁹³ National Native Title Tribunal, 'Native Title Determination Details' (2018) <<http://www.nntt.gov.au/searchRegApps>>.

⁸⁹⁴ ATNS, *Rio Tinto Iron Ore Niyiyaparli Agreement* (28 March 2012) <<http://www.atns.net.au/agreement.asp?EntityID=5601>>.

⁸⁹⁵ Rio Tinto, *Rio Tinto to Seal Comprehensive Land Use Agreements with Traditional Owners across the Pilbara Region* (3 June 2011) <http://www.riotinto.com/documents/MediaReleases-ironore/20110603_Rio_Tinto_finalises_land_use_agreements_with_traditional_owners.pdf>; ATNS, *Rio Tinto Iron Ore Niyiyaparli Agreement* (28 March 2012) <<http://www.atns.net.au/agreement.asp?EntityID=5601>>.

⁸⁹⁶ Rio Tinto, *Land Agreements* <www.riotinto.com/australia/pilbara/land-agreements-9619.aspx>.

Regional Framework Deed provides the opportunity for the establishment of a Regional Implementation Committee, with the purpose of providing Rio Tinto and Traditional Owner groups with a regional forum to address particular commitments around Employment and Training and Business Development. The Regional Implementation Committee was formally established in April 2016 and consists of representatives from eight Pilbara Traditional Owner groups, including Banjima, Kuruma Marthudunera, Ngarlawangga, Ngarluma, Nyiyaparli, Puutu Kunti Kurrama and Pinikura, Yinhawangka and Yindjibarndi.

Further, in 2012, the Nyiyaparli People entered into a Comprehensive Agreement with BHP in relation to BHP's existing and future iron ore mining operations within the Nyiyaparli claim area, including the Mt Whaleback iron ore mine (**BHP-Nyiyaparli Agreement**).⁸⁹⁷ The BHP-Nyiyaparli Agreement is intended to:

- provide BHP with the consents and cooperation it requires from the Nyiyaparli People in order to conduct and expand BHP's iron ore business; and
- provide the Nyiyaparli People with financial (eg, an income stream linked to production) and non-financial benefits, and enable the Nyiyaparli People to influence the way BHP conducts its business.

The agreements also provide a process for formal periodic reviews of the agreements and of the BMS. Reviews are intended to identify whether the agreement is operating as originally intended, whether it continues to be workable and satisfactory, whether things could be done differently, and whether any amendments need to be made to the BMS.

The Banjima People have been determined to be the common law holders of native title in the Banjima determination area. There are approximately 520 Banjima People, excluding the descendants of Daisy Yijiyangu.⁸⁹⁸ The Banjima determination area is relevant to the mining operations of BHP, Rio Tinto, Fortescue Metals Group and Hancock Prospecting.⁸⁹⁹

By way of brief background, there were initially a number of overlapping native title claims in relation to parts of the Banjima determination area: the Innawonga and Bunjima claim (WAD6096/1998), the Martu Idja Banyjima claim (WAD6278/1998) and the Fortescue Banjima claim (WAD371/2010 - which claimed the same area as the Martu Idja Banyjima claim, but involved a different description of the claim group). In June 2011, the overlapping claims (the three claims referred to above and another holding claim made on behalf of the combined Banjima People) were combined into a single claimant

⁸⁹⁷ See, eg, Yamatji Marlpa Aboriginal Corporation, 'Pilbara Traditional Owners Sign Major Iron Ore Mining Agreement' (Media Release, 18 August 2012) <<http://ymac.org.au/wp-content/uploads/2013/05/Pilbara-Traditional-Owners-Sign-Major-Iron-Ore-Mining-Agreement-18-Aug-2012.pdf>>.

⁸⁹⁸ Trustee Officer 18 May 2017.

⁸⁹⁹ ABC News 'Banjima People Win Native Title Claim in the Pilbara' (online) 30 August 2013 <<http://www.abc.net.au/news/2013-08-29/banjima-people-native-title/4922268>>.

application under the NTA, being the Banjima claim.⁹⁰⁰ While there are a range of sub-groups within the Banjima People, it is worth noting that the main sub-groupings appear to be 'top end Banjima', largely corresponding to the IB claim; and 'bottom end Banjima', largely corresponding to the MIB and Fortescue claims.⁹⁰¹ We have called the former sub-group the **IB group** (approximately 220 people) and the latter the **MIB group** (approximately 300 people). Some Banjima People claim affiliation with both top end and bottom end Banjima People and country.⁹⁰²

On 28 August 2013, the Federal Court determined that the Banjima People were the common law holders of native title for the determination area⁹⁰³ and an approved determination of native title was subsequently made by the Federal Court on 11 March 2014.⁹⁰⁴ However, the Federal Court's determination resulted in some of the original Banjima claimants, the descendants of Daisy Yijiyangu (around 500 people), being found not to be common law holders of native title in the Banjima determination area.⁹⁰⁵ The determination also included an order appointing BNTAC as the PBC for the Banjima People, to hold their native title rights and interests on a statutory trust under the NTA.

In November 2015, BHP and BNTAC and the Banjima People entered into the BHP Iron Ore Banjima People Comprehensive Agreement (**BHP-Banjima Agreement**) in relation to BHP's existing and future iron ore mining operations within the Banjima native title determination area, including Mining Area C, Yandi, Munjina, Upper Marillana, Ministers North, parts of Mudlark, Roy Hill and Marillana.⁹⁰⁶ The agreement is intended to:⁹⁰⁷

- provide BHP with the consents and cooperation it requires from the Banjima People and BNTAC in order to conduct and potentially further develop BHP's iron ore operations; and
- provide the Banjima People with financial and non-financial benefits (eg support for jobs and training) and enable the Banjima People to influence the way BHP conducts its operations (eg mining exclusion zones for sacred areas); and

⁹⁰⁰ See, eg, *Banjima People v State of Western Australia (No 2)* [2013] FCA 868 [9]-[19]; <http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/RegistrationDecisionDocuments/2011/August%202011/WC11_6-1%2005082011.pdf> 3-4.

⁹⁰¹ *Banjima People v State of Western Australia (No 2)* [2013] FCA 868 [135]-[138], [172]-[175].

⁹⁰² *Ibid* [135]-[138].

⁹⁰³ *Ibid*.

⁹⁰⁴ *Banjima People v State of Western Australia (No 3)* [2014] FCA 201. The determination was varied in several minor respects on appeal: *Banjima People v State of Western Australia* [2015] FCAFC 84 (12 June 2015).

⁹⁰⁵ See, especially, *Banjima People v State of Western Australia (No 2)* [2013] FCA 868, [601], [645].

⁹⁰⁶ BHP, *Community and Sustainability News: New Agreement Signed with Banjima People* (5 November 2015) <<http://www.bhpbilliton.com/society/communitynews/new-agreement-signed-with-banjima-people>>.

⁹⁰⁷ See, eg, *ibid*; Tess Ingram, 'BHP Billiton, Pilbara Traditional Owners Sign Multimillion Dollar Deal' *Sydney Morning Herald* (online) 5 November 2015 <<http://www.smh.com.au/business/mining-and-resources/bhp-billiton-pilbara-traditional-owners-ink-multimillion-dollar-agreement-20151104-gkqzgl.html>>; ABC News, 'Banjima People Celebrate after Pilbara Native Title Deal Signed in Kings Park Ceremony' (online) 4 November 2015 <<http://www.abc.net.au/news/2015-11-04/bhp-billiton-and-banjima-people-sign-pilbara-native-title-deal/6913522>>.

- provide agreed processes for BHP and the Banjima People to work together on matters such as heritage, environment, education, health, employment and community participation.

The BHP-Banjima Agreement also provides a process for a formal review of the agreement to occur three years after commencement, and then every five years. Reviews are intended to identify whether the agreement is operating as originally intended, whether it continues to be workable and satisfactory, whether things could be done differently, and whether any amendments need to be made to the agreement or the BMS.

The BHP-Banjima Agreement presumably terminates and replaces certain previous agreements between BHP and some members of the Banjima People. For instance, the Mining Area C Project Development Agreement entered into in December 2000 between BHP and the Martu Idja Banyjima claimants (as noted above, a sub group of the Banjima People).⁹⁰⁸

In April 2016, Rio Tinto and BNTAC and the Banjima People entered into a claim-wide native title agreement (**Rio Tinto-Banjima Agreement**) in relation to Rio Tinto's existing and future iron ore mining operations within the Banjima native title determination area, including Hope Downs 1, rail lines and supporting infrastructure.⁹⁰⁹ The agreement commenced in November 2016 and is intended to:⁹¹⁰

- provide Rio Tinto with the consents and cooperation it requires from the Banjima People and BNTAC in order to conduct and potentially further develop Rio Tinto's iron ore mining, exploration and infrastructure; and
- provide the Banjima People with financial and non-financial benefits (eg support for jobs and training); and
- provide agreed processes for Rio Tinto and the Banjima People to work together on matters such as cultural, community participation, commercial development, environmental management, education, health and employment activities.

Following execution of the Rio Tinto-Banjima Agreement, the Banjima People were given the opportunity to opt into a 'Regional Framework Deed'.⁹¹¹ The

⁹⁰⁸ It appears that there has been litigation in relation to a charitable trust related to the Project Development Agreement: the MIB Charitable Trust. See, eg, *Plan B Trustees Ltd v Parker (No 2)* [2013] WASC 216 (30 May 2013).

⁹⁰⁹ Rio Tinto, *Rio Tinto Celebrates Agreement with Banjima People* (Media release, 7 November 2016) <www.riotinto.com/documents/161107_Rio_Tinto_celebrates_agreement_with_Banjima_people.pdf>; YMAC, *Banjima People Enter Land Use Agreement with Rio Tinto* (Media release, 15 April 2016) <<http://ymac.org.au/wp-content/uploads/2016/04/FINAL-160415-Banjima-Rio-Tinto.pdf>>.

⁹¹⁰ See, eg, National Native Title Tribunal, 'Extract from Register of Indigenous Land Use Agreements' (WI2016/002, 1 November 2016); Rio Tinto, *Rio Tinto Celebrates Agreement with Banjima People* (7 November 2016) <www.riotinto.com/documents/161107_Rio_Tinto_celebrates_agreement_with_Banjima_people.pdf>; YMAC, *Banjima People Enter Land Use Agreement with Rio Tinto* (Media release, 15 April 2016) <<http://ymac.org.au/wp-content/uploads/2016/04/FINAL-160415-Banjima-Rio-Tinto.pdf>>; YMAC, *2016 Annual Report* (2016) 16 <https://issuu.com/ymac/docs/ymac_annual_report_1516/18>.

⁹¹¹ Rio Tinto, *Land Agreements* <www.riotinto.com/australia/pilbara/land-agreements-9619.aspx>.

Regional Framework Deed provides the opportunity for the establishment of a Regional Implementation Committee, with the purpose of providing Rio Tinto and Traditional Owner groups with a regional forum to address particular commitments around Employment and Training and Business Development.

The Rio Tinto-Banjima Agreement also provides a process for a formal review of the BMS to occur three years after commencement, and then every five years.⁹¹² Reviews are intended to identify whether the BMS is operating as originally intended, whether it continues to be workable and satisfactory, whether things could be done differently, and whether any amendments need to be made to the BMS. Essentially, it is a 'health check' of BMS operations.

6.2.2 Legal entities

The Rio Tinto and BHP-Niyaparli and Banjima Agreements all contemplate the receipt and management of financial benefits by a BMS. As is the case for many recent Pilbara agreements, the BMSs comprise the following legal entities, with the BMSs able to receive financial benefits from both Rio Tinto and BHP (and other contributors).

- *A charitable trust, typically with a professional trustee company as trustee*⁹¹³

By way of example, the charitable purposes of the Niyaparli Charitable Trust are to be pursued to benefit 'current and future generations of Community members',⁹¹⁴ with 'Community' defined to mean (a) all persons of Aboriginal descent having a connection with or living within a geographic region within the Pilbara,⁹¹⁵ (b) the Niyaparli People who fall within (a) in any event, (c) organisations that have a majority of members within (a), (d) charities or community organisations benefiting people within (a) and (e) the Local Aboriginal Corporation.⁹¹⁶

The Banjima Charitable Trust charitable purposes are similar, with the purposes to be pursued to benefit 'current and future generations of Community members',⁹¹⁷ with 'Community' defined to mean (a) all persons of Aboriginal descent having a connection with or living within a geographic region within the

⁹¹² Independent BMS Facilitator 21 March 2018.

⁹¹³ Niyaparli Charitable Trust Deed (24 May 2012), Myer Family Company Ltd (**MFCo**) as trustee; Banjima Charitable Trust Deed (6 November 2014), Australian Executor Trustees Limited as trustee. See also Yindjibarndi People Community Trust Deed (24 June 2013); Eastern Guruma Charitable Trust (19 June 2012); Kuruma Marthudunera Charitable Trust Deed (26 October 2010); Ngarluma Charitable Trust Deed (19 July 2010); Puutu Kunti Kurrama and Pinikura People Charitable Trust Deed (8 April 2015). Trust deeds obtained from: ACNC, *Find a Charity* (accessed April 2018) <<https://www.acnc.gov.au/ACNC/FindCharity>>. See also Yinhawangka Aboriginal Corporation, 'Yinhawangka Trust' (December 2018) <<http://yinhawangka.com.au/yinhawangka-trust/>>; ABN Lookup for Ngarlawangga Charitable Trust.

⁹¹⁴ Niyaparli Charitable Trust Deed cl 2.3(a).

⁹¹⁵ The geographic region is defined by reference to the footprint of specific local government authorities: the Shire of Roebourne, the Shire of Ashburton, the Shire of East Pilbara and the Town of Port Hedland.

⁹¹⁶ Niyaparli Charitable Trust Deed sch 1.

⁹¹⁷ Banjima Charitable Trust Deed cl 2.3(a).

Pilbara,⁹¹⁸ (b) the Banjima People who fall within (a) in any event, (c) a group of claimants who were determined not to hold native title – the Descendants of Daisy, who fall within (a) in any event, (d) organisations that have a majority of members within (a), (e) charities or community organisations benefiting people within (a) and (f) the Local Aboriginal Corporation.⁹¹⁹

Some of the recent BMSs do not mandate that the initial trustee be a professional trustee company, but instead permit an Aboriginal community-controlled trustee. For instance, the Kuruma Marthudunera BMS,⁹²⁰ the Yindjibarndi BMS⁹²¹ and the Ngarluma BMS.⁹²²

- *At least one discretionary trust with the same professional trustee company as trustee*

For example, the Nyiyaparli Direct Benefits Trust, a discretionary trust with the same professional trustee company, MFCo, as trustee.⁹²³

The Banjima agreements contemplate two discretionary trusts:

- Banjima Direct Benefits Trust, a discretionary trust with the same professional trustee company, Australian Executor Trustees Limited, as trustee. The beneficiaries of the trust are the Banjima People (mainly MIB people from the earlier MIB claim, but also some IB claimants), Banjima controlled entities and the Local Aboriginal Corporation.⁹²⁴
- Yaramarri Banjima Direct Benefits Trust, a discretionary trust established with the same professional trustee company, Australian Executor Trustees Limited, as trustee. The beneficiaries of the trust are certain Banjima People (being mainly former IB claimants), most of the Descendants of Daisy (even though they are not Banjima People), controlled entities and the B2 Corporation (the Yaramarri Banjima Direct Benefits Trust contemplates a ‘Local Aboriginal Corporation’ analogous role for the Yaramarri Banjima Corporation Limited as the ‘B2 Corporation’).⁹²⁵

For the purposes of the amalgamated pilot structure, we have not focussed on the presence of a second discretionary trust, as the other recent Pilbara BMSs (Eastern Guruma, Kuruma Marthudunera, Ngarlawangga, Ngarluma, Nyiyaparli,

⁹¹⁸ The geographic region is defined by reference to the footprint of specific local government authorities: the Shire of Roebourne, the Shire of Ashburton, the Shire of East Pilbara and the Town of Port Hedland.

⁹¹⁹ Banjima Charitable Trust sch 1.

⁹²⁰ See, eg, Kuruma Marthudunera Charitable Trust Deed cl 3.1

⁹²¹ Yindjibarndi People Community Trust cl 5.1, 5.5.

⁹²² Ngarluma Charitable Trust Deed cl 3.1.

⁹²³ See, eg, ABN Lookup <<http://abr.business.gov.au/SearchByAbn.aspx?abn=18246195674>>; Nyiyaparli Charitable Trust Deed.

⁹²⁴ As to potential benefit recipients, see, eg, Trustee Officer 18 May 2017.

⁹²⁵ As to potential benefit recipients, see eg Trustee Officer 18 May 2017.

Puutu Kunti Kurrama and Pinikura, Yinhawangka and Yindjibarndi structures)⁹²⁶ typically only involve one.

➤ *A CATSI Act corporation – the ‘Local Aboriginal Corporation’*

The Nyiyaparli BMS and Banjima BMS, for example, both contemplate a ‘Local Aboriginal Corporation’ which has a role in helping to administer the trusts and in applying for funding for projects and implementing projects.⁹²⁷ The Local Aboriginal Corporation for the Nyiyaparli BMS is Karlka Nyiyaparli Aboriginal Corporation⁹²⁸ and for the Banjima BMS is BNTAC.⁹²⁹ Both are CATSI Act corporations, the members of which are those Nyiyaparli People or Banjima People, respectively, who are at least 18 and who have applied and been accepted for membership.⁹³⁰ Karlka and BNTAC are the respective PBCs for the Nyiyaparli People’s native title and the Banjima People’s native title.⁹³¹ As is common, Karlka and BNTAC are also both registered with the ACNC as charities.⁹³²

6.2.3 Decision making, asset protection, information sharing and general operation of the structures

The trusts typically receive certain signature, milestone and on-going production linked payments. Sometimes the Local Aboriginal Corporation, as is the case with Karlka, receives annual fixed quantum payments to assist with agreement implementation. Typically, a portion of the funds received must be retained in a ‘future fund’, which is essentially a capital and (to some extent) income protected endowment fund.⁹³³

The trusts contemplate that the initial trustee will be a professional trustee company (essentially defined to mean a licensed trustee company under chapter 5D Corporations Act that has at least 5 years’ experience in carrying out functions and providing services similar to those required under the trust deeds and that is independent from the relevant Aboriginal people).⁹³⁴ The Nyiyaparli BMS expressly permits a transition after a time to an Indigenous-controlled trustee company, albeit that the Indigenous-controlled trustee company must have one or two independent directors, with an independent director

⁹²⁶ Discretionary trust details located on ABN Lookup <<http://abr.business.gov.au>> and in many of the charitable trust deeds referred to at n 913.

⁹²⁷ Nyiyaparli Charitable Trust Deed cl 3.8, 6.8; Banjima Charitable Trust Deed cl 3.8, 6.8.

⁹²⁸ Consolidated rule book (obtained from the Office of the Registrar of Indigenous Corporations on 26 October 2016: <<http://register.oric.gov.au/document.aspx?concernID=103649>>).

⁹²⁹ Constitution of BNTAC (obtained from the Office of the Registrar of Indigenous Corporations December 2018) <<http://register.oric.gov.au/document.aspx?concernID=3746520>>. Cf PKKP Aboriginal Corporation RNTBC Rule Book; Kuruma Marthudunera Aboriginal Corporation RNTBC Rule Book.

⁹³⁰ Karlka Rule Book r 6.1. Constitution of BNTAC r 6.2.

⁹³¹ National Native Title Tribunal, ‘Native Title Determination Details’ (2018) <<http://www.nntt.gov.au/searchRegApps>>.

⁹³² ACNC, Find a Charity (accessed 4 December 2018) <<https://www.acnc.gov.au>>.

⁹³³ Nyiyaparli Charitable Trust Deed ch 10; Banjima Charitable Trust Deed ch 10.

⁹³⁴ See, eg, Nyiyaparli Charitable Trust Deed cl 1.1, 4.1. As noted above, MFCo is the initial professional trustee company. Banjima Charitable Trust Deed cl 1.1, 4.1. As noted above, AET is the initial professional trustee company.

required to be present for a board meeting to have quorum and with each independent director holding a 'compliance veto' right to veto any decision on the grounds that it will or is likely to be in breach of the company's constitution, or any relevant trust deed.⁹³⁵ A procedure is provided in the event of a compliance veto being exercised, which involves obtaining legal advice and then, potentially, reconsidering the matter at the next board meeting.⁹³⁶ In contrast, the Banjima BMS does not permit a transition to an Indigenous-controlled trustee company,⁹³⁷ although this could be achieved by way of amendment to the trust deeds.

The key decision making bodies for the BMS – and their interrelationships and decision making responsibilities – are illustrated in Figure 6.2 below. As can be seen from the diagrams, the BMS:

- Contemplates a role for several committees (the Traditional Owner Council and the Decision Making Committee), as well as a role for the Aboriginal community (such as the Nyiyaparli People or Banjima People) and for entities such as a professional trustee, resource company contributors and a Local Aboriginal Corporation (such as Karlka or BNTAC). Interestingly, one of the more recent BMSs materially reduces the length of the trust deeds and reduces overlapping functions by having the CATSI Act PBC take on a number of functions of the Traditional Owner Council and some of the Decision Making Committee and by effectively suspending all other Traditional Owner Council and Decision Making Committee functions unless a professional trustee company has been appointed, in which case a 'Review Committee' adopts those suspended functions.⁹³⁸ This may be partly due to the prior experience and history of operation of the PBC. However, we have adopted the more common approach for our amalgam BMS.
- Reflects a distinction between who makes decisions in relation to fundamental, strategic and day-to-day operational decisions, although there is clearly a degree of overlap. This overlap is in part due to enabling different sets of stakeholders to have a say in the different types of decisions. For instance, resource companies, the independent professional trustee and the Aboriginal community (or their representatives) all have to consent to many fundamental and strategic matters. Aboriginal community representatives and the independent professional trustee must also agree on a range of day to day operational matters.
- Also provides for consultation, but not consent, on a range of matters. The diagrams do not seek to capture consultation with and information flows to the Aboriginal community, as this is dealt with further below.

⁹³⁵ Nyiyaparli Charitable Trust Deed sch 9, S9.2.4, S9.2.7.

⁹³⁶ Nyiyaparli Charitable Trust Deed sch 9, S9.2.7.

⁹³⁷ Banjima Charitable Trust Deed cl 4.2(a).

⁹³⁸ Yindjibarndi Community Trust Deed, especially S11.

There is also the possibility of some differentiation of decision making in relation to different pools of payments. For example, the Banjima BMS appears to contemplate a slightly different decision making regime for payments related to BHP's Mining Area C mine. Decisions about distributions from the Mining Area C sub fund under the Banjima Charitable Trust or about a distribution, investment or accumulation policy related to the Mining Area C sub fund (an '**MIB MAC Related Decision**')⁹³⁹ are largely made by Banjima People who identify with the MIB group. This is achieved by providing that Decision Making Committee decisions that are MIB MAC Related Decisions must be made by MIB group appointed members and the independent member of the Decision Making Committee.⁹⁴⁰ IB group appointed committee members can be asked to leave the meeting while such decisions are being made. The Banjima Charitable Trust leaves open the possibility that IB group members of the Decision Making Committee (and the independent member) may be the only members permitted to make decisions about other sub funds.⁹⁴¹ In addition, reflecting the different sub groups, a certain number of places on the Decision Making Committee are reserved for representatives of the IB group and of the MIB group.⁹⁴² Likewise, if the Banjima Council is to make an MIB MAC Related Decision, then the decision must be made by MIB group members of the Banjima Council.⁹⁴³ While there is no explicit requirement that members of the Banjima Council include a set number of MIB group members or IB group members, it is implicit that there must be at least one MIB group member given the need for MIB MAC Related Decisions to be made by MIB group members and the requirement in S2.1(a) of the Banjima Charitable Trust that 'the composition of the Banjima Council is required to be representative of the Banjima People on a fair and just basis having regard to the particular dynamics of the Banjima People from time to time noting that MIB MAC Related Decisions of the Banjima Council may only be made by B1 Banjima Non-IBN Beneficiaries of the Banjima Council'.

Several key points can be made in terms of the decision making processes:

- Decisions of an Aboriginal community (such as the Banjima People or Nyiyaparli People) are to be made by way of an 'Agreed Decision Making Process', which permits the relevant community to adopt traditional decision making processes, but also provides a mechanism for supporting and then recognising that traditional decision making process.⁹⁴⁴ Typically, however,

⁹³⁹ Banjima Charitable Trust Deed cl 1.1.

⁹⁴⁰ Banjima Charitable Trust Deed S11.6(m).

⁹⁴¹ Banjima Charitable Trust Deed S11.6(n).

⁹⁴² Banjima Charitable Trust Deed S11.1(a)(i).

⁹⁴³ Banjima Charitable Trust Deed S2.8(m)

⁹⁴⁴ Banjima Charitable Trust Deed cl 1.1, 3.5(a), S10.1.5; Nyiyaparli Charitable Trust Deed cl 3.5(a).

Karlka's rule book contains somewhat analogous provisions for voting at the AGM (r 8.10), providing for 'consensus' decisions, with a (typically) majority vote only where consensus cannot be obtained. Consensus means 'the general agreement among those present at a meeting... as to a particular matter whereby differing points of view, if any, have been considered and reconciled and any decision is generally agreed upon in accordance with Nyiyaparli law and custom, as determined by the Chariperson of the meeting' (sch 1). The approach in Karlka's rule book is far more abbreviated and does not involve quite the same level of processes for support and recognition of traditional decision making. BNTAC's rule book contains very similar provisions: r 8.11.

in circumstances where there is dispute over the traditional process or where the trustee considers that the process is oppressing some members there is an ability for a portion of the Aboriginal community, eg 25%, or the trustee to demand a majority vote.⁹⁴⁵ The Agreed Decision Making Process itself must be recorded in writing by the trustee.⁹⁴⁶

- Traditional Owner Council and Decision Making Committee decisions are typically to be made by consensus (meaning general agreement as to a particular matter whereby differing points of view have been considered and reconciled and any decision is generally agreed upon in accordance with the traditions of the relevant Aboriginal community as determined by the meeting chair), but this is subject to majority vote if consensus cannot be obtained and, significantly, subject to an independent member compliance veto for the Decision Making Committee.⁹⁴⁷
- The procedures permit some space and time for an Aboriginal community or their representatives to make decisions according to traditional law and custom, but they also impose limits in support of **Certainty**. For instance, under the Banjima and Nyiyaparli BMSs, if the trustee has attempted to obtain the consent of or to consult with the Banjima People or Nyiyaparli People on 2 occasions and the Banjima People or Nyiyaparli People have not made a valid decision to consent or not consent, or not held a meeting within 3 months of the trustee's first attempt, then the trustee can proceed without consent or consultation.⁹⁴⁸ Similar time limits apply to consultation and consent of the Banjima/Nyiyaparli Council and the Decision Making Committee.⁹⁴⁹ As highlighted above, there are also limits on traditional decision making processes being used to oppress members of the Banjima People or Nyiyaparli People.
- For the CATSI Act corporation, independent directors are often contemplated, not required, by the rule book, with the majority of directors being from the relevant Aboriginal community. Nyiyaparli People and decisions are made by majority vote.⁹⁵⁰ For Karlka, decisions are made by majority vote,⁹⁵¹ for

⁹⁴⁵ There is some ability for the Aboriginal community to use the Agreed Decision Making Process to determine a new process for making decisions. However, this is usually still subject to limits, for instance that the trustee can require the Banjima or Nyiyaparli People to remake a decision if it is not satisfied that the decision has been validly made or that it is contrary to the interests of the Banjima or Nyiyaparli People as a whole or oppressive of some members: Banjima Charitable Trust Deed cl 3.5(b), Nyiyaparli Charitable Trust Deed cl 3.5(b). The terminology is derived from corporations law concepts of oppression.

⁹⁴⁶ See, eg, Banjima Charitable Trust Deed S10.1.6(a)(iv).

⁹⁴⁷ See, eg, Banjima Charitable Trust Deed S2.8(l), S11.6(l).

⁹⁴⁸ Banjima Charitable Trust Deed cl 3.5(c); Nyiyaparli Charitable Trust Deed cl 3.5(c).

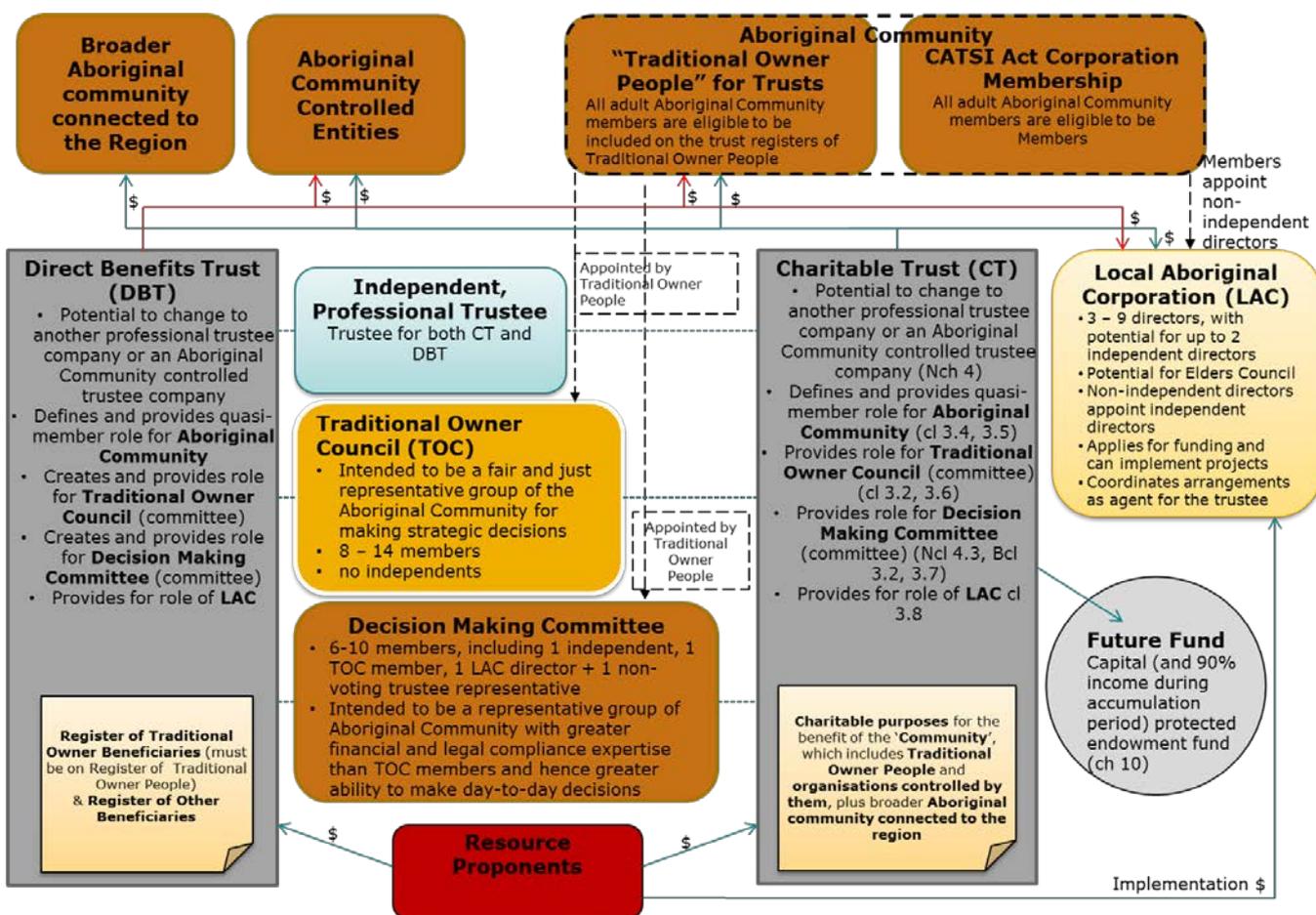
⁹⁴⁹ Banjima Charitable Trust Deed cl 3.6(b), 3.7(h); Nyiyaparli Charitable Trust Deed cl 3.6(b), 3.7(h).

⁹⁵⁰ Karlka Rule Book rr 9.1, 9.24; Constitution of Banjima Native Title Aboriginal Corporation RNTBC rr 12.1, 12.2.

⁹⁵¹ Karlka Rule Book r 12.6.1.

BNTAC, decisions are made by consensus⁹⁵² and, failing that, by majority vote of the non-independent directors.⁹⁵³ There are some exceptions, for instance, a two-thirds of directors rule applies to decisions about membership and to disputes relating to law and custom.⁹⁵⁴ BNTAC's constitution contemplates the existence of an Elders' Council to provide guidance and recommendations to BNTAC on a range of matters.⁹⁵⁵

Figure 6.2 - Interrelationship of Decision making Bodies and Benefit Recipients⁹⁵⁶



⁹⁵² Meaning general agreement as to a particular matter whereby differing points of view have been considered and reconciled and any decision is generally agreed upon in accordance with Banjima law and custom as determined by the meeting chair.

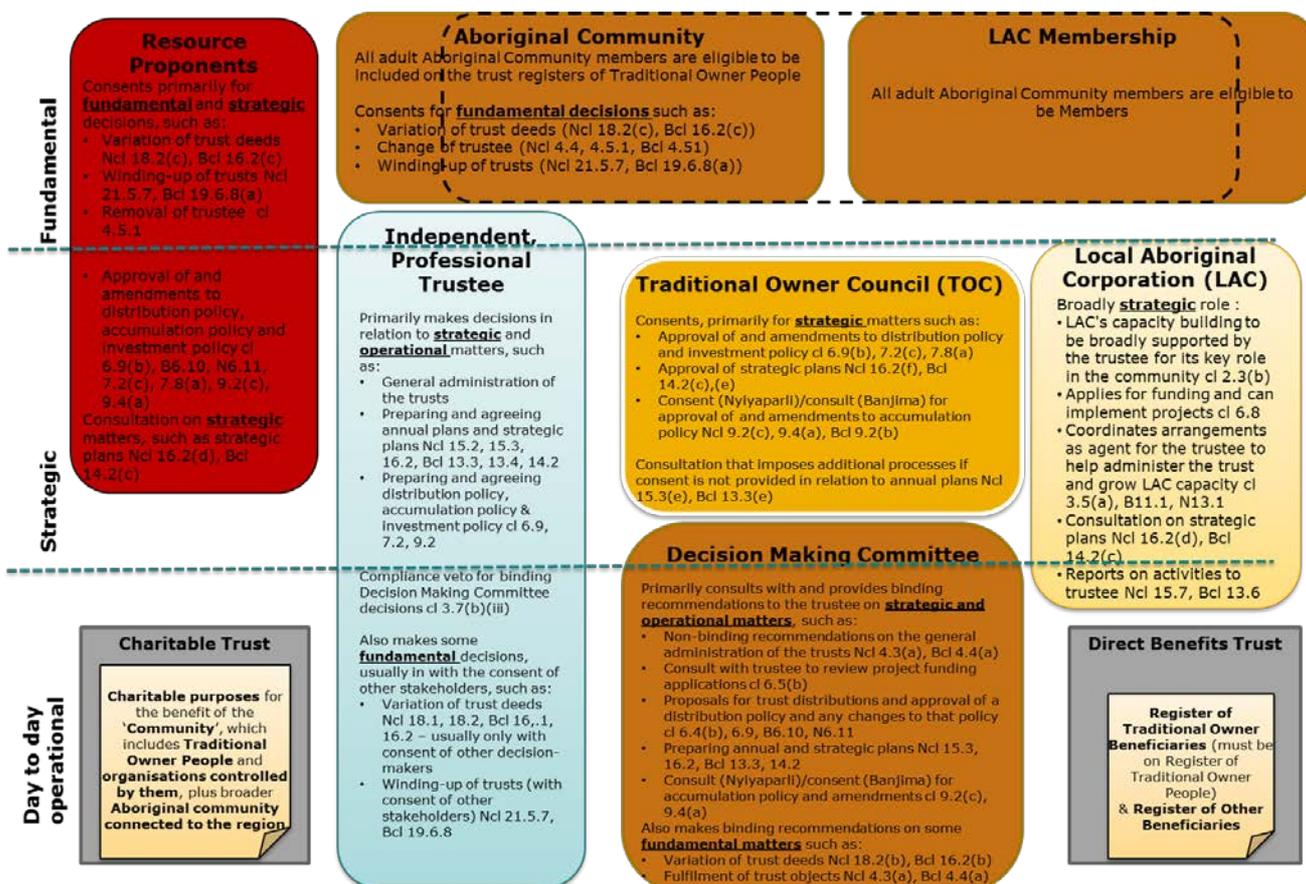
⁹⁵³ Constitution of BNTAC r 15.7.1.

⁹⁵⁴ Constitution of BNTAC rr 6.2.4(e), 15.7.3.

⁹⁵⁵ Constitution of BNTAC r 9, sch 1.

⁹⁵⁶ Clause references are to both the Niyaparli Charitable Trust Deed and Banjima Charitable Trust Deed. Where 'N' or 'B' precedes the clause reference, the reference is only to the Niyaparli Charitable Trust Deed or the Banjima Charitable Trust Deed, respectively.

Figure 6.3 - Decisions Made by Decision making Bodies⁹⁵⁷



In addition to differentiating responsibility for formal consents to decisions, the BMS documents also contemplate a range of information flows to and from the different committees, entities and groups of people outlined above. The table below sets out some of the key information flows. While the table does provide information about decision making by the various committees and bodies, its focus is on information flows and decision making is referred to only in the sense that rights to consent or to prepare documents are associated with the provision of information.

⁹⁵⁷ Clause references are to both the Niyaparli Charitable Trust Deed and Banjima Charitable Trust Deed. Where 'N' or 'B' precedes the clause reference, the reference is only to the Niyaparli Charitable Trust Deed or the Banjima Charitable Trust Deed, respectively.

Table 6.2 – Selected Information Flows⁹⁵⁸

Item / Entity	Professional Trustee (Trustee)	Decision Making Committee (Committee)	Traditional Owner Council (Council)	Aboriginal Community	Local Aboriginal Corporation (LAC)	Resource Company (Contributor)
<p>3 Year Strategic Plan (B Ch 14, N Ch 16)</p> <p>Sets the long term objectives for the trusts to provide context for Annual Plans, including policy guidelines for distribution, investment and accumulation.</p>	<p>Must prepare an initial draft with the Committee for each relevant 3 year period (Bcl 14.2 Ncl 16.2)</p>	<p>Prepares initial draft with Trustee (Bcl 14.2, Ncl 16.2) and can make a binding direction to Trustee</p>	<p>Trustee must consult with the Council and obtain Council consent (Bcl 14.2(c), (e), Ncl 16.2(d), (f))</p>	<p>No formal consultation, but Strategic Plan must be made available (Bcl 14.5(a), Ncl 16.6(a))</p>	<p>Trustee must consult with LAC (Bcl 14.2(c)(ii), Ncl 16.2(d)(ii))</p>	<p>Trustee must consult with Contributors (Bcl 14.2(c)(ii), Ncl 16.2(d)(ii)) and make finalised Strategic Plan available (Bcl 14.5(b), Ncl 16.6(b))</p>
<p>Annual Plan (B Ch 13, N Ch 15)</p> <p>Outlines the proposed activities for each trust for each financial year, having regard to a range of matters.</p>	<p>May prepare annual plan for the first year and for subsequent years must prepare an initial draft with the Committee (Bcl 13.3, Ncl 15.3)</p>	<p>Prepares initial draft with Trustee (Bcl 13.3, Ncl 15.3) and can make a binding direction to Trustee</p>	<p>Trustee must consult with Council and if Council does not consent, Trustee must amend with assistance of the Committee and then consult again with Council. However, Trustee must implement a draft Annual Plan even if not consented to by the Council (Bcl 13.3, Ncl 15.3)</p>	<p>No formal consultation, but Annual Plan must be made available (Bcl 13.5(a), Ncl 15.6(a))</p>	<p>For BNTAC, Trustee must consult (Bcl 13.3(b)). For Karlka, no formal consultation, but Annual Plan must be made available (Ncl 15.6(a))</p>	<p>No formal consultation, but modified Annual Plan must be made available (Bcl 13.5(b), Ncl 15.6(b))</p>

⁹⁵⁸ Clause and chapter references are to both the Niyaparli Charitable Trust Deed and Banjima Charitable Trust Deed. Where ‘N’ or ‘B’ precedes the clause reference, the reference is only to the Niyaparli Charitable Trust Deed or the Banjima Charitable Trust Deed, respectively.

Item / Entity	Professional Trustee (Trustee)	Decision Making Committee (Committee)	Traditional Owner Council (Council)	Aboriginal Community	Local Aboriginal Corporation (LAC)	Resource Company (Contributor)
Accountability for implementation of Strategic Plan and Annual Plan – Internal Report	Must review each Annual Plan and determine whether the trust activities were carried out in accordance with the Annual Plan and Strategic Plan and the trust deeds. While the review must be carried out on an ‘outcomes basis according to the aims set out in the Annual Plan and the Strategic Plan and the outcomes actually achieved’, the Trustee’s report (Trustee’s Annual Report) of that review is only required to include a summary of the trusts’ activities, details of the distributions ⁹⁵⁹ including eligible projects for which funds were provided; trust administration costs; and distributions to and activities by the LAC (Bcl 13.4, Ncl 15.5)	Trustee’s Annual Report must be made available (Bcl 13.5(a), Ncl 15.6(a))	Trustee’s Annual Report must be made available (Bcl 13.5(a), Ncl 15.6(a))	Trustee’s Annual Report must be made available (Bcl 13.5(a), Ncl 15.6(a))	Trustee’s Annual Report must be made available (Bcl 13.5(a), Ncl 15.6(a))	Modified version of Trustee’s Annual Report must be made available (Bcl 13.5(b), Ncl 15.6(b))

⁹⁵⁹ Not at the level of individual recipients.

Item / Entity	Professional Trustee (Trustee)	Decision Making Committee (Committee)	Traditional Owner Council (Council)	Aboriginal Community	Local Aboriginal Corporation (LAC)	Resource Company (Contributor)
Accountability for implementation of Strategic Plan and Annual Plan and Administration of Trusts – External Report	Trustee must appoint an auditor who will audit the trusts' financial statements; the Trustee's Annual Report; and the due administration of the trusts, including on-going compliance with the trust deeds (Bcl 18.2, Ncl 20.2)	Auditor's Annual Report must be made available (Bcl 18.5(a), Ncl 20.5(a))	Auditor's Annual Report must be made available (Bcl 18.5(a), Ncl 20.5(a))	Auditor's Annual Report must be made available (Bcl 18.5(a), Ncl 20.5(a))	N/A for Karlka, but for BNTAC Auditor's Annual Report must be made available (Bcl 18.5(a))	Auditor's Annual Report must be made available (Bcl 18.5(b), Ncl 20.5(b))
Distribution Policy Sets out rules for the distribution of trust assets.	Must prepare an initial draft with the Committee and with Council consent (cl 6.9(b), N6.10), but the Nyiyaparli BMS Trustee may approve an initial distribution policy without a Committee decision or Council consent in certain circumstances if it has attempted to obtain such consent (Ncl 6.10(b))	Prepares initial draft with Trustee (cl 6.9(b), N6.10) and can make a binding direction to the Trustee	Trustee must obtain Council consent (cl 6.9(b))	No formal consultation, but distribution policy must be made available (Bcl 6.11(a), Ncl 6.12(a)) and copy must be provided upon request (Bcl 6.11(b), Ncl 6.12(b))	No formal consultation and no requirement for provision of policy to Karlka, but distribution policy must be provided to BNTAC (Bcl 6.11(b))	Trustee must obtain Contributor consent (cl 6.9(b))
Standard Process for Varying the Trust Deeds (B Ch 16, N Ch 18) This procedure applies to any variations other than certain minor	May vary the trust deed if satisfied of certain circumstances, but must first consult with the Committee and, subject to other consent requirements, must vary the trust deed in accordance with a binding	Consults with the Trustee and can issue a binding direction to the Trustee as to variation of the trust deed (Bcl 16.2(b),	No formal consultation, but variation must be made available (Bcl 16.4(a), Ncl 18.3(a))	No variation without consent of the Aboriginal Community (Bcl 16.2(c), Ncl 18.2(c)), with the trust deeds contemplating consent being	No formal consultation, but variation must be made available (Bcl 16.4(a), Ncl 18.3(a))	No variation without consent of Contributors (Bcl 16.2(c), Ncl 18.2(c))

Item / Entity	Professional Trustee (Trustee)	Decision Making Committee (Committee)	Traditional Owner Council (Council)	Aboriginal Community	Local Aboriginal Corporation (LAC)	Resource Company (Contributor)
and technical variations to comply with laws or correct typographical errors.	direction from the Committee (Bcl 16.2(b), 16.3, Ncl 18.2)	16.3, Ncl 18.2(b))		evidenced by way of a determination at a general meeting		

There is also typically a general consultation and participation requirement imposed on the trustee under the trust deeds for a BMS. For instance, the Nyiyaparli Charitable Trust requires the trustee to:⁹⁶⁰

develop appropriate mechanisms for participation, consultation and information dissemination with the Nyiyaparli People which shall have regard to the following non exhaustive objectives:

- (i) encouraging participation by the Nyiyaparli People in the operation of the Benefits Management Structure;
- (ii) preparing the Nyiyaparli People for effective participation in meetings;
- (iii) ensuring transparency and accountability in decision making; and
- (iv) ensuring the operations of the Trust are just and fair and effective in meeting the Trust Objects.

In addition, the trustee is required to consult with the Nyiyaparli People at least once each financial year by way of a general meeting.⁹⁶¹

6.3 Application of design considerations to the pilot structure

Each of the design considerations is considered below.

6.3.1 Customisation

As outlined in Part 5.1, the BMS should be tailored to the size and capacity, complexity, geographical dispersion, aspirations and organisational culture of the relevant Aboriginal community.

The pilot BMS permits significant scope and flexibility to address many such elements. For instance, the strategic planning process (and, as a result, annual planning) under the pilot BMS permits the aspirations of the relevant Aboriginal community to be incorporated as BMS goals, principally by way of Decision Making Committee, Council and Local Aboriginal Corporation involvement in developing the plans and especially through the creation of a 'vision statement' of the Aboriginal community as part of that process.⁹⁶² This is also reflected in the flexible approach to implementing those goals, whereby applications can be made by a range of persons, including the Local Aboriginal Corporation, to receive trust funding or to carry out projects in pursuit of BMS goals.⁹⁶³

⁹⁶⁰ Nyiyaparli Charitable Trust Deed cl 3.4(a). Banjima Charitable Trust Deed cl 3.4(a) is in almost identical terms.

⁹⁶¹ Nyiyaparli Charitable Trust Deed cl 3.4(c), (d). Cf Banjima Charitable Trust Deed cl 3.4(c), (d).

⁹⁶² See, eg, Figure 6.3; Nyiyaparli Charitable Trust Deed cl 16.1(e); Banjima Charitable Trust Deed cl 14.1(e).

⁹⁶³ See, eg, Nyiyaparli Charitable Trust Deed cl 6.5, 6.8, 6.13; Banjima Charitable Trust Deed cl 6.5, 6.8, 6.12.

As discussed in Parts 6.3.2 and 6.3.5 below, the BMS constituent documents also permit and support some recourse to the traditional laws and customs of the relevant Aboriginal community for the purposes of decision making, so reflecting the organisational culture of the community to an extent.

The capacity and complexity of the Aboriginal community are also catered for by way of various provisions that permit the Aboriginal community to select a lesser or greater scope of matters over which it wishes to make decisions (see Part 6.3.10). There are also various provisions that require or enable communities to purchase assistance in operating a BMS in such a way as to progressively build capacity and organisation so that the Aboriginal community and its representatives can adopt more responsibilities over time.⁹⁶⁴ In particular, the pilot BMS trust deeds contain a chapter setting out a very flexible process by which the trustee can provide or procure services for the administration of the BMS, which include procuring services from the Local Aboriginal Corporation or other persons.⁹⁶⁵ Further, many Pilbara BMSs expressly support a transition from a professional trustee to an Aboriginal community-controlled trustee over time (or provide for an initial Aboriginal community-controlled trustee). Nevertheless, some Aboriginal community representatives still considered that BMS compliance requirements did not adequately reduce as community capacity increased.⁹⁶⁶

A BMS such as the Banjima BMS, which would require amendment to permit a transition from a professional trustee company, sacrifices a degree of **Customisation**. On the other hand, some BMSs, such as the Banjima BMS, provide for greater recognition of sub-groups within an Aboriginal community, thus enhancing **Customisation**. As noted in Part 6.2.3, this recognition was incorporated by way of separate decision making processes for certain pools of funds, such as the Mining Area C sub fund, that relate to mining activities that impact more on the native title interests of a particular sub-group (the MIB). Greater recognition of sub-groups does, however, generate additional complexity (particularly where the sub-groups jointly hold rights) and also presents challenges for communal management of assets.⁹⁶⁷ It also appears to have contributed to a greater delay in developing distribution and other policies and hence in applying BMS funds.⁹⁶⁸

The above picture of significant flexibility under the pilot BMS documents nevertheless omits some important considerations. In particular, the complexity of the BMS documents (see Part 6.3.8). Many Aboriginal community and corporation stakeholders suggested that the Pilbara BMSs with which they had experience were insufficiently

⁹⁶⁴ Cf Trustee Officer 28 June 2018; Trustee Officer May and June 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Executive 10 May 2018; Pilbara Aboriginal Corporation Director 21 June 2018; Professional Adviser 31 January 2018; Resource Proponent Manager 24 January 2018.

⁹⁶⁵ See, eg, Nyiyaparli Charitable Trust Deed Ch 13. Cf Banjima Charitable Trust Deed Ch 11.

⁹⁶⁶ See n 672 and accompanying text.

⁹⁶⁷ See, eg, Resource Proponent Implementation Adviser 10 August 2017.

⁹⁶⁸ See, eg, Resource Proponent Implementation Adviser 10 August 2017. Cf Trustee Officer 18 May 2017.

customised and felt like imposed templates.⁹⁶⁹ This partly reflected stakeholder perceptions of the significant complexity of BMS documents, which enabled their flexible implementation in theory, but in practice impeded that flexibility because many actors within a BMS did not have a good sense of the options available.⁹⁷⁰ In particular, the example context provided for the pilot BMS (Part 6.2.1) indicates that the relevant Pilbara Aboriginal community to which such a BMS relates, is likely to number in the hundreds of people, not the tens of thousands as for the Noongar BMS. However, the BMS committees and boards are numerous and have relatively large memberships,⁹⁷¹ so identifying 20 or so board and committee members out of the pool of hundreds of people and then expecting those members to navigate the multiple options provided throughout hundreds of pages of trust deeds and corporate constitutions is likely to be challenging. The geographic dispersion of many Pilbara Aboriginal communities – as for the Banjima People and Nyiyaparli People – is likely to exacerbate the issue, as well as posing difficulties for some of the intended ways in which Aboriginal community members are to communicate about and participate in the pilot BMS operations (Part 4.13).

Viewing the pilot BMS from the perspective of complexity, it is possible to align the Aboriginal community and corporation stakeholder comments with those of trustees and resource proponent stakeholders. Trustee and resource proponent stakeholders acknowledged the need for each community, family and individual to be treated differently, but tended to consider that the Pilbara BMS documents were already heavily customised, potentially at the expense of their efficient operation. One trustee officer noted that customisation of BMS documents is inefficient and unnecessary, as a straightforward BMS arrangement would fit most circumstances. This respondent stated that a simple and standardised structure would greatly improve the general level of understanding of BMS structures and processes and therefore minimise community dissatisfaction.⁹⁷² Another trustee officer suggested that there may be greater scope for customisation once the initial BMS ‘learning’ phase has been completed.⁹⁷³ Resource proponent representatives noted that customisation can give rise to undesirable complexity, and that an enhanced focus on efficiency – particularly in decision making – may require the use of ‘leaner’ (less customised) structures.⁹⁷⁴

⁹⁶⁹ Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Executive 10 May 2018; Pilbara Aboriginal Corporation Executive 4 July 2018; Pilbara Aboriginal Corporation Director 21 June 2018. Cf Independent BMS Facilitator 21 March 2018; Pilbara Aboriginal Corporation Officer 12 March 2019.

⁹⁷⁰ Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Director 20 June 2018; Trustee Officer May and June 2018.

⁹⁷¹ Localism suggests that it is good to have broader committees representative of the smaller family groups and clans. In the context of Indigenous organisations, rather than BMSs, cf Jon Altman, ‘Different Governance for Difference: The Bawinanga Aboriginal Corporation’ in *Hunt et al’s Contested Governance* 177, 193.

⁹⁷² Trustee Officer 19 July 2018. Cf Trustee Officer 28 June 2018.

⁹⁷³ Cf Trustee Officer 28 June 2018.

⁹⁷⁴ Resource Proponent Implementation Adviser 10 August 2018; Resource Proponent 24 January 2017.

There appears to be a strong link then between the **Simplicity** of the pilot BMS and the practical achievement of **Customisation**. Enhancing **Simplicity** in some way, would thus aid **Customisation**, a theme taken up in Part 7.5.

Several Aboriginal community and corporation stakeholders also suggested that the perception of imposed templates might be due to insufficient community knowledge of the structures and their operation.⁹⁷⁵ This links with **Durability**, in that stakeholder understanding of BMS documents and why they have been fashioned as they are, needs to be transferred to new stakeholder representatives over time. Feelings that BMS documents are imposed templates are also relevant to **Allegiance**.⁹⁷⁶

Finally, a number of stakeholders suggested that in implementing a BMS such as the pilot BMS, far greater regard could be had to the individual circumstances of each member of the relevant Aboriginal community. This could apply when carrying out capacity building (Part 4.1) or in the provision of services (Part 4.2). Part 7.2 discusses how strategic planning processes might be enhanced to help promote an individualised approach.

6.3.2 Legal adequacy

The pilot BMS does reasonably well at meeting this consideration. In particular, decision making procedures take account of concerns about the limits to incorporating traditional decision making processes and the need for the currently agreed approach to be recorded in writing (but subject to change) and of the need for decision making to permit space for traditional processes, but not at the expense of a decision ever being reached.⁹⁷⁷ These procedures have been described below as the ‘windows approach’ to decision making and are identified as a best practice in the following Chapter 7.

However, the use of large meetings as the formal procedure for the Aboriginal community to make fundamental decisions, such as approving variations to the trust deeds, is relatively ineffective for consultation and representatives (which are extensively relied upon by the pilot BMS) have not consulted and communicated as well in practice as predicted in theory. A search for modified approaches that address limitations with these practices is examined in more detail in Part 7.1. In addition, to the extent that representatives are used, Part 4.6 indicated that consultation with representatives could be improved, particularly by promoting more coordinated planning across BMS bodies and by capacity building – matters discussed in Parts 7.2 and 7.3.

⁹⁷⁵ Aboriginal Community Representatives 3 May 2018; Pilbara Aboriginal Corporation Executive 2 May 2018. Cf Trustee Officer May and June 2018; Trustee Officer 28 June 2018; Professional Adviser 31 January 2018.

⁹⁷⁶ Cf Pilbara Aboriginal Corporation Executive 21 May 2018.

⁹⁷⁷ See, especially, *Mantzaris and Martin’s Native Title Corporations* 314-15.

Further, the pilot BMS features multiple decision making bodies with overlapping functions. While this can be useful for separation of powers, uncertainty about roles and responsibilities can reduce **Efficiency** and hinder achievement of BMS goals (**Capacity to pursue purpose**). The uncertainty is heightened by the relatively unique nature of some decision making bodies, especially the Traditional Owner Council and Decision Making Committee. Part 7.3, in particular, investigates some potential solutions.

External and internal reporting is relatively pronounced and increases administration costs for the pilot BMS and so areas where reporting is duplicated or where reporting is focussed on matters that are less important (eg BMS activities rather than BMS outcomes) bear further consideration and are examined in Part 7.2.

Dispute resolution mechanisms in the pilot BMS structures reflect many of the features suggested in the literature, but they were little used by stakeholders and, where used, were viewed by some stakeholders as ineffective. Part 7.3 therefore discusses some further practical steps that could be taken to try and achieve more effective use of the existing dispute resolution provisions in practice.

In addition, in identifying the native title group, only adult members are included. As decision makers under the BMS who need to have decision making capacity, this makes sense. However, this approach means that young and future group members do not formally participate in decisions and hence that there may need to be another way for protecting their interests (see Part 6.3.11).

The following table documents key points for each of the relevant facilities.

Table 6.3 – Pilot BMS Legal Facilities

Facility	Pilot BMS
Legal capacity to hold and manage property and bear rights and obligations	Entities within the BMS have this capacity, such as the professional trustee as trustee of the Charitable Trust and the Direct Benefits Trust, as well as the Local Aboriginal Corporation.
Means of establishing legal authority	Professional trustee company constitution, ⁹⁷⁸ Local Aboriginal Corporation rule book ⁹⁷⁹ and general corporations law should permit the directors or other individuals with delegated authority, to bind the corporations.
Method for identifying the native title group	The Direct Benefits Trust provides for the creation and maintenance of a register of the Aboriginal community which represents the

⁹⁷⁸ We have assumed this would be standard for a licensed trustee company in the form of a public company.

⁹⁷⁹ See, eg, Karla Rule Book rr 11.1, 11.4, 14.2; Constitution of BNTAC rr 14.1, 14.6, 19.2.

Facility	Pilot BMS
	<p>relevant group of native title claimants or holders from time to time.⁹⁸⁰</p> <p>Likewise, the Local Aboriginal Corporation's rule book often contemplates that the corporation can maintain a similar register. For instance, Karlka's rule book contemplates a 'Register of Nyiyaparli People', with inclusion to be determined by the Karlka directors based on (i) any relevant court determination that a person is a Nyiyaparli Person; (ii) otherwise, in accordance with a decision of the current Nyiyaparli native title holders or claimants made by way of a traditional decision making process; and (iii) in the absence of the first two methods, Karlka can request and act upon the advice of the Nyiyaparli native title representative body or solicitor on the record for the Nyiyaparli claim.⁹⁸¹ The provision provides for removal or inclusion as members die and reach 18 years of age.⁹⁸² The rules also require the register to be made available to the BMS trustee and to others, subject in some cases to conditions.⁹⁸³ The register includes only a person's name, birthdate and address.⁹⁸⁴</p> <p>Accordingly, a register system is used, but unless a court determination is made, there is no codification of the traditional laws and customs for member identification. Instead, administrative support is provided, for instance, by way of Karlka's responsibility for maintaining and updating the register; traditional laws and customs are recognised and a mechanism is provided to translate a traditional decision into a legally recognised form.⁹⁸⁵ This is an example of the 'windows approach' proposed by Martin and Mantziaris as the preferable approach to adopt to incorporate traditional law and custom.⁹⁸⁶ In addition, <i>Certainty</i> is assisted by the Local Aboriginal Corporation's ability to act in the absence of a decision made in accordance with traditional law and custom.</p>
Method of identifying the nature and extent of native title rights and interests of group members	<p>The registers of the Aboriginal community members referred to above are not typically required by the pilot BMS to contain any such details.⁹⁸⁷</p> <p>However, the pilot BMS has been employed in the case of the Banjima BMS in a way that records Aboriginal community members as being members of a particular sub-group (IB or MIB), with the potential for differentiated decision making rights for BMS funds that arise from activities that particularly affect the native title interests of a sub-group (see Part 6.2.3).</p>

⁹⁸⁰ See, eg, Nyiyaparli Charitable Trust Deed cl 1.1 (definition of 'Register of Nyiyaparli People'); Banjima Charitable Trust Deed cl 1.1 (definition of 'Register of Banjima People').

⁹⁸¹ Karlka Rule Book, r 5. Cf Constitution of BNTAC r 7.5.

⁹⁸² Karlka Rule Book, r 5.3.

⁹⁸³ Karlka Rule Book, r 5.5.

⁹⁸⁴ Karlka Rule Book, r 5.2.

⁹⁸⁵ Cf Pilbara Aboriginal Corporation Director 20 June 2018.

⁹⁸⁶ *Mantziaris and Martin's Native Title Corporations* 309.

⁹⁸⁷ Cf Karlka Rule Book, r 5; Constitution of BNTAC r 7.5.

Facility	Pilot BMS
	<p>Thus, the pilot BMS has some, albeit restricted, ability to identify particular pools of funding as relating to particular impacts on native title rights and interests and hence in identifying who can speak for each native title right and for that funding.</p>
<p>Inclusion of formal decision making procedures</p>	<p>The various decision making bodies and the types of decisions that they make are identified in Figures 6.2 and 6.3 above. There are several key themes:</p> <ul style="list-style-type: none"> • Different types of decisions are made by different bodies, eg fundamental decisions by the Aboriginal community, but strategic and operational decisions, which are likely to require more detailed knowledge and particular financial and legal compliance skills, by other bodies – accordingly large meetings are not the usual procedure for decision making. • Despite this differentiation, there is also a degree of overlapping responsibility for decisions on some matters. While creating checks and balances, distributing power in this way can also generate uncertainty and the potential for conflict between the various decision making bodies, which can pose problems for <i>Efficiency</i> (Part 6.3.9), as well as to allocation of liability for decisions, as discussed below. • Some bodies are intended to be representative of the Aboriginal community, in particular the Decision Making Committee, the Traditional Owner Council and the directors of the Local Aboriginal Corporation. For instance, the members of the Traditional Owner Council and the Decision Making Committee are directly nominated by the Aboriginal Community, subject to trustee veto if the nominations do not comprise a fair and just representative group of all the Aboriginal community.⁹⁸⁸ Traditional Owner Council members are permitted to make decisions in the interests of a particular family or subgroup, while having regard to the overall interests of the community intended to be benefitted under the trusts.⁹⁸⁹ The Decision Making Committee differs from the Traditional Owner Council in that members' fiduciary duties are not attenuated in the same way and also in that members must possess or must acquire financial and corporate governance expertise.⁹⁹⁰ There is also an independent member and a requirement that there be a Traditional Owner Council member and Local Aboriginal Corporation director, to assist information flows. Representation is discussed further below under <i>Allegiance</i> (Part 6.3.4). • As outlined in Part 6.2.3, traditional decision making processes are contemplated to some degree. For instance, the 'Agreed Decision Making Process' for Aboriginal community decisions⁹⁹¹ again reflects a 'windows approach' to recognising traditional law

⁹⁸⁸ See, eg, Banjima Charitable Trust Deed S2.1, S11.1(a).

⁹⁸⁹ See, eg, Banjima Charitable Trust Deed S2.1(c).

⁹⁹⁰ See, eg, Banjima Charitable Trust Deed S11.1.

⁹⁹¹ See n 944.

Facility	Pilot BMS
	<p>and custom. Traditional Owner Council and Decision Making Committee decisions are also typically made by consensus in accordance with traditional law and custom, as are Local Aboriginal Corporation board decisions in some cases. The BMS documents thus provide administrative support and processes to enable and recognise decisions made according to traditional law and custom. However, this process is subject to limits in support of <i>Certainty</i>. For instance, a majority vote if traditional procedures do not permit a decision and integrity checks such as an independent member compliance veto for the Decision Making Committee and trustee oversight of oppression for Aboriginal community decisions. Time limits also apply so that, for instance, a professional trustee can proceed without consent or consultation if it has twice attempted to obtain a valid decision over a 3 month period. However, some stakeholders noted that more work could be done on processes for ensuring a ready pool of independent members and directors so that independents can be appointed as required.⁹⁹² FDIO or the Forum for Directors of Indigenous Organisations, is one organisation that has been undertaking work on this issue.</p> <ul style="list-style-type: none"> • Nevertheless, large meetings are the formal procedure provided for making certain fundamental decisions, such as approving variations to the trust deeds (see figure 6.3 and table 6.2 above). There are problems in relying on large meetings to consider and make decisions, rather than formally ratifying previously made decisions. The effectiveness of general consultation (as envisaged by the pilot BMS)⁹⁹³ in the lead up to such decisions is therefore likely crucial, as is the effectiveness of participation and information by way of representation on bodies such as the Local Aboriginal Corporation and the Decision Making Committee (or in some cases, the Traditional Owner Council).
Dispute resolution procedures	<p>The pilot BMS trust deeds and Local Aboriginal Corporation rule book each contain procedures to help resolve and address the consequences of disputes.⁹⁹⁴ The procedures first support informal resolution, which would permit recourse to traditional mechanisms and then move to formal techniques drawn from the broader Australian society, such as the trustee or directors acting as a form of conciliator and, failing that, determination by an independent expert. Certain procedures also countenance a role for an Elders' Council, for instance in relation to decisions about membership of the relevant Aboriginal community.⁹⁹⁵ In addition, the Aboriginal community typically has the ability to remove and replace Traditional Owner</p>

⁹⁹² See, eg, Trustee Officer 8 March 2019; Independent BMS Facilitator 7 March 2019; Professional Adviser 5 March 2019.

⁹⁹³ See, eg, Banjima Charitable Trust Deed cl 3.4, Nyiyaparli Charitable Trust Deed cl 3.4.

⁹⁹⁴ See, eg, Nyiyaparli Charitable Trust Deed Ch 17; Karlka Rule Book r 18; Banjima Charitable Trust Deed Ch 15; Constitution of BNTAC r 25.

⁹⁹⁵ See, eg, Constitution of BNTAC r 9, S1.1.

Facility	Pilot BMS
	<p>Committee members or directors with whom they are dissatisfied.⁹⁹⁶ These mechanisms permit a mix of Indigenous mechanisms and more mainstream approaches as recommended by Mantziaris and Martin.⁹⁹⁷</p> <p>However, stakeholders suggested that most formal processes were rarely used⁹⁹⁸ and others indicated that existing dispute resolution provisions had not been effective in bringing disputes to a quick conclusion and raised uncertainty over which stakeholders were covered and what matters can be arbitrated.⁹⁹⁹ Possibly in light of these difficulties, stakeholders instead emphasised that it can be useful to work on interpersonal relationships at the committee/board level in order to address family disputes that members may have with each other.¹⁰⁰⁰ Nevertheless, as noted in Parts 3.4 and 5.2 and as broadly reflected in the literature, disputes will arise and so there should be culturally appropriate dispute resolution procedures.¹⁰⁰¹ Culturally appropriate dispute resolution procedures will often emphasise process and consensus, as well as respect for Elders, flexibility of procedure and sensitivity to matters of gender and kinship.¹⁰⁰² However, there is no one size fits all as cultures differ and are also dynamic in nature.¹⁰⁰³ Dodson and Smith have also observed that dispute resolution procedures should be formalised at least to a degree.¹⁰⁰⁴ There is thus scope to incorporate into BMS documents 'internal' mechanisms such as an Elders' Committee, an Indigenous ethics committee and processes of delegation.¹⁰⁰⁵ Additionally, there</p>

⁹⁹⁶ See, eg, Banjima Charitable Trust Deed S11.5; Constitution of BNTAC r 12.10; Karlka Rule Book r 9.8.

⁹⁹⁷ *Mantziaris and Martin's Native Title Corporations* 316.

⁹⁹⁸ Trustee Officer 19 July 2018; Trustee Officer May and June 2018; Pilbara Aboriginal Corporation Executive 4 July 2018.

⁹⁹⁹ Professional Adviser 31 January 2018; Trustee Officer 8 March 2019.

¹⁰⁰⁰ Pilbara Aboriginal Corporation Executive 5 July 2018.

¹⁰⁰¹ See, eg, Toni Bauman, 'Final Report of the Indigenous Facilitation and Mediation Project' (Report No. 6, AIATSIS, 2006) 29-36; Toni Bauman and Juanita Pope (eds), 'Solid Work You Mob Are Doing: Case Studies in Indigenous Dispute Resolution & Conflict Management in Australia' (Commonwealth of Australia, Indigenous Dispute Resolution and Conflict Management Case Study Project Report, 2009) 99-103; *Mantziaris and Martin's Native Title Corporations* 316; Paul Memmott and Scott MacDougall, *Holding Title and Managing Land in Cape York: Indigenous Land Management and Native Title*, (Research Project, National Native Title Tribunal, Perth, 2003) 80; Mick Dodson and Dianne Smith, 'Governance for Sustainable Development: Strategic Issues and Principles for Indigenous Australian Communities' (Discussion Paper No 250, CAEPR, ANU, 2003) 16.

¹⁰⁰² Toni Bauman and Rhian Williams, 'The Business of Process: Research Issues in Managing Indigenous Decision making and Disputes in Land' (Report, Indigenous Facilitation and Mediation Project, AIATSIS, 2004); Larissa Behrendt, *Aboriginal Dispute Resolution: A Step Towards Self-Determination and Community Autonomy* (The Federation Press, Sydney, 1995) 77-9.

¹⁰⁰³ Toni Bauman, 'Final Report of the Indigenous Facilitation and Mediation Project' (Report No. 6, AIATSIS, 2006) 17.

¹⁰⁰⁴ Mick Dodson and Dianne Smith, 'Governance for Sustainable Development: Strategic Issues and Principles for Indigenous Australian Communities' (Discussion Paper No 250, CAEPR, ANU, 2003) 16.

¹⁰⁰⁵ See, eg, *ibid* 16; Larissa Behrendt, *Aboriginal Dispute Resolution: A Step Towards Self-Determination and Community Autonomy* (The Federation Press, Sydney, 1995) 79-86; ORIC, 'A Guide to Writing Good Governance Rules for PBCs and RNTBCs' (May 2008) 21.

Facility	Pilot BMS
	<p>is space for 'external' dispute mechanisms such as independent mediation or arbitration.¹⁰⁰⁶</p> <p>Dispute resolution mechanisms in the pilot BMS structures already reflect many of these proposed features, although they could perhaps formalize the role of an Elders' Council (such as the Traditional Owner Council) to a greater degree. Overall, however, they rate reasonably well in theory. Nevertheless, Part 7.3 discusses some further practical steps that could be taken to try and achieve more effective use of the existing dispute resolution provisions in practice.</p>
Accountability	<p><i>Internal</i></p> <ul style="list-style-type: none"> • The views or decisions of the Aboriginal community members are obtained directly on only a small range of 'fundamental' matters and otherwise in relation to a broader range of matters at the relevant AGMs. • Information is provided directly to Aboriginal community members in a much broader range of matters by way of making certain reports, plans, policies and other documents 'available'. However, this only requires the trustee to 'make... available for viewing by, and provide reasonable access to' members of the Aboriginal community, the relevant document, such as a strategic plan, or the trustee's annual report and annual plan.¹⁰⁰⁷ This requirement appears to leave significant flexibility for the trustee to determine how readily to provide the information. • Generally, the views of Aboriginal community members on strategic or day-to-day administrative matters are obtained only by way of representatives on the Traditional Owner Council, Decision Making Committee or Local Aboriginal Corporation board (see also Part 4.6). • However, the general BMS consultation requirements (such as those provided for under cl 3.4 of the Banjima and Nyiyaparli Charitable Trust Deeds) permit the trustee significant discretion as to the means and extent of communication.¹⁰⁰⁸ • Stakeholder feedback from interviews (see Part 4.6) suggested that structures like the pilot BMS can enable good communication and consultation with Aboriginal community members and representatives. However, the general view was that in most

¹⁰⁰⁶ See, eg, Toni Bauman and Juanita Pope (eds), 'Solid Work You Mob Are Doing: Case Studies in Indigenous Dispute Resolution & Conflict Management in Australia' (Commonwealth of Australia, Indigenous Dispute Resolution and Conflict Management Case Study Project Report, 2009); Mick Dodson and Dianne Smith, 'Governance for Sustainable Development: Strategic Issues and Principles for Indigenous Australian Communities' (Discussion Paper No 250, CAEPR, ANU, 2003) 16; ORIC, 'A Guide to Writing Good Governance Rules for PBCs and RNTBCs' (May 2008) 21.

¹⁰⁰⁷ See, eg, Nyiyaparli Charitable Trust Deed cl 15.6(a), 16.6(a). Cf Banjima Charitable Trust Deed cl 13.5(a), 14.5(a).

¹⁰⁰⁸ The cl 3.4 consultation requirements are expressed at a high level of generality. This gives the trustee a wide discretion over the means adopted.

Facility	Pilot BMS
	<p>instances communication and consultation could be materially improved. In particular, general meetings of Aboriginal community members were not seen as effective for consultation and of only mixed effectiveness for information dissemination.</p> <ul style="list-style-type: none"> • In addition, the pilot BMS relies heavily on representatives of the Aboriginal community. The composition of the Traditional Owner Council and Decision Making Committee reflect Martin's suggestion for a broad cross-section of the relevant Aboriginal community that reflects the 'cultural geography' of the governance environment,¹⁰⁰⁹ in that they are required to be 'fairly and justly representative of the [Aboriginal community]', with the election of members left with the Aboriginal community, but subject to trustee veto on the 'representative' ground and that they arise in relation to an Indigenous-determined Aboriginal community, albeit determined for native title claim purposes.¹⁰¹⁰ To similar effect, the Local Aboriginal Corporation rule book often requires, as the BNTAC rule book does, that the board evaluate candidates for appointment to the board based on the need for the directors to be 'broadly representative of the Banjima People', including the express references to the need for directors with understanding of traditional law and custom, representation for women and representation for youth.¹⁰¹¹ Unlike the Nyiyaparli BMS, the Banjima BMS also recognises, to some extent, sub-groups (MIB and IB) within the Aboriginal community – providing for a certain number of places on the Decision Making Committee for each sub-group,¹⁰¹² which reflects current political and social arrangements, but which may be at risk of becoming obsolete. The Banjima BMS approach to the Traditional Owner Council deals better with the potential for change: 'The composition of the Banjima Council is required to be... representative of the Banjima People on a fair and just basis having regard to the particular dynamics of the Banjima People from time to time'.¹⁰¹³ Nevertheless, stakeholder comments indicated that the pilot BMS representative bodies could be improved upon. A Karratha workshop response suggested that 'Decision Making Committees are clearly not adequately representing the collective [community] interest' and not adequately consulting with the broader community in that '[h]aving no direct native title group traditional owner input/buy in into policy is <u>asking</u> for problems'.¹⁰¹⁴ An Aboriginal corporation executive noted that:¹⁰¹⁵

¹⁰⁰⁹ See n 487.

¹⁰¹⁰ See, eg, Banjima Charitable Trust Deed S11.1(a), S11.2(a). Cf Banjima Charitable Trust Deed S2.1(a), S2.3(b).

¹⁰¹¹ Constitution of BNTAC r 12.4.2(b).

¹⁰¹² See, eg, Banjima Charitable Trust Deed S11.1(a).

¹⁰¹³ See, eg, Banjima Charitable Trust Deed S2.1(a).

¹⁰¹⁴ Karratha Workshop 3 May 2018.

¹⁰¹⁵ Pilbara Aboriginal Corporation Executive 21 May 2018.

Facility	Pilot BMS
	<p>You can't just rely on representatives... [you need] triangulation to collect views/information/involvement in decision making... Committee members need direct contact with a sample of members, service providers. So focus groups in key towns near where members reside, electronic surveys.</p> <p>A resource proponent representative noted their view in relation to the role of committee members that:¹⁰¹⁶</p> <p style="padding-left: 40px;">there's not full acceptance that there is in these roles, it's incumbent upon you to disseminate and gather [information]... I think that's the piece that's missing.</p> <p>In addition, it is unsurprising that trustees and corporation directors and executives, tended to think that communication and consultation was working better than Aboriginal community members who were not directors or executives.¹⁰¹⁷</p> <ul style="list-style-type: none"> • The pilot BMS documents also permit material flexibility for the trustee in consulting with representatives. For instance, meetings of the Traditional Owner Council and are to be held 'as often as is necessary or required to deal with the business of the [BMS]',¹⁰¹⁸ but that such meetings should be convened and held 'in an efficient, responsible and cost effective manner and with consideration as to whether they should be held at all'.¹⁰¹⁹ The mode of meetings also provides a fair amount of discretion to the trustee, with the key requirement being that 'meetings will be called by the Trustee giving reasonable notice to each of the members of the [Traditional Owner Council] of the time, date and place of the meeting and the general nature of the business to be conducted at the meeting'.¹⁰²⁰ Stakeholder feedback discussed in Part 4.6 indicated that consultation with representatives could also be improved, particularly by promoting more coordinated planning across BMS bodies and by capacity building. • As discussed below under 'allocation of liability', the duties of the various office holders are not always clearly defined, which poses problems for accountability. In addition, as discussed under <i>Sensitivity to motivational complexity</i> (Part 6.3.6), there are some difficulties with the conflict of interest provisions applying to decision makers. There are also broader issues relating to the application of fiduciary duties to Indigenous office holders that are considered under <i>Sensitivity to motivational complexity</i>. • Internal accountability under a BMS is complicated by the fact that there are different entities that may each have slightly different groups of internal stakeholders to whom they are accountable. For instance, while the Aboriginal community should largely overlap with the membership of the Local Aboriginal

¹⁰¹⁶ Resource Proponent Manager 24 January 2017.

¹⁰¹⁷ Karratha Workshop 3 May 2018.

¹⁰¹⁸ See, eg, Banjima Charitable Trust Deed S2.8(a), S11.6(a).

¹⁰¹⁹ See, eg, Banjima Charitable Trust Deed cl 3.3(b).

¹⁰²⁰ See, eg, Banjima Charitable Trust Deed S2.8(c). Cf Banjima Charitable Trust Deed S11.6(c) (Decision Making Committee).

Facility	Pilot BMS
	<p>Corporation and the register of Aboriginal community members under the trusts, there may be some discrepancies, eg if a person has not yet applied for Local Aboriginal Corporation or trust membership. More fundamentally, the pilot BMS Charitable Trust exists for the benefit of Aboriginal people with a connection to the Pilbara region, not just the relevant Aboriginal community. However, as they are not technically considered ‘beneficiaries’, it would be consistent with general practice for charities to view accountability to these persons as involving some degree of external accountability by way of accountability to the relevant regulators who are treated as representing that community of potential benefit recipients – such as the ACNC and the relevant Attorney-General.</p> <p><i>External</i></p> <ul style="list-style-type: none"> • The trust deeds involve extensive consultation with and reporting to resource proponent contributors as external stakeholders. Table 6.2 provides some examples. The scope of this accountability raises questions about (i) the extent to which accountability may be externalised to resource company contributors; (ii) its impact on Autonomy and (iii) costs. Interestingly, stakeholder interviews suggested that responsibility was not typically externalised to resource proponents, although it was sometimes externalised to the professional trustee company, given its predominant role in administering the BMS.¹⁰²¹ However, perceptions of Autonomy were negatively affected, with one Aboriginal community representative noting that:¹⁰²² <p style="margin-left: 40px;">BMSs don’t appropriately deal with the increasing capacity of groups. They impose too many reporting rules even when groups have shown that they can govern the funds well and have increased capacity... There is a lot of ticking boxes that does not seem to achieve that much.</p> <p>A Pilbara Aboriginal Corporation Executive stated that ‘[i]t should be possible to achieve compliance under the BMS without the resource company (or trustee) being big brother’.¹⁰²³ As discussed in Part 4.9 external reporting does raise administration costs for the pilot BMS and so areas where reporting is duplicated or where reporting is focussing on matters that are less important (eg BMS activities rather than BMS outcomes) bear further consideration and are examined in Part 7.2.</p> • The pilot BMS Charitable Trust and, often, the Local Aboriginal Corporation, as registered charities would also be required to

¹⁰²¹ See, eg, Resource Proponent Manager 10 August 2017; Resource Proponent Manager Implementation Adviser 10 August 2017; Resource Proponent Manager 24 January 2017. Cf Trustee Officer 18 May 2017; Trustee Officer 19 July 2018.

¹⁰²² Pilbara Aboriginal Corporation Director 21 June 2018. Cf Trustee Officer 19 July 2018; Independent BMS Facilitator 21 March 2018.

¹⁰²³ Pilbara Aboriginal Corporation Executive 10 May 2018.

Facility	Pilot BMS
	<p>report annually to the Australian Charities and Not-for-profits Commission and the public register maintained by the ACNC is another source of information for other stakeholders.</p> <ul style="list-style-type: none"> • The Local Aboriginal Corporation, as a CATSI Act corporation would also be regulated by ORIC. • The professional trustee company is typically required to be a licensed trustee company regulated by ASIC.
Allocation of liability for decisions	<p>The incorporation legislation for a BMS entity (eg the CATSI Act), the Local Aboriginal Corporation's rule book, the trust deeds and the general company, trusts and charity law effects an allocation of liability. However, there are two key issues.</p> <p>First, the extent of liability of trustees, of Traditional Owner Council members and Decision Making Committee members. The Traditional Owner Council and Decision Making Committee roles, in particular, are quite unique – they are certainly far from the standard fiduciary roles of a trustee or a director of a corporation. Determining the range of duties owed by the holders of the committee roles raises novel technical challenges. This is exacerbated by attempts in the trust deeds to reduce the duties owed (in recognition of the political representative capacity of members, of 'localism' and of the inherent potential for conflicts of interest discussed in Part 4.5), while at the same time maintaining minimum standards. For instance, the Traditional Owner Council members' duties are reduced to enable them to make decisions in the interests of a particular family or subgroup, while still maintaining duties of care and diligence, good faith, and to not improperly use their position or information and to make decisions having regard to the overall interests of the community intended to be benefitted under the trusts.¹⁰²⁴ The Banjima BMS also involves a Decision Making Committee with reserved places for sub-group representatives, yet still imposes the same generic duties of care and diligence, good faith, and to not improperly use their position or information.¹⁰²⁵ Even the trustee role is non-standard in that it involves a degree of community development and service delivery that is outside the norm for philanthropic foundations, albeit there are far clearer legal rules here. The issue is exacerbated for many BMSs by the need for more capacity building for committee members.¹⁰²⁶ The pilot BMS partially addresses the capacity issue by providing for an initial professional trustee company and the capacity to engage other service providers to progressively build capacity and organisation of Aboriginal communities.¹⁰²⁷</p> <p>Second, overlapping responsibility for decisions on a range of matters affects the clarity of allocation of liability. In particular, the trustee</p>

¹⁰²⁴ See, eg, Banjima Charitable Trust Deed S2.1(c), S2.5.

¹⁰²⁵ Banjima Charitable Trust Deed S11.1(a), S11.7.

¹⁰²⁶ See nn 384 to 385; nn 446 to 450.

¹⁰²⁷ See n 964.

Facility	Pilot BMS
	<p>(and sometimes a resource proponent) and the Local Aboriginal Corporation often have co-responsibility for many decisions with each other and with the Decision Making Committee and Traditional Owner Council. For instance, to what extent are Decision Making Committee members liable, along with the trustee, if the trustee fails to veto a binding Decision Making Committee decision that turns out to be in breach of the BMS trust deeds? Who has failed to meet care and diligence requirements if a BMS does not measure attainment of BMS goals – the trustee or the Local Aboriginal Corporation? As discussed in Part 4.7, lack of clarity about liability hinders BMS actors adopting responsibility for achievement of BMS purposes. As one Pilbara Aboriginal corporation director noted:¹⁰²⁸</p> <p style="padding-left: 40px;">We've got a wide spectrum of people because there is the trustee, the Council, the Decision Making Committee, then you've got the [PBC] board. Who drives all of this? ... It's the Decision Making Committee that is making the policies, yet at the end of the day, we're the ones on the board who are liable.</p> <p>Lack of clarity about liability may also motivate trustees to act overly conservatively and with too great a focus purely on check-the-box compliance with trust deeds, even if this results in inferior outcomes for the BMS.¹⁰²⁹</p> <p>As noted above for external accountability, it also raises the risk that the Aboriginal community allocates moral, if not legal, liability to the trustee.¹⁰³⁰</p>
Asset protection	<p>The initial pilot BMS trustee is required to be a licensed professional trustee company. As the trusts receive the majority of the payments and as the trustee holds legal title to trust assets, this provides a measure of asset protection based on the internal systems of and external regulation of the trustee. If a professional trustee is replaced by an Indigenous-controlled trustee company, the BMS trust deeds require an appropriately qualified custodian trustee to be appointed to hold title to trust assets.¹⁰³¹</p> <p>In addition, the BMS trust deeds contain risk mitigation provisions in relation to the investment of trust assets.¹⁰³² For instance, processes such as the need to develop, invest in accordance with and continually review, an investment policy and the need to obtain the assistance of an appropriately qualified internal or external investment adviser. However, as discussed in Part 4.14, in addressing one set of risks, the BMS investment provisions potentially open up asset</p>

¹⁰²⁸ Pilbara Aboriginal Corporation Director 20 June 2018.

¹⁰²⁹ See Part 4.14.

¹⁰³⁰ As to the risks of externalising moral responsibility, see *Mantziaris and Martin's Native Title Corporations* 321-2.

¹⁰³¹ See, eg, Nyiyaparli Charitable Trust Deed cl 11.1(b).

¹⁰³² See, eg, Nyiyaparli Charitable Trust Deed ch 7, 8; Banjima Charitable Trust Deed ch 7, 8.

Facility	Pilot BMS
	<p>depletion risks by fostering professional trustee conflicts of interest. That is because the trust deeds do not require the investment adviser to be unrelated to the professional trustee.¹⁰³³ Some particular investment risks are also addressed, such as the overlap between pursuit of purpose by making distributions to support Indigenous economic development and the social investment of funds to earn a return, which can arise when investments are made in Indigenous businesses.¹⁰³⁴</p> <p>In terms of financial management and administrative systems, monitoring, acquittal and evaluation of trust distributions is discussed under <i>Allegiance</i> and broader accountability for financial and non-financial matters is set out under the description of the trustee's annual report and auditor's annual report in Table 6.2 above.</p>

6.3.3 Certainty

The above discussion about decision making procedures indicates that while the pilot BMS does have regard to traditional law and custom, it typically does so by way of providing support and recognition mechanisms (rather than codifying the principles) and that it imposes some limits on the extent to which decisions in accordance with traditional law and custom will be applied or sought. Those limits are both temporal and derived from substantive norms in the broader Australian community. This is broadly supportive of *Certainty*, albeit it entails some reduction.

The dispute resolution mechanisms also seek to reduce the risk of disputes that incapacitate the BMS. While some concerns were raised in Part 6.3.2 about their effectiveness, they do contain a number of 'night watchman' provisions that ensure continued minimal operations. For example, the dispute resolution clauses provide that the relevant trust or corporation continues to operate and that office holders must continue to fulfil their obligations to the extent possible.¹⁰³⁵ These general provisions are bolstered by more specific requirements to maintain core activities. For instance, the distribution provisions provide that if there is a dispute in relation to a distribution, the trustee 'must proceed with such minimum Distributions necessary to act in accordance with the most recent Annual Plan and Strategic Plan...'.¹⁰³⁶

¹⁰³³ See, eg, Niyaparli Charitable Trust Deed cl 8.1(d); Banjima Charitable Trust Deed cl 8.1(d).

¹⁰³⁴ See, eg, Niyaparli Charitable Trust Deed cl 7.6; Banjima Charitable Trust Deed cl 7.6.

¹⁰³⁵ See, eg, Niyaparli Charitable Trust Deed cl 17.2; Karlka Rule Book r 18; Banjima Charitable Trust Deed cl 15.2.

¹⁰³⁶ See, eg, Niyaparli Charitable Trust Deed cl 6.1(d); Banjima Charitable Trust Deed cl 6.1(d).

Nevertheless, there is a risk to **Certainty** posed by the overlapping responsibilities for decision making held by the various BMS bodies.

6.3.4 Allegiance

As discussed under **Certainty**, the decision making procedures under the pilot BMS have regard to traditional law and custom, typically by way of providing support and recognition mechanisms rather than codifying the principles, albeit they are subject to some limits. This promotes non-coercive allegiance of the native title group by means of incorporating traditional authority structures and processes, so enhancing ‘social legitimacy’.¹⁰³⁷ Nevertheless, the pilot BMS appears to rely to a significant extent on representatives of the Aboriginal community (on the Traditional Owner Council and Decision Making Committee) passing on information and obtaining the views of the Aboriginal community. For the reasons discussed in Chapters 3 and 4, these assumptions are unlikely to be justified and hence there may be potential to increase **Allegiance** by enhancing information flow and consultation processes. Indeed, Part 5.4 identifies the relationship between communication and participation (see Part 4.6), along with capacity building (see Part 4.4), on the one hand, and **Allegiance** on the other. This relationship was of central interest to the stakeholders who provided feedback on this consideration. Several Aboriginal community and corporation representatives suggested that a BMS focus on compliance – particularly in new structures – hindered the provision of adequate information to committee members and other decision makers, with associated negative consequences for allegiance or ‘ownership’.¹⁰³⁸ More broadly for community ownership of structures, a ‘key issue is ensuring that communities understand the complex documents and processes’.¹⁰³⁹ As discussed in Part 4.6, some form of broad community participation is vital, with a Karratha workshop response that:¹⁰⁴⁰

Having no direct native title group traditional owner input/buy in into policy is asking for problems. Decision Making Committees are clearly not adequately representing the collective [community] interest.

A resource proponent officer also commented that ‘familiarity and engagement builds allegiance’ and that providing good information, and sufficient time to digest it, can dissolve ‘dissonance between what people want ... and what they can get in reality’,

¹⁰³⁷ As discussed by Sullivan, the Harvard Project can potentially be seen in this light as promoting the use of aspects of traditional law and custom to legitimate an institution: Patrick Sullivan, ‘Indigenous Governance: The Harvard Project, Australian Aboriginal Organisations and Cultural Subsidiarity’ (Working Paper No. 4, Desert Knowledge Cooperative Research Centre, Alice Springs, 2007). More broadly, this approach is consistent with sociological neo-institutionalism as set out at n 747 and accompanying text. See also *Mantziaris and Martin’s Native Title Corporations* 325.

¹⁰³⁸ Pilbara Aboriginal Corporation Executive 21 May 2018. See also Aboriginal Community Representatives 3 May 2018.

¹⁰³⁹ Trustee Officer May and June 2018. See also Part 4.4.

¹⁰⁴⁰ Karratha Workshop 3 May 2018.

thereby increasing allegiance.¹⁰⁴¹ A greater sense of participation in the BMS may thus reduce the severity of disputes, or at least focus disputes on more productive matters such as which are the best projects to fund, rather than on how to place a family member on a decision making body. Improving communication, participation and building capacity also increases corporate/institutional knowledge and enhances the level of understanding about the things a BMS cannot do and the full range of things it *can* achieve, minimising the risk that a structure is perceived as 'broken'.¹⁰⁴² To ensure that information flow and consultation processes do not undermine the timeliness and validity of BMS decisions, there would need to be limits on the time for processes and on the extent to which process deficiencies can impact decisions made by the relevant BMS decision maker.

A related point made in Part 5.4 is that involvement of community members in the creation of BMS documents fosters allegiance. Yet, as outlined in Part 6.3.1, despite customisation of the pilot BMS documents for each Aboriginal community and negotiations with that community, there is a relatively widespread perception by Aboriginal community and corporation representatives that the BMS documents are imposed templates. This suggests that, along with capacity building, stakeholder understanding of BMS documents and why they have been fashioned as they are, could be better transferred to new stakeholder representatives over time.¹⁰⁴³

While processes are important, a BMS's ability to achieve outcomes for the Aboriginal community matters too,¹⁰⁴⁴ an assertion consistent with rational choice institutionalism. It is thus relevant that the Aboriginal community has a key role in selecting, framing and implementing the outcomes pursued by the pilot BMS (see Part 6.3.1). The pilot BMS provides for longer and shorter-term goals (eg the future fund and more immediate charitable projects, as well as direct distributions to Aboriginal community members). The pilot BMS also contains procedures, some optional, for ongoing monitoring and acquittal of funding and evaluating the use of funding.¹⁰⁴⁵ However, as outlined in Part 6.3.12, there are some deficiencies in the way that the pilot BMS processes provide for the articulation and measurement of achievement of BMS goals.

Linked to this point is the neo-institutionalist insight (Part 5.4) that organisational values and goals become more rigid over time, emphasising the importance of initial BMS goal

¹⁰⁴¹ Resource Proponent Manager 24 January 2017.

¹⁰⁴² Professional Adviser 16 November 2017.

¹⁰⁴³ See, eg, Pilbara Aboriginal Corporation Director 8 May 2019.

¹⁰⁴⁴ In the PBC context, cf *Mantziaris and Martin's Native Title Corporations* 325.

¹⁰⁴⁵ As to financial and non-financial monitoring and acquittal of funding see, eg, Nyiyaparli Charitable Trust Deed cl 6.13(b)(v), 6.14; Banjima Charitable Trust Deed cl 6.12(b)(v), 6.13. As to evaluating the use of funding, see, eg, Nyiyaparli Charitable Trust Deed cl 15.5 (trustee's annual report must report, amongst other things, on the funds spent on eligible projects and outcomes achieved), 15.7 (trustee can request a copy of an annual report from the Local Aboriginal Corporation reviewing the Local Aboriginal Corporation's performance); Banjima Charitable Trust Deed cl 13.4, 13.6.

setting. Part 7.2 thus investigates approaches that could strengthen strategic planning and goal setting and monitoring.

Additionally, the BMS's adherence to 'expectation[s] about the distribution of rights, interests and service and resource entitlement' will be relevant.¹⁰⁴⁶ In particular, the pilot BMS Charitable Trust is intended to benefit Aboriginal people who have a connection with the Pilbara region, but who are not part of the native title holder/claimant Aboriginal community. The existence of non-community people who benefit may thus reduce the *Allegiance* of the BMS, albeit that cultural tendencies to localism are counterbalanced to some extent by broader regional social networks.¹⁰⁴⁷

6.3.5 Incorporation of traditional law and custom & intercultural adequacy

As discussed in Parts 6.3.2 and 6.3.3, the pilot BMS recognises traditional law and custom in a number of ways. In particular, in relation to identifying the Aboriginal community and in relation to decision making processes, the pilot BMS adopts the 'windows approach' of providing mechanisms to support and recognise, but not codify or internalise, traditional law and custom. This helps maintain a balance between certainty and recognition of traditional law and custom, which was the key tension identified in Part 4.3 and for which the 'windows approach' was recommended in Part 5.5. Further, several Aboriginal corporation executives and trustee officers also noted that some western decision making procedure limits in BMS structures offer a safety-valve to provide Indigenous decision makers some protection against traditional law and custom claims and obligations that might be in the interests of a family and consistent with localism, but not in the interests of the broader community.¹⁰⁴⁸

In addition, the pilot BMS permits traditional mechanisms to be adopted to resolve disputes, but also provides more mainstream alternatives for formal dispute resolution. In relation to disputes or potential disputes, trustee officers and Aboriginal community and corporation representatives emphasised, in particular, that community members almost always worked out a position before a meeting was held, according to traditional decision making processes,¹⁰⁴⁹ or that those with cultural authority might call a break to a meeting or 'pull rank' to determine how the matter should be resolved, and that the broader committee or community would generally 'go with this'.¹⁰⁵⁰ This also had the result that formal dispute resolution processes were very infrequently engaged (albeit seriously debilitating disputes have manifested in BMSs in the past - see Part 4.7). In such cases traditional laws and customs could be said to function independently of formalised trust and corporate governance arrangements. This

¹⁰⁴⁶ In the PBC context, cf *Mantziaris and Martin's Native Title Corporations* 325.

¹⁰⁴⁷ Janet Hunt and Diane Smith, 'Building Indigenous Community Governance in Australia: Preliminary Research Findings' (CAEPR Working Paper No 31, 2006) 24.

¹⁰⁴⁸ Pilbara Aboriginal Corporation Executive 21 May 2018.

¹⁰⁴⁹ Trustee Officer 19 July 2018.

¹⁰⁵⁰ Trustee Officer May and June 2018. See also Pilbara Aboriginal Corporation Executive 10 May 2018; Pilbara Aboriginal Corporation Director 21 June 2018.

highlights the vital importance of communication and participation and, in particular, the importance of processes for communication to and from the Aboriginal community and for accountability to the community. As discussed above, this is an area in which the pilot BMS could improve.

Several stakeholders also suggested that those with cultural authority might be given more targeted ability to advise on or make decisions – with that targeting based on the scope of their cultural authority. For instance, land committees for different areas comprised of those with authority to speak for that land, which can then have input to decisions in relation to the relevant pieces of land.¹⁰⁵¹ The MG Corporation discussed in Part 4.3 provides an example. The pilot BMS would permit an Aboriginal community to adopt this approach, for instance, by establishing one or more advisory committees on such matters,¹⁰⁵² or by creating new corporations or charitable trusts that would be eligible to be recipients of benefits under the BMS trusts.¹⁰⁵³

Another Aboriginal community member raised a novel proposal for incorporation of traditional laws and customs to address issues with the accountability of Traditional Owner Council or Elders' Council members. Namely, this stakeholder proposed that a modified form of Elders' Council should be established to work alongside the Decision Making Committee and Local Aboriginal Corporation board, acting in a purely **advisory** capacity:¹⁰⁵⁴

That would be one step towards keeping our culture alive due to cultural representation, but also keeps Elders accountable in that if some Elders later claim a decision is not culturally appropriate, they would need to explain why this is different from the advice of their representatives on the Elders' Council.

This proposal was aimed at ensuring influence and accountability of those with cultural authority, while also alleviating some of the concerns about **Certainty**. In this regard, it is worth noting the discussion in Part 4.7 about different experiences of overlapping composition of Decision Making Committees and Traditional Owner Councils. That discussion demonstrated the risk that different Indigenous interests will try to seek political control of committees, without regard to voting based purely on technical skills or traditional authority, referred to in the case of such committees as 'popularity voting'.¹⁰⁵⁵ There may thus be scope for incorporating traditional law and custom (through an advisory Elders' Council), but without the duplication of two committees that are authorised to make decisions and can make conflicting decisions.

The pilot BMS generally appears to perform well against this consideration, although there is scope to permit more participatory information sharing and consultation processes that are likely to also be more aligned with traditional law and custom (and

¹⁰⁵¹ Pilbara Aboriginal Corporation Executive 10 May 2018. Cf Professional Adviser 31 January 2018.

¹⁰⁵² See, eg, Banjima Charitable Trust Deed Ch 12; Niyaparli Charitable Trust Deed Ch 14.

¹⁰⁵³ See, eg, Banjima Charitable Trust Deed S1 (definition of 'Community'); Niyaparli Charitable Trust Deed S1 (definition of 'Community').

¹⁰⁵⁴ Pilbara Aboriginal Corporation Director 20 June 2018

¹⁰⁵⁵ Trustee Officer 18 May 2017. Cf Pilbara Aboriginal Corporation Director 20 June 2018.

localism) and to permit a greater role for traditional structures in hosting and promoting those processes (see Part 7.1). It would also be worth considering whether separate Decision Making Committees and Traditional Owner Committees are warranted for all BMSs (examined further in Part 7.3).

6.3.6 Sensitivity to motivational complexity

In line with the recommendations in Part 5.6, the pilot BMS appears to have been drafted on the assumption that the participants will be driven by a range of motives for acting, including self-interest and including ethical and political motivation to act in the interests of close family members. In particular, the trusts require an initial professional trustee, thus providing an independent maker of, and compliance check on, decisions. This is a screening of actors technique that should have the effect of promoting other-regarding behaviour and alignment with organisational values and goals. Screening techniques are also adopted in relation to a range of other actors under the pilot BMS, generally by way of screening *out* entities or individuals that do not meet licensing, experience, solvency, character and/or independence requirements. For instance, the professional trustee,¹⁰⁵⁶ Local Aboriginal Corporation,¹⁰⁵⁷ the Investment Adviser,¹⁰⁵⁸ the Executive Office (with administration responsibilities),¹⁰⁵⁹ the Auditor,¹⁰⁶⁰ members of the Decision Making Committee¹⁰⁶¹ and the independent directors of an Indigenous-controlled trustee company.¹⁰⁶² In comparison, membership of the Traditional Owner Council has been set at a fairly inclusive level by effectively requiring the person to simply be on the register of Aboriginal community members and at least 18.¹⁰⁶³

Screening *in* of actors is employed in fewer circumstances. For instance, upon notification that the Aboriginal community wish to transition to an Indigenous-controlled trustee company, the trustee must assist to identify and train Aboriginal community members such that they have a good understanding of the trusts and have the capacity to be directors of the new trustee company.¹⁰⁶⁴ Alternatively, some non-independent directors or committee members are required to undertake governance training within a certain time of commencing as a director,¹⁰⁶⁵ which reflects lower experience requirements for the non-independent directors/committee members and some steps to enable those who would not otherwise qualify. Otherwise only very general

¹⁰⁵⁶ See, eg, Nyiyaparli Charitable Trust Deed cl 1.1 (definition of 'Eligible Trustee'), 4.2; Banjima Charitable Trust Deed cl 4.2.

¹⁰⁵⁷ See, eg, Nyiyaparli Charitable Trust Deed cl 3.8; Banjima Charitable Trust Deed cl 3.8.

¹⁰⁵⁸ See, eg, Nyiyaparli Charitable Trust Deed cl 8.3; Banjima Charitable Trust Deed cl 8.3.

¹⁰⁵⁹ See, eg, Nyiyaparli Charitable Trust Deed cl 13.1, 13.3; Banjima Charitable Trust Deed cl 11.1, 11.3.

¹⁰⁶⁰ See, eg, Nyiyaparli Charitable Trust Deed cl 20.3; Banjima Charitable Trust Deed cl 18.3.

¹⁰⁶¹ See, eg, Banjima Charitable Trust Deed S11.1(a), S11.3.

¹⁰⁶² See, eg, Nyiyaparli Charitable Trust Deed S9.2.4, S9.2.5.

¹⁰⁶³ See, eg, Banjima Charitable Trust Deed S2.2.

¹⁰⁶⁴ See, eg, Nyiyaparli Charitable Trust Deed cl 4.4(b).

¹⁰⁶⁵ See, eg, Nyiyaparli Charitable Trust Deed S9.2.4(b) (non-independent directors of Indigenous-controlled trustee company); Banjima Charitable Trust Deed S11.1(a)F (Decision Making Committee members).

motherhood statements tend to be used about assisting to encourage consultation and participation or to develop governance practices.¹⁰⁶⁶ Given the difficulties in determining the liability for decisions of the various committee members discussed in Part 6.3.2 and the narrow focus on governance training, there appears to be scope to engage in more proactive screening, particularly of persons who could be Traditional Owner Council or Decision Making Committee members, which reflects some of the difficulties in filling boards and succession planning outlined in Part 4.8. Broader training and capacity building would have cost and hence **Efficiency** implications, but may also help to bolster **Autonomy**. This approach is briefly considered further in Part 7.1.

Indeed, greater capacity building for current and potential members of committees and boards, along with greater consultation and participation by all Aboriginal community members is also likely, not only to build **Allegiance** as discussed in Part 6.3.4, but to enhance internalisation of BMS values and goals – by increasing autonomy, competence and relatedness. As noted previously, this is an area that could be improved for the pilot BMS.

The conflict of interest provisions can also be seen as screening (of actors) provisions. There are provisions relevant to a conflict of interest for members of the Decision Making Committee¹⁰⁶⁷ and very similar provisions for Traditional Owner Council members.¹⁰⁶⁸ The provisions require disclosure and potential exclusion from discussing and voting on the relevant matter. However, eligibility to be a member of the Traditional Owner Council does not require any governance training or a commitment to undertake such training after appointment, as is the case for the Decision Making Committee. It is difficult to see how members of the Traditional Owner Council would be, in those circumstances, in an appropriate position to determine whether a conflict of interest exists. Therefore, in the context of the Traditional Owner Council, the conflict of interest procedures may lack **Legal adequacy**.

Equally, there may be similar questions associated with compliance with duties of ‘good faith’, ‘proper purposes’ and ‘care and diligence’ in the context of members of the Traditional Owner Council, as required by the relevant trust deed.¹⁰⁶⁹ This potential deficiency is inextricably linked to **Autonomy**. In addition, there is a carve-out for disclosure of an interest as a member of the ‘Community’ (intended to be benefitted by the pilot BMS Charitable Trust) that is identical to that of all other members of the Community – ie an interest as a potential benefit recipient under the trusts. If construed broadly, the carve-out is likely to significantly limit the effect of the conflict of interest provisions when decisions are made about which Aboriginal community members should receive distributions and about which charitable projects should be pursued under the

¹⁰⁶⁶ See, eg, Niyaparli Charitable Trust Deed cl 3.3(a) (good governance practices), 3.4 (consultation with the Niyaparli people); Banjima Charitable Trust Deed cl 3.3(a), 3.4. See also Part 6.3.4.

¹⁰⁶⁷ See, eg, Banjima Charitable Trust Deed S11.7, S11.8.

¹⁰⁶⁸ See, eg, Banjima Charitable Trust Deed S2.5 and S2.6.

¹⁰⁶⁹ See, eg, Banjima Charitable Trust Deed S2.5.

pilot BMS Charitable Trust. Such a carve-out runs counter to the strongly expressed views about the desirability of recording potential conflicts of interest in a charitable trust setting contained in the Report on Njamal People's Trust.¹⁰⁷⁰ It would be preferable to amend the carve-out to still require recording of the potential conflict, even if the committee member may still vote.

Nevertheless, the pilot BMS documents do contain an alternative to the Njamal People's Trust Inquiry recommendation that the trustee should examine the merits of all advisory committee decisions in the case of conflicts of interest.¹⁰⁷¹ That is because the pilot BMS documents provide (where a conflict exists) for the non-conflicted members of the Traditional Owner Council or the Decision Making Committee to determine whether the conflicted member can participate on the basis of whether the conflict is sufficiently significant.¹⁰⁷² The pilot BMS trustee must, of course, still ensure that actions in response to any decisions accord with the trust deed and general law.

Screening of *options* is also adopted. Screening *out* is achieved by way of requiring multiple decision making bodies to approve certain decisions. For instance, as set out in Table 6.2, the trustee, Decision Making Committee and Traditional Owner Council must all approve the strategic plan. The trustee, Decision Making Committee, Aboriginal community and the relevant resource proponent must typically all approve a variation to the trust deeds. Figure 6.3 also highlights the relatively extensive overlap of decision making responsibilities. There are clear time and cost implications, as well as blurred responsibility, from adopting these procedures which detract from **Certainty** and **Efficiency**.

Finally, *sanctions* are also contemplated. For instance, the professional trustee has a compliance veto that means the professional trustee does not have to follow an otherwise binding decision of the Decision Making Committee if the trustee, acting reasonably, considers it is contrary to the trust deed, a sub fund agreement or to any duties of the trustee at law.¹⁰⁷³ The Decision Making Committee also has independent members with a similar compliance veto.¹⁰⁷⁴ If the professional trustee is replaced by an Indigenous-controlled trustee company, then the compliance veto is preserved as that company must have one or two independent directors, with each independent director holding a right to veto any decision on the grounds that it will or is likely to be in breach of the company's constitution, or any relevant trust deed.¹⁰⁷⁵

While such compliance vetoes clearly limit the permitted extent of self-interested behaviour by decision makers, they are likely to be used only in exceptional circumstances. Otherwise, the relationship between the directors or between the

¹⁰⁷⁰ Alan Sefton, 'Report on Njamal People's Trust' (Inquiry under Section 20 of the *Charitable Trusts Act 1962* (WA), 1 November 2018) 428-56.

¹⁰⁷¹ To be fair, this approach was suggested by the wording of the Njamal People's Trust deed.

¹⁰⁷² See, eg, Banjima Charitable Trust Deed S2.6, S11.8.

¹⁰⁷³ See, eg, Nyiyaparli Charitable Trust Deed cl 3.7(b)(iii); Banjima Charitable Trust Deed cl 3.7(b)(iii).

¹⁰⁷⁴ See, eg, Banjima Charitable Trust Deed S11.6(l).

¹⁰⁷⁵ See, eg, Nyiyaparli Charitable Trust Deed sch 9. Especially, S9.2.4, S9.2.7.

professional trustee and the Decision Making Committee may become more antagonistic than cooperative, with implications for **Certainty** and **Efficiency**. In addition, the procedures either encourage or require additional steps, such as the provision of the trustee's reasons for decision, the obtaining of legal advice, and further meetings to consider that advice.¹⁰⁷⁶ While these further steps help to retain cooperation, there are time and cost considerations.

Stronger sanctions are also contemplated by the dispute resolution procedure, which permits the independent expert to assign responsibility for costs (including out of future distribution entitlements) by reference to factors such as the degree of 'fault' or 'unreasonableness' of a disputant or by reference to whether their conduct was 'vexatious' or 'frivolous'.¹⁰⁷⁷ While there must be some doubts about the legal validity of such a provision, to the extent effective, it does appear to target stronger sanctions to the 'occasional wrong-doer' rather than to all participants and so is consistent with a complier-centred strategy that should maximise other-regarding behaviour.

This approach of targeted sanctions only for the occasional wrong-doer appears to align with stakeholder's perception of behaviour under BMSs akin to the pilot BMS. Stakeholders noted that while there are some who will try to 'get in first' (requiring the imposition of measures to mitigate this),¹⁰⁷⁸ people are in general 'very respectful of different views'.¹⁰⁷⁹ Others noted that decision makers 'feel the weight of the decisions that they have made – they don't take them lightly'.¹⁰⁸⁰ The significance of this respectfulness and consciousness of the importance of decisions is that decision makers may in fact be quite risk-averse and other-regarding to begin with and in consequence limit their decision making input if sanctions are too broadly applied.¹⁰⁸¹

Nevertheless, there is some room to include sanctioning or screening out of options by means that support other-regarding behaviour, rather than resulting in a more antagonistic relationship between the participants. For instance, requiring the members of decision making bodies to publically state, at least in that meeting, their reasons for voting in a particular way. As discussed in Part 5.6, this does not necessarily mean those reasons should be recorded and released to the broader Aboriginal community.

There is also space to better apply some of the above principles to trustees. For instance, while the screening of actors discussion covers trustees, there could be further screening of options and sanctions by way of better public justification. Part 7.7 examines in greater detail how the investment mandate could be screened out of a professional trustee's activities, how the change of trustee process could likewise be screened out and how identification and pursuit of a BMS's goals might be enhanced

¹⁰⁷⁶ See, eg, Niyaparli Charitable Trust Deed cl 3.7(c), (d), S9.2.7; Banjima Charitable Trust Deed S11.6(l).

¹⁰⁷⁷ Niyaparli CT cl 17.7(b), (c); Banjima Charitable Trust Deed cl 15.7(b), (c).

¹⁰⁷⁸ Independent BMS Facilitator 21 March 2018.

¹⁰⁷⁹ Pilbara Aboriginal Corporation Executive 21 May 2018.

¹⁰⁸⁰ Pilbara Aboriginal Corporation Director 21 June 2018.

¹⁰⁸¹ Cf Pilbara Aboriginal Corporation Director 21 June 2018.

by greater public justification and by participatory strategic planning processes that enhance internalisation of those goals by the trustee.

6.3.7 Durability

The trustee is permitted to amend the trust deeds without obtaining broader approvals to make minor and technical variations that are required to comply with any laws or to correct typographical errors.¹⁰⁸² Generally, however, the trust deeds must not be varied unless certain circumstances apply and without approvals from a range of stakeholders. In terms of circumstances, the variation must (in the case of the pilot BMS Charitable Trust) not result in the trust ceasing to be a charity; generally benefit the trust objects; and be necessary for the more effective operation of the trust (including by reference to a result of a change in the law affecting the administration of trusts, or as a result of changes in social or political conditions, or as a result of a defect in, or improvement to, the trusts).¹⁰⁸³ For approvals, the trustee must at least consult with the Decision Making Committee (and act in accordance with any Decision Making Committee binding direction), obtain the consent of the Aboriginal community and, potentially, obtain the consent of relevant resource proponent contributors.¹⁰⁸⁴ Amendments to the Local Aboriginal Corporation rule book are typically subject to far fewer restrictions,¹⁰⁸⁵ although this appears less critical as the trust deeds set out the overarching principles to be applied under the BMS and the rules that apply to making distributions to the Local Aboriginal Corporation.

Accordingly, **Durability** is satisfied reasonably well in that there is some flexibility while at the same time maintaining some robustness in limiting the extent and ease of changes to the BMS trusts. The main drawback for **Durability** is the effect of several of the decision making tie-breaker clauses that permit the trustee to act without the consent of, or consulting with, the Aboriginal community and the Decision Making Committee after two failed attempts to obtain that consent or consultation.¹⁰⁸⁶ This potentially undermines **Allegiance** in that situation, although it does aid **Certainty**.

The process of developing and applying three year strategic plans also provides a level of continuity, while accepting that some adaptation will be required as circumstances change.

However, Part 5.7 also emphasised the importance of keeping documents 'alive'. As noted in Part 6.3.1, many Aboriginal community and corporation stakeholders perceived that BMSs were imposed templates, with some stakeholders suggesting that this might be due to insufficient community knowledge of the structures and their

¹⁰⁸² See, eg, Nyiyaparli Charitable Trust Deed cl 18.1; Banjima Charitable Trust Deed cl 16.1.

¹⁰⁸³ See, eg, Nyiyaparli Charitable Trust Deed cl 18.2(a); Banjima Charitable Trust Deed cl 16.2(a).

¹⁰⁸⁴ See, eg, Nyiyaparli Charitable Trust Deed cl 18.2(b), (c); Banjima Charitable Trust Deed cl 16.2(b), (c).

¹⁰⁸⁵ See, eg, Karlka Rule Book r 21; Constitution of BNTAC r 29.

¹⁰⁸⁶ See, eg, Nyiyaparli Charitable Trust Deed cl 3.5(c), 3.7(h); Banjima Charitable Trust Deed cl 3.5(c), 3.7(h). The clauses are discussed in Part 6.2.3.

operations. Stakeholder understanding of BMS documents and why they have been fashioned as they are could thus be improved and maintained over time.

6.3.8 Simplicity

The pilot BMS is not simple. For example, each Banjima and Niyiyaparli trust deed runs to about 125 pages, with the Local Aboriginal Corporation rule book another 45-90 pages and any associated sub fund agreements (which attach additional conditions, where permitted by the trust deeds) adding yet more pages. Efforts have been made to streamline functions, with the trustee, the Traditional Owner Council and the Decision Making Committee being the same bodies for each of the Charitable Trust and the Direct Benefits Trust, although this type of practice was questioned as potentially raising conflict of interest issues in the Report on Njamal People's Trust.¹⁰⁸⁷

Nevertheless, the complexity involved does have human and capital resourcing implications. For instance, the complexity presents significant challenges for maintaining familiarity with the rules, and with the underlying reasons for those rules, for all stakeholders – eg Indigenous peoples, resource proponents and trustees.¹⁰⁸⁸ In short, as some stakeholders noted, large BMSs at least, 'are not simple ... and I don't think there's much getting around that'.¹⁰⁸⁹ Such a structure would not be appropriate for a group that does not already have some human capacity to administer such institutions or in circumstances where the funds received are likely to be low.

However, lack of **Simplicity** is not easy to address under the pilot BMS, as much of the complexity brings advantages. For instance, the ability to transition from a professional trustee company to an Indigenous-controlled trustee company necessitates a range of provisions dealing with this transition and with the lack of a need for bodies such as the Decision Making Committee, or the new need for entities like a custodian trustee, once an Indigenous-controlled trustee company is appointed. In particular, the complexity is intended to aid **Customisation** (by providing options – see Part 6.3.1) and **Autonomy** (by including bespoke measures to ensure Indigenous control over decision making, with the extent of control depending on the level of capacity of the particular community – see Part 6.3.10).

As identified in Part 4.7 many, but not all, stakeholders considered that **Simplicity** for a BMS such as the pilot BMS could be improved by combining the Decision Making Committee and Traditional Owner Council, or else cutting back the Council's role. This is explored further in Part 7.3. The Yindjibarndi Community Trust Deed (see n 938 and accompanying text), which is 'only' 100 pages long, also indicates that in circumstances where the Local Aboriginal Corporation has been operational for long

¹⁰⁸⁷ Alan Sefton, 'Report on Njamal People's Trust' (Inquiry under Section 20 of the *Charitable Trusts Act 1962* (WA), 1 November 2018) 477-81.

¹⁰⁸⁸ See, eg, Resource Proponent Manager 10 August 2017.

¹⁰⁸⁹ Resource Proponent Manager 24 January 2017.

enough to build up capacity, it may be possible to reduce some of the trust committee functions and provide for the Local Aboriginal Corporation to take on those functions.¹⁰⁹⁰ However, caution should be exercised. Much of the length reduction for the Yindjibarndi Community Trust Deed appears to have been achieved by expressing equally complex concepts in a slightly briefer and denser format, such that the actual application of the Yindjibarndi Community Trust Deed may not be much simpler than that for the pilot BMS charitable trust.

Stakeholders therefore noted that, while on the one hand **Simplicity** can be seen as 'essential', it may not be necessary to have a simple BMS if there is a strategy in place that can be distilled down to a simple plan that is understandable to people.¹⁰⁹¹ Similarly, another stakeholder stated that the key is to ensure that there is simplicity in the implementation or operation of a structure rather than in simplicity of the structure itself.¹⁰⁹² 'Translation is the key issue'.¹⁰⁹³ These comments all go to the need to ensure that there are simple implementation strategies for a complex structure, a matter considered further in Part 7.5.

6.3.9 Efficiency

The complexity of the pilot BMS and the range of entities, decision makers and functions within it suggest that establishment and maintenance transaction costs are likely to be high. There also appears to be concern about the extent of the current information costs of running the pilot BMS. For instance, the Niyiyaparli Charitable Trust Deed requires the trustee to:¹⁰⁹⁴

ensure that meetings of the Niyiyaparli People, the Decision Making Committee and the Niyiyaparli Council are convened (as to timing and number of meetings) and held in an efficient, responsible and cost effective manner *and with consideration as to whether they should be held at all*.

This reflects the view in Part 5.9 that BMSs, such as the pilot BMS have the potential for significant regularity of transactions and uncertainty about what and how transactions will be entered into.¹⁰⁹⁵ The scope of purposes pursued and entities that can receive distributions from the pilot BMS, along with some lack of clarity about liability and functions of decision makers (see Parts 6.2.2, 6.2.3 and 6.3.2) suggests that the pilot BMS does contain these features. Further, the Decision Making Committee and Traditional Owner Council, in particular, and the community development and service delivery roles of a BMS represent a degree of asset

¹⁰⁹⁰ Cf Independent BMS Facilitator 21 March 2018.

¹⁰⁹¹ Trustee Officer 28 June 2018; Resource Proponent Manager 10 August 2017.

¹⁰⁹² Professional Adviser 16 November 2017.

¹⁰⁹³ Pilbara Aboriginal Corporation Executive 21 May 2018.

¹⁰⁹⁴ Niyiyaparli Charitable Trust Deed cl 3.3(b) (emphasis added).

¹⁰⁹⁵ Which is not the same thing as third party certainty that a decision has actually been made, and which is the focus of Part 6.3.3.

specificity, that is enhanced by the geographic remoteness and dispersion of the Aboriginal communities served by BMSs such as the pilot BMS.¹⁰⁹⁶

Stakeholders particularly emphasised the transaction costs associated with decision making¹⁰⁹⁷ and with compliance activities of controlling the managers¹⁰⁹⁸ as key **Efficiency** issues under the pilot BMS. As outlined in Part 5.9, building interpersonal trust to reduce uncertainty and opportunism (eg in response to asset specificity) or putting institutional mechanisms in place are key responses. In this regard, it is important to note that the pilot BMS does include dispute resolution mechanisms and accountability procedures (albeit with some room to improve).¹⁰⁹⁹ The pilot BMS also attempts to separate strategic from operational decisions as recommended. However, Figure 6.3 and Table 6.2 demonstrate that the separation is not clean. There is material room for clarifying the responsibilities and functions of committees such as the Traditional Owner Council and Decision Making Committee and the Local Aboriginal Corporation board and this matter is discussed further in Part 7.3.

There is also scope to better develop interpersonal trust. While the pilot BMS does provide for communication with and participation in decision making by the Aboriginal community and its representatives, as already discussed, those processes could be improved, which should help with trust. Further, coordination and reporting measures could be adopted for the various decision making committees. These matters are also discussed further in Part 7.3. To the extent that stakeholders raised concerns about the cost of such measures and the extra capacity requirements (such as administrative capacity) they might raise, the Ngarluma and Gumala examples in Part 4.7 indicate the very high monitoring and enforcement transaction costs that can arise when trust is low and institutional mechanisms are insufficient. Accordingly, while it may be expensive, **Efficiency** may in fact be enhanced.

6.3.10 Autonomy

Autonomy requires that a BMS seek to empower Aboriginal community members and the community as a whole to make informed decisions concerning the BMS and the community's goals. The pilot BMS seeks to enhance **Autonomy** by providing the Aboriginal community members, or their representatives, with a wide range of decision making authority over the management, investment and distribution of BMS funds. For instance, despite the use of a professional trustee company, the Decision Making Committee can issue binding directions to the trustee as to the distribution of funds.¹¹⁰⁰ This means that individual members of the Aboriginal community potentially have the ability to make self-determining exercises of the will and that the Aboriginal community

¹⁰⁹⁶ See further Parts 5.9 and 6.3.2.

¹⁰⁹⁷ See, eg, Part 4.7; Resource Proponent Manager 24 January 2017.

¹⁰⁹⁸ See, eg, Independent BMS Facilitator 21 March 2018.

¹⁰⁹⁹ See Part 6.3.2.

¹¹⁰⁰ See, eg, Niyaparli Charitable Trust Deed cl 6.4; Banjima Charitable Trust Deed cl 6.4.

as a whole can achieve a level of self-determination at least in the areas in which the pilot BMS operates. There are some decision making limits that are imposed in aid of **Certainty** and these have been discussed above, primarily in Part 6.3.2.

There is likely to be scope to reduce some of these limits, such as the need to obtain resource proponent contributor consent to changes in investment policies,¹¹⁰¹ at least where a professional trustee is in place, since it is unlikely that resource proponents would have the expertise required to meaningfully review investment policies, such that there is no design consideration being furthered to balance the loss in **Autonomy**.¹¹⁰² However, the bigger issues are, first, that the current approach to communication and consultation relies overly on representatives and as examined in Part 6.3.4, representatives may not adequately inform and advocate the desires of their nominal 'constituents'. Accordingly, **Autonomy** could be further enhanced by greater information flow and consultation measures (see Part 7.1).

Second, an adequate understanding of the pilot BMS and of its administration seems vital to enable the exercise of free will in participating in the BMS. Capacity building supports autonomy and self-determination and has many facets and applications (see Part 4.4). At the institutional level, Indigenous institutions must be equipped with the financial capacity to meet the necessary costs associated with running a BMS, such as administrative costs. This does not appear to be a major issue for the pilot BMS, although if the Local Aboriginal Corporation receives funding only after establishment of the BMS, this may raise timing issues.¹¹⁰³ Further down, decision makers such as directors, trustees, committee members and council members must have the requisite skills to competently discharge their duties. On the ground, individual community members must possess capacity in a general sense. As noted in Part 4.1, individualised capacity-building approaches may be necessary. While targeted training about BMS governance is provided to some board or committee members¹¹⁰⁴ and general statements are contained in the trust deeds about supporting governance practices or encouraging participation,¹¹⁰⁵ the training is not comprehensive in scope or coverage and there is no express requirement that the trustee generally educate the Aboriginal community about BMS administration. This will become more important if participation is expanded beyond representatives as set out above (discussed further in Part 7.1).

The provision of a degree of flexibility in the BMS constituting documents also empowers individuals to make autonomous decisions.¹¹⁰⁶ However, as emphasised in Chapter 4, the greater complexity often required to provide flexibility can start to reduce autonomy unless measures are in place to ensure capacity to deal with that complexity. A related point is that different Aboriginal communities will have different competencies. Thus,

¹¹⁰¹ See, eg, Nyiyaparli Charitable Trust Deed cl 7.2(c)(iii); Banjima Charitable Trust Deed cl 7.2(c)(iii).

¹¹⁰² Cf Resource Proponent Manager 24 January 2017; Trustee Officer 19 July 2018.

¹¹⁰³ See, eg, Part 4.11.

¹¹⁰⁴ See, eg, Banjima Charitable Trust Deed S11.1(a)(i)F.

¹¹⁰⁵ See, eg, Nyiyaparli Charitable Trust Deed cl 3.3(a), 3.4; Banjima Charitable Trust Deed cl 3.3(a), 3.4.

¹¹⁰⁶ Trustee Officer 28 June 2018.

autonomy may mean greater support and hands-on assistance by service providers in the early stages of a BMS – for some but not necessarily all communities – but in such a way as to progressively build capacity so as to shift responsibilities to the relevant Aboriginal community and its representatives over time.¹¹⁰⁷ As noted in Part 6.3.1, the pilot BMS does provide mechanisms to progressively build capacity and organisation so that the Aboriginal community and its representatives can adopt more responsibilities over time. The option of transitioning from a professional trustee company to an Indigenous-controlled trustee company appears an important example¹¹⁰⁸ and its omission from some BMSs, such as the Banjima BMS, appears a material detraction from **Autonomy**.

Autonomy is also supported by the pilot BMS as it seeks, in a broad sense, to expand the range of options for living their lives from which members of the Aboriginal Community can choose through the BMS goals of social, economic and cultural development. For instance, the Nyiyaparli Charitable Trust is intended to pursue certain charitable purposes for the benefit of the Community, with those purposes including the ‘relief of poverty’, ‘relief of sickness or distress’, ‘advancement of education’ and ‘advancement of religion’.¹¹⁰⁹

Finally, Aboriginal community and corporation representatives noted another way of achieving **Autonomy** is to ensure that service payments go to Indigenous businesses or organisations, and one Aboriginal corporation executive advocated taking a regional approach in relation to this.¹¹¹⁰ Mandating the use of a professional trustee company potentially detracts from this approach, most particularly if it is difficult to transition to an Indigenous-controlled trustee company.

6.3.11 Equity

One way of implementing notions of inter and intra-generational equity is to require decision makers to give genuine consideration to the distribution of resources or of the conditions necessary for autonomy between members of the current generation of the Aboriginal community and also as between current and future generations. While other factors, such as traditional law and custom and the impact of the revenue-generating resource extraction activities on the native title interests of members of the Aboriginal community, would also be relevant,¹¹¹¹ genuine consideration must still be given to matters of equity such that decision makers would need to turn their minds to the issue, take relevant information into account and actually make a decision. An approach

¹¹⁰⁷ Parts 4.1 and 4.4.

¹¹⁰⁸ See, eg, Nyiyaparli Charitable Trust Deed cl 4.4.

¹¹⁰⁹ Nyiyaparli Charitable Trust Deed S2.1.

¹¹¹⁰ Pilbara Aboriginal Corporation Executive 10 May 2018.

¹¹¹¹ As noted in Part 5.11, corrective justice may require funds relating to an impact on particular native title rights to be directed to a subsection of the community, before distributive justice considerations are taken into account.

along these lines appears to be adopted for distribution policies under the pilot BMS Charitable Trust, for instance. The distribution policies are required to:¹¹¹²

- be impartial and not favour any particular sections of the community, albeit that some sections of the community may receive some benefits before other sections because of limited financial resources and recognising that different sections of the community may receive different kinds of benefits; and
- otherwise ensure that distributions are made in a way that benefits a broad cross-section of the community but without limiting the trustee's discretion as to how to balance distributions between individual, local and regional projects.

However, the requirements would protect **Equity** further if: (a) they more clearly referred to the distribution of resources (and, potentially, the conditions necessary for autonomy) in the relevant Aboriginal community, rather than just to particular trust distributions or benefits; (b) they required consideration of future generations as well as current generations.

In addition, as some Community members under the pilot BMS Charitable Trust are Aboriginal persons who are not members of the native title holding Aboriginal community, the risks posed by localism to reliance on decision maker fiduciary duties appear magnified. An additional reason for requiring decision makers to state their reasons for decisions (even if those reasons are not routinely provided to the broader Aboriginal community) may then be to provide an evidence base for external regulators, such as the ACNC, to take action in the event that such duties are breached.

While the current generation's interests are protected to some degree by participation in pilot BMS decision making, future generations are also protected by means of the future fund under the Charitable Trust (see Part 6.2.3). Most groups of stakeholders interviewed indicated that a structure such as the pilot BMS, involving a charitable trust, incorporating a future fund, plus a discretionary trust, generally worked well to promote **Equity** by way of:¹¹¹³

- financial saving for future generations (in the future fund);
- a broad range of benefits to individuals from the current generation under the discretionary trust – distributed on bases such as age or involvement in law and culture (and some trustees emphasised the importance of trust deeds explicitly requiring the distribution of monies on grounds that are 'fair, just and equitable')

¹¹¹² Nyiyaparli Charitable Trust Deed cl 6.9(d)(ii), (iii); Banjima Charitable Trust Deed cl 6.9(d)(ii), (iii).

¹¹¹³ See, eg, Trustee Officer 18 May 2017; Trustee Officer 8 March 2019; Pilbara Aboriginal Corporation Officer 12 March 2019; Pilbara Aboriginal Corporation Executive 2 May 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Executive 10 May 2018; Pilbara Corporation Executive 7 June 2018; Resource Proponent Manager 24 January 2017;. Cf Pilbara Aboriginal Corporation Director 8 May 2019.

so as to ensure that standards more attuned to need or to efforts which increase the resources to be distributed, such as age, are selected rather than kinship to the people who happen to sit on the committee that determines distributions, or the length of time for which a person has been registered as a community member who can benefit under a trust);¹¹¹⁴

- broader (benefiting people beyond the native title group) and development-focussed community projects, as well as more immediate aid or relief projects – under the charitable trust.

A capital (and potentially income) protected future fund, as discussed in Chapter 2, essentially provides an asset lock for a portion of BMS funds by restricting the use of those funds and a proportion of income earned on those funds. The intended result is that a certain capital base (defined under the pilot BMS as the ‘Target Capital Base’) be preserved so as to provide income in perpetuity. The pilot BMS charitable trust provides for such a future fund, with the Target Capital Base set so that future fund income will match the projected annual resource company contributions received over the foreseeable future,¹¹¹⁵ an example of generational neutrality.

Commentators such as Langton have highlighted the use of future funds by some communities to accumulate a portion of land use payments to create ‘intergenerational prosperity’.¹¹¹⁶ As noted above, stakeholders agreed that future funds in their experience generally worked well to ensure financial saving for future generations. In addition, trustee officers noted the use of mandated future funds minimised contention about whether funds should be spent immediately or saved, thereby freeing more time and energy for longer term strategic planning.¹¹¹⁷

Building a sufficient capital base that future generations can receive income roughly equal to the income being received by current generations would broadly accord with the sufficientarian interpretation of intergenerational justice outlined in Part 5.11. After

¹¹¹⁴ See, eg, Trustee Officer 18 May 2017; Trustee Officer 8 March 2019. Some of these bases appear more compatible with distributive justice (as noted in Part 5.11) than others. However, even involvement in law and custom may not fully reflect choices as opposed to the luck of circumstances. For example, some Aboriginal community members questioned the objectiveness of some standards, such as cultural involvement, in that cultural involvement could be interpreted in a conservative fashion, or in a more expansive fashion that takes account of changing ways of maintaining and supporting culture – such as wiki language sites: Pilbara Indigenous Corporation Director 20 June 2018. As to luck and choice in relation to distributive justice, see, eg, Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2000) 113-17; Amartya Sen, *Inequality Reexamined* (Clarendon Press, 1995) 36-8, 79-87.

¹¹¹⁵ See, eg, Nyiyaparli Charitable Trust Deed cl 10.3(a); Banjima Charitable Trust Deed cl 10.3(a).

¹¹¹⁶ Marcia Langton, ‘From Conflict to Cooperation’ (Minerals Council of Australia, 2015) 44. See also *Levin’s Observations*, 255; Marcia Langton and Odette Mazel, ‘Poverty in the Midst of Plenty: Aboriginal People, the Resource Curse and the Mining Boom’ (2008) 26(1) *Journal of Energy & Natural Resources Law* 31, 63. The future fund could also be conceived in terms of Smith’s further proposal for an additional component of compensation payments to cover intergenerational equity: Diane Smith ‘Valuing Native Title: Aboriginal, Statutory and Policy Discourses About Compensation’ (CAEPR Discussion Paper No. 222, CAEPR, ANU, Canberra) 41.

¹¹¹⁷ Trustee Officer 19 July 2018.

all, it would involve current generations receiving benefits in such a way that resources are not dissipated to the disadvantage of future generations. Future funds can thus ensure a degree of intergenerational **Equity**.

As with other BMS features there are trade-offs associated with the use of future funds. One resource proponent representative noted the potential for tension between **Autonomy** and **Equity**, where a group wishes to access its future fund now for economic development.¹¹¹⁸ However, the imperative for present economic development does have a nexus with spending on human capital to promote intergenerational equity – a potentially competing way to employ future fund monies in order to achieve intergenerational equity. The pilot BMS charitable trust deeds cater for this by permitting ‘Aboriginal Economic Development Investments’ from up to 10% of investment funds, including from the future fund.¹¹¹⁹ However, it appears that these provisions have not been used very much, potentially due to a relatively cautious culture on the part of professional trustees.¹¹²⁰ Moreover, stakeholders suggested that non-monetary benefits also need to be provided to future generations (especially maintaining and transmitting culture) and some acknowledged that the existence of a future fund may obscure this issue to some extent.¹¹²¹ This competing perspective is also reflected in the principles of intergenerational justice discussed in Part 5.11, which suggest that the current generation of Aboriginal community members should not pursue benefits that will result in the world being handed on in a lesser state to future generations of community members.

Further, as noted in Part 5.11, there are a range of possible interpretations of intergenerational justice. Some of the interpretations afford a much greater priority to those who are less well-off and even a sufficientarian interpretation may do so, depending on where the threshold of sufficiency is set and the degree of priority afforded to those below the threshold. If future generations of the relevant Aboriginal community are, on the whole, expected to be better off, then greater distribution might be justified now, rather than in the future.¹¹²²

Another challenge for BMSs such as the pilot BMS is that it appears that material gaps in wellbeing are opening up in the Pilbara between Aboriginal people who are

¹¹¹⁸ Resource Proponent Implementation Adviser 10 Aug 2017.

¹¹¹⁹ See, eg, Nyiyaparli Charitable Trust Deed cl 7.6; Banjima Charitable Trust Deed cl 7.6.

¹¹²⁰ Trustee Officer 8 March 2019; Professional Adviser 31 January 2018. Cf Pilbara Aboriginal Corporation Executive 19 March 2019.

¹¹²¹ See, eg, Resource Proponent Manager 24 January 2017, referring to the importance and on-going benefits of building human capital for the present generation; Pilbara Aboriginal Corporation Director 21 June 2018; Pilbara Aboriginal Corporation Executive 10 May 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Independent BMS Facilitator 21 March 2018. Cf Trustee Officer May and June 2018; Professional Adviser 31 January 2018.

¹¹²² Lukas Meyer and Dominic Roser, ‘Enough for the Future’ in Axel Gosseries and Lukas Meyer (eds), *Intergenerational Justice* (Oxford University Press, 2009) 219, 222-5; Yitzhak Benbaji, ‘Sufficiency or Priority’ (2006) 14(3) *European Journal of Philosophy* 327, 338-42.

benefitting from resource development and BMS opportunities and others who have not.¹¹²³

Finally, one professional adviser raised a more fundamental question about the future fund/discretionary trust/charitable trust combination. The professional adviser suggested that it may no longer be necessary to include a discretionary trust, given the changes in charity and tax law identified in Chapter 1.¹¹²⁴ If a similar degree of equity could be achieved with one less entity that would have very material **Simplicity** benefits, which would likely aid governance. However, as discussed in Parts 4.10 and 4.12, some technical risk remains for the section of the public issue and practical and technical hurdles pertain to economic development activities. Those issues would also apply even if a BMS Indigenous corporation was used in place of the charitable trust, if the corporation was also charitable. Side-stepping these issues in any material way through direct payments to community members would be a relatively radical departure from some stakeholder perspectives about the benefit of an intermediary to help manage funds, maintain relationships and achieve good governance.¹¹²⁵ It may be that the trustee of the charitable trust or the BMS Indigenous corporation could, consistently with charity status, play a funds management facilitation role,¹¹²⁶ although this would need to be investigated and would tend to reduce the **Simplicity** gains.¹¹²⁷

6.3.12 Capacity to pursue purpose

The pilot BMS contains a charitable trust, a direct benefits discretionary trust and the Local Aboriginal Corporation. The pilot BMS Charitable Trust exists for purposes not persons. As discussed under Part 6.3.10, the purposes are wide, covering a range of social, economic, health, cultural and religious matters. The Local Aboriginal Corporation is often also a charity¹¹²⁸ and so an entity with a purpose, rather than simply a profit making and distributing vehicle. Although a trust for persons not purposes, the pilot BMS Direct Benefits Trust also permits the pursuit of range of economic development goals that could not be pursued to the same extent under the Charitable Trust. Accordingly, the pilot BMS can pursue a range of purposes.

¹¹²³ John Taylor, "The RIC Report: Change in Wellbeing Indicators of Pilbara Aboriginal People: 2001 – 2016" (Commissioned Report, September 2018) 2-3.

¹¹²⁴ Professional Adviser 5 March 2019.

¹¹²⁵ See Part 2.3.

¹¹²⁶ Such a role is arguably more clearly within the type of economic development activities accepted in the promotion of commerce and relieving Indigenous disadvantage cases. See, eg, *Tasmanian Electronic Commerce Centre Pty Ltd v FCT* (2005) 142 FCR 371; *Northern Land Council v Commissioner of Taxes* (NT) [2002] ATC 5117, 5133-4 (Thomas J). And in the context of 'community service' organisations, see *FCT v Wentworth District Capital Ltd* [2011] FCAFC 42 (facilitation of banking services).

¹¹²⁷ As to the potential administrative costs of attempting to provide benefits and services to individuals rather than delivering community projects, see Professional Adviser 5 March 2019.

¹¹²⁸ BNTAC and Karika, for example, are registered charities: ACNC, *Search for a Charity* <<https://www.acnc.gov.au/charity>>.

As set out in Table 6.2 and Part 6.3.1, the pilot BMS provides an ability to articulate the precise purposes within the broad possibilities enabled by the BMS, especially by way of the strategic and annual plans and the ‘vision statement’ contained within the strategic plan. The Aboriginal community has a key role in selecting and framing the outcomes pursued by the pilot BMS through this process. However, stakeholder interviews generally suggested that annual and strategic plans developed under Pilbara BMSs akin to the pilot BMS focused on:¹¹²⁹

- BMS governance and administrative systems, along with capacity building in relation to governance and systems;
- amounts of money to spend on certain programs (eg funeral fund) and projects (eg building a retirement village) rather than on measurable outcomes; and
- only to a limited extent, broader outcomes – and when included, expressed at a fairly high level of generality.

This bears some echoes of Smith’s comments in Part 3.4 about the dangers of administrative and accountability practices becoming divorced from goals.

Some Aboriginal community and corporation representatives and their professional advisers also perceived that professional trustees were focused on easy to measure acquittals against investment income and amounts spent on activities, rather than on setting and achieving outcomes from those activities.¹¹³⁰ Indeed, one trustee officer acknowledged that this can sometimes be an issue and provided the following example:¹¹³¹

I often use this fridge analogy. Yes, people need a fridge in their home. But, if community members don’t think about what else they can buy, then next year they ask for another fridge. Each year, year after year, the trustee provides a fridge to each family. The trustee says, we’re completely compliant – we can only spend the money on charitable purposes and everyone needs a fridge. But everyone has three fridges in their houses. Why is it that the trustee is not sitting down with the families and talking to them about what they actually want to achieve and perhaps it is that the community member is coming from a welfare recipient background and the trustee is not talking about what that community member can achieve? If they did, the trustee might allocate the dollars to something much more meaningful than white goods. However, there are usually no KPIs on the trustee to do this.

These sentiments were contrary to the experience of other stakeholders.¹¹³² Further, a trustee officer also suggested that high turnover of board or committee members under

¹¹²⁹ Trustee Officer 28 June 2018; Trustee Officer May and June 2018; Pilbara Aboriginal Corporation Executive 21 May 2018.

¹¹³⁰ Pilbara Aboriginal Corporation Director 20 June 2018; Professional Adviser 31 January 2018. Also reflected in Independent BMS Facilitator 21 March 2018. Cf Pilbara Aboriginal Corporation Executive 21 May 2018; Karratha Workshop 3 May 2018.

¹¹³¹ Trustee Officer 28 June 2018.

¹¹³² Pilbara Aboriginal Corporation Executive 10 May 2018; Trustee Officer 19 June 2018. Cf Karratha Workshop 3 May 2018.

a BMS had impeded setting and tracking outcomes goals, as it had resulted in frequent changes in those goals.¹¹³³

In terms of measuring achievement of outcomes, the pilot BMS does contain procedures, some optional, for ongoing monitoring and acquittal of funding and evaluating the use of funding.¹¹³⁴ Less attention is placed on checking quality and ability when selecting the recipients of project funding, other than the applicant's previous history of compliance with conditions and, in the case of the Local Aboriginal Corporation, that it meets some minimal capacity requirements (to be the Local Aboriginal Corporation in the first place) and what it might need to properly administer a project and the efficiency and effectiveness with which it might do so.¹¹³⁵ However, the more fundamental problem is that while the Trustee's Annual Report requires the trustee to report generally on achievement of outcomes against the annual and strategic plans,¹¹³⁶ the specific foci are BMS costs, activities and distributions – not the effect of these actions – outcomes and impacts.¹¹³⁷ Part 7.2 considers how this might be improved.

Further, as discussed under Part 6.3.4, there is some scope to improve direct participation by the Aboriginal community, including in setting strategic priorities and to improve reporting on achievement of purposes – a matter elaborated in Parts 7.1 and 7.2.

It should also be noted that restrictions on the use of funds for particular purposes (as required by the use of a charitable trust and the need for some Direct Benefits Trust funds to be used for a 'wealth creation purpose', 'capacity building purpose' or 'community purpose')¹¹³⁸ potentially reduce **Autonomy**. In particular, as identified in Part 4.12, there are some practical and technical limits on the use of a charitable trust to pursue economic development. These are ameliorated to some extent by the dual use of a direct benefits trust under the pilot BMS, although as just noted, 'purposes' appear to be creeping into the pilot BMS Direct Benefits Trust too.

¹¹³³ Trustee Officer 18 May 2017.

¹¹³⁴ As to financial and non-financial monitoring and acquittal of funding see, eg, Nyiyaparli Charitable Trust Deed cl 6.13(b)(v), 6.14; Banjima Charitable Trust Deed cl 6.12(b)(v), 6.13. As to evaluating the use of funding, see, eg, Nyiyaparli Charitable Trust Deed cl 15.5 (trustee's annual report must report, amongst other things, on the funds spent on eligible projects and outcomes achieved), 15.7 (trustee can request a copy of an annual report from the Local Aboriginal Corporation reviewing the Local Aboriginal Corporation's performance); Banjima Charitable Trust Deed cl 13.4, 13.6.

¹¹³⁵ See, eg, Nyiyaparli Charitable Trust Deed cl 6.5(c). In the case of the Local Aboriginal Corporation, see, eg, Nyiyaparli Charitable Trust Deed cl 3.8 (eligibility to be the Local Aboriginal Corporation includes the requirement that the Local Aboriginal Corporation is incorporated under the CATSI Act and that it is not suffering an insolvency event), 6.8 (applications by the Local Aboriginal Corporation require the trustee to consider what is reasonably required to ensure the proper and adequate administration of the project by the Local Aboriginal Corporation and whether there are any means available to ensure that the Local Aboriginal Corporation acts more efficiently or cost effectively). Cf Banjima Charitable Trust Deed cl 3.8, 6.8.

¹¹³⁶ See, eg, Nyiyaparli Charitable Trust Deed cl 15.5(c); Banjima Charitable Trust Deed cl 13.4(c).

¹¹³⁷ See Table 6.3.

¹¹³⁸ See, eg, Yinhawangka Aboriginal Corporation, 'Yinhawangka Trust' (2018) <<https://yinhawangka.com.au/yinhawangka-trust/>>.

7. Applying the Design Considerations to Identify General Best Practice

We spoke with stakeholders about areas for potential change and examples of best practice and used the design considerations to help frame potential examples. Representatives from all groups of stakeholders strongly supported:

- Improving BMS communication and participation, including from the perspectives of **Sensitivity to motivational complexity** and **Autonomy** – as examined in Part 7.1. Indeed, this was an explicit focus of the Karratha workshop.¹¹³⁹
- Enhancing strategic planning by specifying BMS outcomes and impacts in plans (in addition to financial inputs and activity and distribution outputs), along with measuring and reporting achievement of those outcomes and impacts so as to support **Capacity to pursue purpose** – as discussed in Part 7.2.
- Reducing transaction costs arising from interactions between overlapping decision making bodies through an **Efficiency** lens of building certainty and inter-personal trust as outlined in Part 7.3. Best practice approaches to achieve this were also the explicit focus of the Karratha workshop.¹¹⁴⁰
- The use of a future fund, in conjunction with the use of a charitable trust and a discretionary trust, to achieve **Equity** (see Part 7.4), provided this better acknowledges non-monetary benefits for future generations and better permits alternative interpretations of intergenerational justice.
- Greater capacity building and otherwise improving the **Autonomy** of Indigenous community members. Although not always linked with the complexity of BMS documents, a number of stakeholders did identify a connection and these matters are considered in Part 7.5 in the context of dealing with BMS complexity and achieving the flexibility promised in theory by such complexity.¹¹⁴¹

¹¹³⁹ Karratha Workshop 3 May 2018. While positive overall, one response from the workshop did query the usefulness of **Sensitivity to motivational complexity**, but that was on the basis that benefits management ought to be a bottom up process rather than a top down process utilising design considerations, rather than a rejection of Sensitivity to motivational complexity as a relevant consideration. Conscious of the need for a bottom-up dimension to the process, the design considerations proposed place **Customisation** as the very first consideration, such that the entire process is informed by the needs and circumstances of the relevant Indigenous community.

¹¹⁴⁰ Karratha Workshop 3 May 2018. Some participants in the workshop suggested that high transaction costs arise from other BMS elements also.

¹¹⁴¹ See, eg, Professional Adviser 16 November 2017 and 3 May 2019; Pilbara Aboriginal Corporation Executive 10 May 2018; Pilbara Aboriginal Corporation Executive 19 March 2019; Pilbara Aboriginal Corporation Officer 12 March 2019.

The 'windows approach' (Part 7.6) was not extensively commented on by stakeholders, but was exemplified by the pilot BMS and appears to be an innovative response to some of the difficulties of incorporating traditional law and custom identified in Part 5.5. When presented to stakeholders as a possible best practice approach it was endorsed by interviewees from each group of stakeholders.¹¹⁴² The use of professional trustee companies (Part 7.7) was hotly debated by most stakeholders and this practice has thus been included along with some precautionary steps that can be taken to ameliorate several risks identified by stakeholders.

Thus, while the design considerations outlined in Chapter 5 enable the development of a range of best practices, including by helping formulate responses to the specific BMS issues discussed in Chapter 4, this Chapter focuses on the best practice areas expressly raised by stakeholders or else contained in the pilot BMS documents reviewed in Chapter 6.

7.1 Communication and participation

Part 4.6 highlighted issues with achieving adequate communication between the various BMS stakeholders and participation by stakeholders in BMS decisions. Yet, as noted in part 4.6, communication is critical to a BMS' ability to pursue its purposes, and therefore is a beneficial feature supporting **Capacity to pursue purpose**. In addition, some modes of communication and participation, such as general meetings or over-reliance on representative Indigenous community members on committees or boards, can affect engagement by a community with a BMS and also affect individuals' ability to exercise choices. Communication and participation is thus also central to **Allegiance** and **Autonomy**. Thus, as discussed in Chapter 3¹¹⁴³ and Chapter 5, rather than spending inordinate amounts of time designing a new representative structure, far more important are processes for communication to and from the Indigenous community, accountability to the community and participation by the community in policy decisions.¹¹⁴⁴ That is because those processes provide links to traditional decision making in the informal realm at the community level.

Sensitivity to motivational complexity provides one key lens through which communication and participation processes might be considered. **Autonomy** provides another.

The design consideration of **Sensitivity to motivational complexity** suggests that some BMS stakeholders will act in a self-regarding fashion, so as to maximise

¹¹⁴² Pilbara Aboriginal Corporation Director 8 May 2019; Pilbara Aboriginal Corporation Executive 19 March 2019; Former Aboriginal Corporation CEO & Management Consultant 14 February 2019; Professional Adviser 3 May 2019; Professional Adviser 5 March 2019; Resource Proponent Manager 19 May 2019; Trustee Officer 8 March 2019.

¹¹⁴³ See nn 261 to 263 and accompanying text.

¹¹⁴⁴ David Martin, 'The Governance of Agreements Between Aboriginal People and Resource Developers: Principles for Sustainability', in *Altman and Martin's Power, Culture, Economy* 121.

satisfaction of their individual interests. As noted in Parts 4.6 and 7.7, there is a risk and a perception on the part of some stakeholders that some professional trustees are motivated by fee arrangements and risk of liability to focus on technical compliance and service delivery rather than more ‘woolly’ consultation and participation processes. A number of participants in the Karratha workshop therefore supported the inclusion in trustee service agreements of KPIs about communication and participation – and reporting in the trustee’s annual report about satisfaction of those KPIs.¹¹⁴⁵ As there is a more direct link between the trustee’s actions and communication and participation – than achievement of outcomes such as improved health etc, there should be greater scope to incorporate such KPIs without causing mission drift or other unintended behaviour. Although not expressly raised in the Karratha workshop, logically, similar KPIs could also apply to BMS corporations and CEOs (and perhaps to BMS committee members), to the extent that those bodies or decision makers are responsible for communication and participation processes, given joint responsibility for communication and participation was suggested by most stakeholders in Part 4.6 and that BMS Indigenous corporations are likely to have a critical role, especially with increasing PBC numbers. In this regard, one Aboriginal community member noted that:¹¹⁴⁶

Professional trustees are not so good at achieving good communication as they do not know community drivers and individual circumstances so well. For that you need someone on the ground in the community.

In circumstances where it is not possible to set KPIs (perhaps because there is no service agreement in place or there is already an existing agreement) or where a voluntary approach is preferred, a voluntary charter of good conduct could be agreed between trustees, BMS Indigenous corporations and trust committee members.

To the extent that some trustees, some BMS corporation board members and CEOs and some BMS committee members might be expected to act in their individual interests, **Sensitivity to motivational complexity** also encourages a degree of separation of powers.¹¹⁴⁷ However, for BMS decision makers to operate as an effective check and balance, those decision makers need the capacity to identify and exercise their authority. This links with the autonomy-enhancing measures discussed below.

Sensitivity to motivational complexity also emphasises the importance of encouraging other-regarding behaviour and identification with organisational goals. Stakeholders noted a range of best practice approaches that they had implemented, or would like to see implemented, that would encourage such behaviour in relation to communication and participation.

¹¹⁴⁵ Karratha Workshop 3 May 2018.

¹¹⁴⁶ Pilbara Aboriginal Corporation Director 8 May 2019.

¹¹⁴⁷ Cf Karratha Workshop 3 May 2018.

Stakeholders noted, in particular, the utility of adopting communication protocols in ensuring the internalisation of the importance of consultation by stakeholders, with such protocols ensuring an agreed message, identification of responsibility for communicating the message and identifying the intended recipients.¹¹⁴⁸ The cultural appropriateness of protocols was highlighted.¹¹⁴⁹

Also of benefit, according to stakeholders, were:¹¹⁵⁰

- The adoption of coordination processes, such as having the BMS corporation CEO attend trust committee meetings and using a coordination committee, as set out in Part 7.3.
- Ensuring earlier involvement of professional trustees in drafting the BMS trust deeds.
- Having the trustee report on consultation procedures and practices, for example in their annual trust report, which amounts to a form of public justification of decisions as identified in Part 5.6.

Capacity building about the opportunities for communication and participation under a BMS as discussed immediately below, amounts to a screening in of actors and options as identified in Part 5.6. From an **Autonomy** design consideration perspective, capacity building was identified as a more bottom-up means to enhance communication, by way of enhanced knowledge of the opportunities for communication and participation under a BMS and of the checks and balances available to ensure that communication and participation take place.¹¹⁵¹ This was envisaged at several levels:

- At the community level, ensuring that all community members have a general understanding of the BMS documents and the possibility of information provision and consultation. Such an improved understanding would also help prevent disengagement by community members as a result of making suggestions not permitted by the BMS documents and to which the answer is therefore 'no'.¹¹⁵² Capacity building could occur, for instance, at the same time as community members develop their personal financial plans with the trustee/financial planners,¹¹⁵³ or at general community meetings.¹¹⁵⁴ Cost considerations and the need for some tailoring of capacity building will be relevant.
- At the level of BMS Indigenous corporation board members and executives, trust committee members and the trustee. More specific topics could be covered here, such as alternative methods for communication and participation (eg electronic

¹¹⁴⁸ Karratha Workshop 3 May 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Independent BMS Facilitator 21 March 2018.

¹¹⁴⁹ Karratha Workshop 3 May 2018.

¹¹⁵⁰ Karratha Workshop 3 May 2018.

¹¹⁵¹ Karratha Workshop 3 May 2018. See also Pilbara Aboriginal Corporation Executive 19 March 2019.

¹¹⁵² Pilbara Aboriginal Corporation Director 8 May 2019.

¹¹⁵³ Trustee Officer May and June 2018.

¹¹⁵⁴ Karratha Workshop 3 May 2018.

means, family groups as discussed below) and allocation of responsibilities (eg as between trustee and BMS corporation).¹¹⁵⁵ For example, one Aboriginal community noted that it had engaged a communications agency to advise its BMS corporation on how best to communicate with different segments of the Aboriginal community.¹¹⁵⁶

Implementing these measures should include stronger trust deed and constitutional requirements for capacity building.

In terms of implementing communication and participation strategies, stakeholders noted the utility of focus groups and review committees to obtain the input needed to review and improve BMS processes at the organisational level. Specific measures reported included having community members sit on specially formed review committees for annual plans and strategic plans.¹¹⁵⁷ A similar suggestion involves the use of 'citizen juries' or 'citizen parliaments' comprising a randomly selected group of affected community members.¹¹⁵⁸ Another proposed measure was to hold yearly or twice-yearly focus group meetings with smaller groups of Indigenous community members, such as family or clan groups or community members living in a particular geographic area. This provided the ability to discuss issues in more detail and obtain direct input on how to improve BMS.¹¹⁵⁹ In a similar vein, one stakeholder recommended holding an information day before a decision making day.¹¹⁶⁰ The desire for face-to-face forums identified by one Aboriginal director feeds into such approaches.¹¹⁶¹ The Central Land Council's 'community development approach' discussed in Part 3.1.3 provides another example.

Another means to obtain input is through the use of electronic surveys and electronic communication.¹¹⁶² As noted in Part 4.13, stakeholders indicated in interviews that they had successfully used electronic communications more generally to overcome some of the difficulties associated with geographical remoteness and dispersion.¹¹⁶³ Research in Canada indicates similar success has been enjoyed there,¹¹⁶⁴ as does more general

¹¹⁵⁵ Karratha Workshop 3 May 2018.

¹¹⁵⁶ Karratha Workshop 3 May 2018.

¹¹⁵⁷ Pilbara Aboriginal Corporation Director 21 June 2018.

¹¹⁵⁸ Professional Adviser 5 March 2019.

¹¹⁵⁹ Pilbara Aboriginal Corporation Executive 4 July 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Executive 19 March 2019.

¹¹⁶⁰ Professional Adviser 5 March 2019.

¹¹⁶¹ Pilbara Aboriginal Corporation Director 8 May 2019.

¹¹⁶² See, eg, Pilbara Aboriginal Corporation Executive 21 May 2018; Professional Adviser 5 March 2019. See further Part 4.13; Alan Sefton, 'Report on Njama People's Trust' (Inquiry under Section 20 of the *Charitable Trusts Act 1962* (WA), 1 November 2018) 284.

¹¹⁶³ See also Trustee Officer 19 July 2018; Trustee Officer 18 May 2017; Pilbara Aboriginal Corporation Executive 4 July 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Professional Adviser 31 January 2018.

¹¹⁶⁴ See, eg, Chelsea Gabel, Nicole Goodman, Karen Bird and Brian Budd, 'Indigenous Adoption of Internet Voting: A Case Study of Whitefish River First Nation' (2016) 7(3) *The International Indigenous Policy Journal* art 3.

Australian research on information technology use by Indigenous communities.¹¹⁶⁵ The Australian research indicates that Indigenous Australians have a 20% higher use of social media than the average for all Australians.¹¹⁶⁶ Facebook was also identified by a number of stakeholders as a highly effective means of communication, including in several instances, two-way communication and consultation.¹¹⁶⁷ Indeed, stakeholders noted the importance of two-way communication, especially between the BMS corporation and the trustee.¹¹⁶⁸ The use of electronic communication is also broadly consistent with the proposed CATSI Act amendments for CATSI Act corporations to record and use alternative contact details for members.¹¹⁶⁹

Of course, any such use depends upon access to telephone coverage or internet connection and appropriate technology training or experience, which may vary between communities.¹¹⁷⁰ It would also need to be culturally appropriate and tailored to the different approaches to information technology use within a community.¹¹⁷¹ Cognizance would need to be taken of privacy and security issues.¹¹⁷²

7.2 Enhanced strategic planning

BMSs are vehicles to achieve purposes as well as to invest and distribute funds, yet, as outlined in Part 4.16, planning to achieve these objectives could be improved. The **Capacity to pursue purpose** design consideration suggests that planning should involve:

¹¹⁶⁵ Aaron Corn, 'Introduction: The Indigital Revolution' in Lyndon Ormond-Parker, Aaron Corn, Cressida Fforde, Kazuko Obata and Sandy O'Sullivan (eds), *Information Technology and Indigenous Communities* (AIATSIS Research Publications, 2013) 1; Laurel Dyson and Fiona Brady, 'A Study of Mobile Technology in a Cape York Community: Its reality Today and Potential for the Future' in Lyndon Ormond-Parker, Aaron Corn, Cressida Fforde, Kazuko Obata and Sandy O'Sullivan (eds), *Information Technology and Indigenous Communities* (AIATSIS Research Publications, 2013) 9. Cf Laurel Dyson, 'Framing the Indigenous Mobile Revolution' in Laurel Dyson, Stephen Grant and Max Hendriks (eds), *Indigenous People and Mobile Technologies* (Routledge, 2015) 1, 3, 11.

¹¹⁶⁶ Bronwyn Carson, Terri Farrelly, Ryan Frazer and Fiona Borthwick, 'Mediating Tragedy: Facebook, Aboriginal Peoples and Suicide' (2015) 19 *Australasian Journal of Information Systems* 1, 3.

¹¹⁶⁷ Director Pilbara Aboriginal Corporation 21 June 2018; Pilbara Aboriginal Corporation Executive 19 March 2019; Independent BMS Facilitator 7 March 2019. Cf *ibid*.

¹¹⁶⁸ Karratha Workshop 3 May 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Executive 10 May 2018.

¹¹⁶⁹ See Part 3.1.1.

¹¹⁷⁰ Cf Chelsea Gabel, Nicole Goodman, Karen Bird and Brian Budd, 'Indigenous Adoption of Internet Voting: A Case Study of Whitefish River First Nation' (2016) 7(3) *The International Indigenous Policy Journal* art 3, 9-10; Aaron Corn, 'Introduction: The Indigital Revolution' in Lyndon Ormond-Parker, Aaron Corn, Cressida Fforde, Kazuko Obata and Sandy O'Sullivan (eds), *Information Technology and Indigenous Communities* (AIATSIS Research Publications, 2013) 1.

¹¹⁷¹ Cf Pilbara Aboriginal Corporation Executive 21 May 2018.

¹¹⁷² In the general context of electronic voting, see, eg, R Alvarez, Thad Hall and Alexander Trechsel, 'Internet Voting in Comparative Perspective: The Case of Estonia' (2009) 42(3) *Political Science and Politics* 497; Jo Saglie and Signe Seggaard, 'Internet Voting and the Secret Ballot in Norway: Principles and Popular Understandings' (2016) 26(2) *Journal of elections, Public Opinion and Parties* 155.

- articulating, in addition to financial inputs and service delivery outputs, the broader outcomes (client-specific effects) and impacts (longer-term social changes) that a BMS intends to achieve;
- measuring attainment of those desired inputs, outputs, outcomes and impacts; and
- a process to balance attainment of such goals against the investment and distribution function of BMS.

The BMS pilot structure documents investigated in Chapter 6 indicate that those BMSs do generally provide for annual and strategic plans for each BMS entity, with annual plans focused on funding inputs and activities and strategic plans focused on broader objectives. However, the pilot BMS trust deeds only mandate reviews (annually) of the annual plans, with those reviews requiring (for the trusts) detailed reporting on activities, distributions and expenditure, plus a general requirement to report on outcomes against the strategic and annual plans. Several examples of pilot BMS Local Aboriginal Corporation constitutions indicate that there are either no annual plan or strategic plan provisions, or else there are provisions that demand less detailed reporting (including as to activities and expenditure) than the trust deeds, but that there will often also be an overarching requirement to explain how the corporation objects have been advanced.¹¹⁷³ This approach reflects other two-trust BMS structures in the Pilbara.¹¹⁷⁴

7.2.1 Articulating inputs, outputs, outcomes and impacts

However, stakeholders provided suggestions for how two-trust BMS structures might better articulate outcomes and impacts. One trustee officer indicated that for BMSs for which they were responsible, a comprehensive community planning process had taken place, which resulted in one overarching community plan, with subsidiary and complementary strategic plans for each BMS entity, along with specification of outcomes and impacts.¹¹⁷⁵ For example, a short-term outcome might be: 'more people attending school' or 'more people accessing housing... [further] up the housing scale'.¹¹⁷⁶ A corporation executive of a community-controlled trustee also indicated a similar approach.¹¹⁷⁷ Some implementation plans of Canadian comprehensive regional agreements are also living examples of **Capacity to pursue purpose**, from which insight could be drawn.¹¹⁷⁸

¹¹⁷³ See, eg, Karlka Rule Book; Constitution of BNTAC rr 20-21.

¹¹⁷⁴ See, eg, the trust deeds and rule books for the BMS entities referred to in nn 889, 890, 913, 929.

¹¹⁷⁵ Trustee Officer 19 July 2018.

¹¹⁷⁶ Trustee Officer 19 July 2018.

¹¹⁷⁷ Pilbara Aboriginal Corporation Executive 4 July 2018.

¹¹⁷⁸ Aboriginal Affairs and Northern Development Canada, 'Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights' (Canada, 2014) <www.aadnc-aandc.gc.ca>; 'The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government' (Department of Indian and Northern Affairs Canada, 15 September 2010) <<http://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844>>.

A number of stakeholders referred to the importance of improving alignment of the planning processes of the various BMS entities – and understanding the different strengths and capacities of those entities;¹¹⁷⁹ and also to increasing use or proposed use of demographic and other surveys (employment and skills audits, housing surveys etc) to identify and measure progress toward specific outcomes and impacts.¹¹⁸⁰ This process was assisted by the collection of baseline socioeconomic data on Aboriginal communities in accordance with a number of land use agreements to which the Pilbara BMS related, albeit which stakeholder should bear the cost of ongoing socioeconomic surveys needs to be addressed.¹¹⁸¹ It is also demonstrated by the Regional Implementation Committee report into indicators of Aboriginal wellbeing in the Pilbara.¹¹⁸² Any such discussion would need to consider the role and responsibility of governments in collecting socioeconomic data, given that such exercises are time consuming, expensive and reflect the outcomes of many intersecting factors – a large number of which are heavily influenced by government. One stakeholder also suggested that socioeconomic and social impact surveys could be conducted alongside BMS general meetings.¹¹⁸³

Relatedly, several stakeholders emphasised the importance of acquiring capacity to undertake community development activities,¹¹⁸⁴ an issue elaborated in Part 7.5 and also of relevance to measuring attainment of outcomes and impacts, discussed immediately below.

7.2.2 Measuring attainment of inputs, outputs, outcomes and impacts

Stakeholders generally concurred that reporting against annual and strategic plans focused largely on activities, distributions and expenditure, with reporting against broader outcome goals being highly qualitative rather than based on any specific measures.¹¹⁸⁵ For example, advancing an Indigenous community's economic

¹¹⁷⁹ Trustee Officer 28 June 2018; Pilbara Aboriginal Corporation Director 20 June 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Resource Proponent Manager 24 January 2017.

¹¹⁸⁰ Former Aboriginal Corporation CEO & Management Consultant 14 February 2019; Independent BMS Facilitator 21 March 2018; Trustee Officer 19 July 2018; Pilbara Aboriginal Corporation Director 8 May 2019; Pilbara Aboriginal Corporation Executive 10 May 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Resource Proponent Social Investment Manager 22 February 2017; Karratha Workshop 3 May 2018. Other Pilbara BMSs have also used member surveys to identify needs and priorities: GAC, Annual Report 2016-17, 5 <<http://gumala.com.au/wp-content/uploads/GAC-Annual-Report-2017.pdf>>.

¹¹⁸¹ Resource Proponent Social Investment Adviser 22 February 2017; Resource Proponent Manager 10 August 2017; Independent BMS Facilitator 21 March 2018; Professional Adviser 31 January 2018.

¹¹⁸² John Taylor, "The RIC Report: Change in Wellbeing Indicators of Pilbara Aboriginal People: 2001 – 2016" (Commissioned Report, September 2018).

¹¹⁸³ Former Aboriginal Corporation CEO & Management Consultant 14 February 2019.

¹¹⁸⁴ Which might be by way of independent directors on a board, a CEO with a community development background or engaging service providers. See, eg Pilbara Aboriginal Corporation Executive 21 May 2018; Resource Proponent Manager 24 January 2017; Resource Proponent Social Investment Manager 22 February 2017.

¹¹⁸⁵ See, eg, Trustee Officer 18 May 2017; Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Executive 4 July 2018; Independent BMS Facilitator 21 March 2018. Cf Trustee Officer May and June 2018.

development might have been identified as an outcome, but the BMS had no specific measures in place to report against, such as increasing the revenues earned by Indigenous businesses from \$A to \$B. One trustee officer again indicated that their BMS did adopt some specific measures against the community plan outcomes, albeit those measures might not be overly detailed. To continue the examples in the paragraph above, more people attending school would be measured by comparing the number of students in school before and after an intervention; more people accessing housing further up the housing scale would be assessed by way of the difference in survey responses before and after a housing intervention.¹¹⁸⁶

While stakeholders suggested that greater interest was starting to be shown in more specific measurement of outcomes and impacts, particularly with the aid of demographic data, some stakeholders cautioned against over reliance on specific KPIs for reasons of cost and mission drift.¹¹⁸⁷ Mission drift raises the issue of ***Sensitivity to motivational complexity***. Even with detailed baseline socio-economic surveys and socio-economic information at the level of each individual community member (which does not yet generally exist), the more indirect and multi-causal nature of outcomes and impacts is likely to make the selection of specific KPIs very difficult. Incorrect KPIs risk incentivising individuals to act to meet KPIs so as to keep their job or receive incentive payments, rather than acting in the interests of the BMS. As discussed in relation to communication and participation in Part 7.1, procedures such as reporting could be used to help actors such as professional trustees and corporation directors internalise BMS purposes and even, at a meta-level, the need to pursue such purposes.¹¹⁸⁸ Reporting could thus cover attainment of purposes, as well as steps taken to identify purposes and measure attainment. In relation to cost, while a move to outcomes-based measurement may increase administration costs, there is significant potential to offset that cost by reducing activities and expenditure reporting, given the extensive nature of such reporting presently.

Thus BMS trust deeds and corporation constitutions should:

- More strictly require the identification of outcomes (client specific effects) and impacts (longer-term social changes) that a BMS intends to achieve, including an approach to measurement of achievement.
- Require trustees and corporations to report on steps taken to identify outcomes and impacts.
- Where necessary, be amended to reduce reporting on costs, activities and distributions and increase reporting on outcomes and impacts and on actions taken to measure such outcomes and impacts. This reporting process requirement is

¹¹⁸⁶ Trustee Officer 19 July 2018.

¹¹⁸⁷ See, eg, Pilbara Aboriginal Corporation Executive 4 July 2018; Pilbara Aboriginal Corporation Executive 10 May 2018; Independent BMS Facilitator 21 March 2018.

¹¹⁸⁸ As to the importance of performance reporting by trustees, see, eg, Alan Sefton, 'Report on Njamaal People's Trust' (Inquiry under Section 20 of the *Charitable Trusts Act 1962 (WA)*, 1 November 2018) 258.

generally recommended rather than KPIs due to the risks for mission drift and implementation costs.

As noted in Part 4.2, several Aboriginal community members and a resource proponent social investment manager argued for an individually targeted approach to delivering services and setting and measuring outcomes. Providers such as Illuminance Solutions appear to be starting to develop IT products that would enable tracking of social, economic and cultural outcomes for individual community members.

7.2.3 Balancing attainment of purpose against investment/distribution

Balancing attainment of purpose against the investment and distribution function of a BMS was not explicitly raised as an area in need of change. However, it is implicit in the desire to place a greater focus on outcomes and impacts rather than simply focussing on activity and distribution outputs. While there is no generally accepted process for balancing purpose against investment/distribution, the discussion in Part 5.6 provides some broad approaches that might be adopted.

First, it is possible to measure both purpose and investment/distribution and to do so in the same units of measurement – dollars. For example, by use of the social return on investment approach for measuring attainment of purposes. This approach also permits a better understanding of how administration costs, including of measurement and reporting, compare with the level of purpose or investment gain achieved.

Second, regulation of CICs indicates benefit in mandating the use of some assets for pursuit of purpose, rather than generating and distributing profits. The pilot BMS demonstrates how this might be done as it includes both a charitable trust (which exists for purposes) and a discretionary trust along with a requirement that a portion of land use payments must be made to the charitable trust and a portion to the discretionary trust. In addition, even some of the discretionary trust monies must be used for quasi-purposes.

Third, CIC regulation, also indicates that decision makers could be compelled to consider the purposes of an entity (as well as profit-making) and undertake steps to achieve those purposes. By including a charitable trust and by including quasi-purposes for some discretionary trust payments, the pilot BMS does require decision makers to consider purposes. However, the discussion in Parts 7.2.1 and 7.2.2 indicates that requirements to identify, measure attainment of and report on attainment of purposes, could be better incorporated into BMS documents. In line with the B Corp example of independent monitoring of reporting, an independent person could also be appointed to check on reporting and to provide an overall BMS report on how the various BMS bodies are collaborating to achieve BMS purposes (see Part 7.3). The auditor role under the pilot BMS provides a potential template, although, as noted above, the scope of reporting and of the entities to which the audit relates, is materially narrower than proposed in this Chapter 7.

Finally, as a simple tool to aid balancing, decision makers should have a copy of the BMS's (or their entity's) mission statement and strategic goals with them at all meetings so that they are prompted to think about how decisions fit with the mission and goals. As expressed by one stakeholder:¹¹⁸⁹

My organisation used to ensure that all participants had a copy of the vision and mission statement at every board and community meeting. Then, whenever a question was being discussed, the decision makers could ask: 'how does that question relate back to these vision and mission statements?'

7.3 Overlapping decision making bodies – building certainty and inter-personal trust

The delays and expenses caused by overlapping decision making bodies squarely raise the consideration of **Efficiency**. Part 5.9 suggested that efficiency can be furthered by improving certainty via institutional mechanisms or increasing inter-personal trust. Reducing 'asset specificity', essentially the degree of specialisation of investments in human skills and other assets, is largely disregarded due to the unique circumstances of each Indigenous community, although some reduction could be achieved if template BMS documents were used for Indigenous communities in comparable circumstances.¹¹⁹⁰

A number of trustee officers and Aboriginal corporation executives emphasised approaches that reflect the predictions of transaction cost efficiency, being the importance of building joint processes and mutual trust between the various decision making bodies. One trustee officer commented:¹¹⁹¹

My biggest tip is building trust. This is not necessarily about how a role is described/delineated. It is about making processes predictable and transparent, everybody has information, bring[s] independence and put[s] all cards on the table... It is also about building personal relationships between members.

Stakeholders identified a range of practical measures. One range of measures related to enhanced coordination and communication so as to increase certainty and generate interpersonal trust. For example, in respect of strategic planning, some stakeholders noted the utility of jointly developing one community plan with all individual entity strategic and annual plans and budgets then a sub-set of the overarching community plan.¹¹⁹² Some stakeholders also emphasised the importance of reporting back to a coordinating

¹¹⁸⁹ Pilbara Aboriginal Corporation Director 8 May 2019. See also Former Aboriginal Corporation CEO & Management Consultant 14 February 2019.

¹¹⁹⁰ As to the benefits and detriments of using 'template' documents in this fashion, see, eg, *Levin's Observations*, 246.

¹¹⁹¹ Trustee Officer 19 July 2018.

¹¹⁹² Karratha Workshop 3 May 2018; Trustee Officer 19 July 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Executive 10 May 2018; Pilbara Aboriginal Corporation Executive 5 July 2018.

officer or the community on how the entities as a whole are tracking against this plan.¹¹⁹³ Others noted the importance of information flows to ensuring coordination and trust.¹¹⁹⁴

In respect of decision making processes more broadly, some stakeholders noted that it is beneficial to have trust committees invite the BMS Indigenous corporation CEO to attend committee meetings and to provide an update on BMS Indigenous corporation activities as an agenda item.¹¹⁹⁵ Likewise, it can be useful to establish a coordination committee comprising members of each decision making body, such as the BMS corporation CEO and board chair, chair of the Traditional Owner Council and chair of the Decision Making Committee.¹¹⁹⁶ Other stakeholders referred to holding joint trust committee and BMS Indigenous corporation board meetings at least 2 to 4 times per year.¹¹⁹⁷ Others referred to holding back-to-back corporation and committee meetings so that circumstances do not change between meetings and so that information can more readily be transferred from one decision making body to another.¹¹⁹⁸ Some stakeholders also suggested ensuring the same composition or cross-over in membership between different decision making bodies to reduce the chances of divergence in decisions.¹¹⁹⁹ However, this raises the risk of loss of separate functions, with reduced certainty,¹²⁰⁰ and the type of takeover of function that occurred in the Gumala Foundation case example (Part 4.7).

Other measures involved changing or clarifying the functions of decision making bodies. As discussed in Part 4.7, many stakeholders were in favour of merging the Decision Making Committee and Traditional Owner Council, or else materially reducing the Council's role. This would likely also aid *Simplicity*. However, as noted in Part 5.9, there are advantages in complex organisations to separating strategic from operational decisions so that those at the strategic level have the mandate and time for long-term planning and monitoring. Merging the Decision Making Committee and Council increases the risk that the combined body may become too focussed on operational matters. It may be preferable to merely reduce the role of the Council. For example, perhaps the Council should only have a role in reviewing the strategic plan and consenting to a change of trustee or change of the trust deeds, not to finalisation of distribution, accumulation or investment policies, assuming that those policies would have to be created in accordance with the strategic plan in any event. Replacing the Decision Making Committee with the BMS corporation is another approach that has been

¹¹⁹³ Trustee Officer 28 June 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Executive 10 May 2018; Pilbara Aboriginal Corporation Officer 12 March 2019.

¹¹⁹⁴ See, eg, Independent BMS Facilitator 21 March 2018; Trustee Officer 19 July 2018; Karratha Workshop 3 May 2018; Aboriginal Community Representatives 3 May 2018.

¹¹⁹⁵ Karratha Workshop 3 May 2018; Pilbara Aboriginal Corporation Executive 21 May 2018. Cf Pilbara Aboriginal Corporation Executive 10 May 2018.

¹¹⁹⁶ Trustee Officer May and June 2018; Pilbara Aboriginal Corporation Executive 21 May 2018.

¹¹⁹⁷ Trustee Officer 19 July 2018; Karratha Workshop 3 May 2018; Pilbara Aboriginal Corporation Executive 10 May 2018. Cf Independent BMS Facilitator 7 March 2019.

¹¹⁹⁸ Trustee Officer 28 June 2018; Independent BMS Facilitator 21 March 2018.

¹¹⁹⁹ Trustee Officer 28 June 2018.

¹²⁰⁰ See, eg, Independent BMS Facilitator 21 March 2018.

suggested, so that the 'Decision Making Committee' function is then supported by an executive office that is independent of the trustee because the trustee's compliance role will sometimes put it in a conflict of interest with the Decision Making Committee.¹²⁰¹

This suggestion reflects the very significant increase in native title determinations and PBC numbers between the mid-2000s, when structures akin to the Pilot Structure were developed, and the present. As PBCs are now more common, there should be less need to create a new decision making body, provided the relevant PBC has sufficient capacity.¹²⁰² Other interviewees suggested a preference for BMS trusts focussed on asset protection and investment matters and PBCs focussed on management of native title and potentially cultural, social and economic development matters.¹²⁰³ Or else, the trusts adopting a role akin to that of grant-making philanthropic foundations.¹²⁰⁴ This type of approach would see a reduced role for the trusts and an enhanced role for the BMS Indigenous corporation, such as under the Noongar Settlement BMS or the Canadian Innuialuit structure.¹²⁰⁵ To an extent, the Yindjibarndi BMS discussed in Part 6.2.3 also provides an example.

A more radical approach might be to devolve many of the operational functions of the Decision Making Committee to subgroups within a community, such as family or clan groupings, which would be consistent with the Part 7.1 discussion about attempting communication and participation at such local levels.¹²⁰⁶ From the perspective of **Efficiency**, the benefit of this approach is that localism is likely to mean high levels of personal trust at the local level and hence more efficient functioning of the family or clan groupings. One possible way to achieve this would be for the BMS to allocate funds to each family or clan grouping to pursue their local plans, in accordance with a formula for dividing the funds over time.¹²⁰⁷ However, the MG Corporation example (Part 4.3, acknowledging that it does not involve extensive delegation of spending authority to dawangs),¹²⁰⁸ suggests there should be caution in balancing these gains against the potential for high governance demands and administrative costs from the creation of local level decision making bodies.

More generally, stakeholders concurred that it is important to clearly define the role and code of conduct for each decision making body, which is something that could often be

¹²⁰¹ Professional Adviser 31 January 2018; Pilbara Aboriginal Corporation Executive 19 March 2019.

¹²⁰² See, eg, Pilbara Aboriginal Corporation Executive 19 March 2019; Professional Adviser 5 March 2019. Cf Professional Adviser 3 May 2019; Pilbara Aboriginal Corporation Officer 12 March 2019.

¹²⁰³ Professional Adviser 5 March 2019; Pilbara Aboriginal Corporation Officer 12 March 2019.

¹²⁰⁴ Pilbara Aboriginal Corporation Director 21 June 2018.

¹²⁰⁵ As to the Noongar Settlement BMS, see Government of Western Australia, *South West Native Title Settlement - Settlement Package* (13 March 2018) <<https://www.dpc.wa.gov.au/swnts/Settlement-Package/Pages/default.aspx>>.

¹²⁰⁶ See n 1159 and accompanying text.

¹²⁰⁷ Thank you to one of our anonymous reviewers for raising this suggestion.

¹²⁰⁸ As to the very limited delegation of authority to dawangs, see, eg, Sarah Prout Quicke, Alfred Michael Dockery, Aileen Hoath, 'Aboriginal Assets? The Impact of Major Agreements Associated with Native Title in Western Australia' (Report, 2017) 57.

improved upon.¹²⁰⁹ One Aboriginal community member noted that ‘It’s all about accountability and clearer expectations help accountability’.¹²¹⁰ Reducing the role of the Council might also help to clearly define the functions of each decision making body as it would reduce the extent of overlapping Decision Making Committee and Traditional Owner Council functions (see Part 6.2.3).

Stakeholders also concurred that encouraging more community members to nominate for boards or committees (eg due to greater capacity building to enable people to feel comfortable joining a board or committee or by taking succession planning steps as canvassed under Part 4.8) could be a useful strategy provided that the costs of training are kept in mind.¹²¹¹ Creating a pool of additional committee members in this way should ensure greater certainty due to the lower likelihood that a committee member will act opportunistically because they know that they can be replaced.¹²¹²

In addition, stakeholders suggested several reporting measures. For example provision of progress reports on policy implementation (effectiveness and extent of use of policies) to all decision making bodies, along with information from community member telephone calls to a member service centre. Another option identified was appointing an independent person to report to the community on how well the various decision making bodies have coordinated their activities and are tracking against the community plan.¹²¹³ It was suggested that such a person could be appointed by the BMS Indigenous corporation in the same way that the corporation appoints an auditor. Likewise, where the trustee is required to appoint an auditor to report annually on BMS trust performance, as is the case under the pilot BMS documents, the trustee could appoint an independent person to report on coordination and achievement of outcomes.

The final category of measures referred to by stakeholders relates to dispute resolution. Some stakeholders identified the need for robust dispute resolution processes,¹²¹⁴ while others suggested, as discussed in Part 6.3.2, that while formal dispute resolution processes existed under BMSs such as the pilot BMS, they were infrequently used and, were they were used, were not particularly effective in bringing disputes to a quick conclusion. Accordingly, it may be that greater resources need to be allocated to existing dispute resolution processes. One example would be for BMS stakeholders to develop and adopt a code of conduct, such as the charter of good conduct referred to in Part 7.1. Another example consists of the various interpersonal trust creation measures discussed above, that might generate greater acceptance of

¹²⁰⁹ Karratha Workshop 3 May 2018; Professional Adviser 31 January 2018; Pilbara Aboriginal Corporation Director 20 June 2018; Pilbara Aboriginal Corporation Executive 5 July 2018.

¹²¹⁰ Pilbara Aboriginal Corporation Director 20 June 2018.

¹²¹¹ Karratha Workshop 3 May 2018; Independent BMS Facilitator 7 March 2019.

¹²¹² Cf Thanh-Bing Phun, ‘Using Freelancers and In-house Employees in Computer Programming: A Transaction Cost Perspective’ (2nd International Conference on Management, Economics and Social Sciences, June-July 2012, Bali) 80, 82.

¹²¹³ Trustee Officer 28 June 2018. Cf Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Officer 12 March 2019.

¹²¹⁴ Trustee Officer 28 June 2018.

the proposed dispute resolution processes and less dispute about whether a particular process is legally mandatory or not.¹²¹⁵

Adequate and timely funding for the BMS Indigenous corporation (the issue raised in Part 4.11) will be critical to its ability to participate in many of the certainty-enhancing institutional processes set out above.¹²¹⁶ There may thus need to be some core guaranteed funding for the BMS Indigenous corporation, especially where it is a PBC with separate statutory responsibilities, in order to create a degree of stability and certainty.

7.4 Equity and the use of a future fund

The future fund discussed in Part 6.3.11 is a best practice approach to ensuring intergenerational equity. However, as noted in that Part, there are some challenges that it poses in relation to monetary versus non-monetary benefits for future generations and to the adoption of alternative interpretations of intergenerational justice that more highly prioritise those in need.

One potential way to deal with these challenges while still maintaining a future fund is to give consideration to whether future fund investments ought to incorporate some scope for social impact investment. An Aboriginal community member provided the following example:¹²¹⁷

My community purchased a building. My thinking at the time was that it was not a good financial investment, but that it would have cultural returns – a building in the centre of town as a base for the community. Looking back ten years, I fully support it now. The building is extensively used as a meeting spot, for telephone calls, preparing resumes, printing, obtaining ID documents. It is a community centre.

Another example is the acquisition and redevelopment of the Roebourne Victoria Hotel by the Yindjibarndi People and Yindjibarndi Aboriginal Corporation, so as to provide a commercial venture and community space, including offices, a café, a cultural centre, library and visitor services.¹²¹⁸ The redevelopment included extensive employment of Yindjibarndi People and other Indigenous community members.

As discussed in Part 6.3.11, the pilot BMS charitable trust deeds permit a form of social impact investment in the form of 'Aboriginal Economic Development Investments', but it appears that they have only had limited use, possibly due to conservatism on the part

¹²¹⁵ Pilbara Aboriginal Corporation Executive 5 July 2018. As to the need for resourcing and the use of codes of conduct, cf Toni Bauman, 'Final Report of the Indigenous Facilitation and Mediation Project' (Report No. 6, AIATSIS, 2006) 29-36; Professional Adviser 31 January 2018.

¹²¹⁶ See especially Pilbara Aboriginal Corporation Officer 12 March 2019 and cf Part 4.11.

¹²¹⁷ Pilbara Aboriginal Corporation Director 8 May 2019.

¹²¹⁸ Alicia Perera, 'Roebourne's Victoria Hotel Redevelopment Reaches Practical Completion' *The West Australian* (online), 25 January 2019 <<https://thewest.com.au/news/pilbara-news/roebournes-victoria-hotel-redevelopment-reaches-practical-completion-ng-b881073905z>>.

of trustees, but perhaps also due to the risk tolerance of some communities.¹²¹⁹ That conservatism reflects the fact that social impact investing does raise risks for asset protection and hence **Legal adequacy**. However, the best practice suggestions for strategic planning (Part 7.2.3) should assist in balancing pursuit of purpose and pursuit of monetary returns.

A related approach, while not social impact investment, might involve quarantining a portion of the future fund to be used for country and culture, such that the next generation does not receive simply cash, but cash which is to be used for non-monetary benefits.¹²²⁰

In addition, the presence of a discretionary trust and money held in the charitable trust outside the future fund also permits distributions to those in need in the current generation and the current development of human capital.¹²²¹ It is worth noting though, that some Aboriginal community and corporation representatives, trustee officers and professional advisers indicated that while the charitable trust enabled development projects (eg in education or culture) that would also result in improved social, economic and cultural circumstances for future generations, at least initially there was a tendency for development projects to be pursued to a much lesser extent than immediate aid or relief of a more temporary nature.¹²²² Various reasons were proposed as partly responsible for this, including: decision making bodies often being dominated by older members of Indigenous communities (and obviously not comprising unborn future generations);¹²²³ the difficulty in defining and quarantining financial hardship and health hardship funds;¹²²⁴ trustees being assessed largely by community members on their ability to deliver services and thus being incentivised to distribute immediate funds;¹²²⁵ and greater scope for disagreement about precisely what longer term developments should be pursued.¹²²⁶ The issue was also more pronounced where many current members of a native title group are in necessitous circumstances.¹²²⁷ While there appear to be a range of contributing factors, improved strategic planning should also help to support greater pursuit of development projects.

As discussed in Part 6.3.11, there may also be scope to consider replacing some or all of the discretionary trust's functions through an expansion of the charitable trust's role and direct payments to individual community members. This would require resolution of technical and practical issues with economic development and investigation of the technical and practical bounds on the trustee of the charitable trust or the BMS

¹²¹⁹ Cf Pilbara Aboriginal Corporation Director 8 May 2019.

¹²²⁰ Professional Adviser 5 March 2019.

¹²²¹ Cf Resource Proponent Manager 10 August 2017.

¹²²² See, eg, Trustee Officer 18 May 2017; Pilbara Aboriginal Corporation Executive 5 July 2018; Pilbara Aboriginal Corporation Director 21 June 2018; Professional Adviser 16 November 2017.

¹²²³ Pilbara Aboriginal Corporation Executive 5 July 2018.

¹²²⁴ See, eg, Pilbara Aboriginal Corporation Executive 10 May 2018; Pilbara Aboriginal Corporation Executive 5 July 2018; Pilbara Aboriginal Corporation Director 21 June 2018.

¹²²⁵ Professional Adviser 31 January 2018.

¹²²⁶ See, eg, Resource Proponent Manager 24 January 2017.

¹²²⁷ See, eg, Pilbara Aboriginal Corporation Executive 5 July 2018.

Indigenous corporation playing a funds management facilitation role for the funds paid directly to community members.

7.5 Dealing with complexity in aid of achieving flexibility

Chapter 4 identified that while many Pilbara BMSs permit significant flexibility in recognition that every community, family and individual is different, in practice much of such **Customisation** is lost due to stakeholders' difficulties in dealing with the complexity of BMS documents.

Autonomy is one lens that can be used in thinking about how to improve BMS performance against the consideration of **Customisation**. **Autonomy** suggests that BMSs ought to involve some complexity in providing an adequate range of choices, but that steps should also be taken to ensure that Indigenous community members individually and as a whole have the capacity to make those choices. As phrased by one Aboriginal corporation executive: '[t]he BMS documents do not do a good enough job of setting out what can be done'.¹²²⁸ Stakeholder interviews and the literature discussed in Chapters 3 and 4 indicate three general approaches that can be viewed as best practices.

First, capacity building plays a key role. Capacity building at the community and at the committee/board level has already been discussed in Part 7.1 in relation to communication and participation practices and that discussion is applicable to capacity building about BMS choices.

Second, greater investment could be made in operational guides and procedures for implementing the BMS structure. Broadly applicable implementation suggestions included:

- An operations manual or a series of operations guides for BMSs.¹²²⁹ A compliance matrix (as a cut down version of a full operations manual) was also suggested.¹²³⁰ However, any such manual needs active and on-going support such that it is part of everyday activities, otherwise it has the potential to be ignored.¹²³¹
- Regular fora for BMS officers and stakeholders (in relation to one BMS and as between multiple BMSs) to meet and share implementation experience.¹²³²

¹²²⁸ Pilbara Aboriginal Corporation Executive 10 May 2018.

¹²²⁹ Professional Adviser 31 January 2018; Independent BMS Facilitator 7 March 2019; Pilbara Aboriginal Corporation Executive 21 May 2018. See also Pilbara Aboriginal Corporation Director 20 June 2018.

¹²³⁰ Pilbara Aboriginal Corporation Director 8 May 2019.

¹²³¹ Cf Pilbara Aboriginal Corporation Director 8 May 2019.

¹²³² Karratha Workshop 3 May 2018; Pilbara Aboriginal Corporation Executive 21 May 2018.

- Ensuring that professional trustee terms of engagement appropriately cover desired activities and trustee reporting.¹²³³

Examples of more specific stakeholder suggestions included:

- Communications and meetings protocols to assist with Issue 6 – Communication and Participation and also with alignment of meetings and information flows to help with Issue 7 – Overlapping decision making bodies.¹²³⁴
- An organizational chart and/or role descriptions setting out roles and responsibilities to assist with Issue 7 – Overlapping decision making bodies.¹²³⁵ Other stakeholders put greater emphasis on relationship building than formal documents.¹²³⁶
- Templates and guidance for developing strategic plans and measures, along with a monitoring framework.¹²³⁷

Such operational guides and procedures can affect the scope of and motivation for action of BMS stakeholders and so should be drafted with a view to **Sensitivity to motivational complexity** and the role of trust and uncertainty under **Efficiency**. However, an overarching objective of developing such guides and procedures should be included in the BMS trust deeds and corporate constitutions.

Third, several stakeholders proposed a greater focus on purchasing, partnering with or building up specialist expertise on matters fundamental to operating a BMS, such as community development expertise.¹²³⁸ This might include support in constituent document service provider provisions or a constituent document mandate for the establishment or membership of coordinating bodies. It reflects the concerns about capacity building and siloing examined in Parts 4.4 and 4.19. Of course, the **Efficiency** reasons (uncertainty and asset specificity) for using a BMS rather than the open market will pose some limits (Part 5.9). Nevertheless, stakeholder suggestions about how to incorporate such expertise included:¹²³⁹

- Greater cooperation with government, especially in areas where government has experience or advantages. For instance, cooperating with the Department of Human Services and the Department of Social Services in making payments

¹²³³ Professional Adviser 31 January 2018; Independent BMS Facilitator 21 March 2018; Karratha Workshop 3 May 2018.

¹²³⁴ Independent BMS Facilitator 21 March 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Executive 4 July 2018.

¹²³⁵ Independent BMS Facilitator 21 March 2018; Pilbara Aboriginal Corporation Director 20 June 2018; Pilbara Aboriginal Corporation Executive 5 July 2018.

¹²³⁶ See, eg, Trustee Officer 19 July 2018; Pilbara Aboriginal Corporation Executive 10 May 2018.

¹²³⁷ Professional Adviser 31 January 2018; Pilbara Aboriginal Corporation Executive 21 May 2018.

¹²³⁸ See nn 677 to 678; Pilbara Aboriginal Corporation Officer 12 March 2019.

¹²³⁹ Stakeholder references already included in Part 4.19 are not repeated below.

and providing member services to Indigenous community members.¹²⁴⁰ One Aboriginal community member encapsulated the solution to siloing of government/BMS/NGO service delivery through the lens of BMSs as coordinators of a 'wrap-around service' for community members:¹²⁴¹

The [BMS] should work in partnership with others to help solve problems. It should be a wrap-around service in that it is an avenue to send people out to other relevant service providers. It coordinates the service providers who can help.

- Purchasing services from or jointly pursuing goals with NGOs, especially those with experience in addressing health, education and related issues.
- Greater knowledge sharing and maintenance amongst and by all stakeholders, including resource proponents. Current difficulties appear partly due to issues with communication processes and partly to loss of corporate/institutional knowledge and capacity (due to downsizing and turnover of staff) at resource proponents and other stakeholders.¹²⁴² Thus, the communications proposals in Part 7.1 and the communications protocols identified in this Part 7.5 would help, as would the provision of resources and systems by all stakeholders to retain corporate knowledge. The holding of a BMS forum in Karratha in May 2018, facilitated by Rio Tinto, also provides an example of a process to help improve knowledge sharing interactions. A BHP stakeholder also highlighted the prospects of greater cooperation in tackling particular issues by collaborating with the broader social impact programs of resource proponents.¹²⁴³
- Greater cooperation by BMSs and Aboriginal organisations and communities across the Pilbara. This is particularly important given the frequently high geographical remoteness and dispersion of Aboriginal communities (see Part 4.13). For example, the use of a regional body or committee to ensure that BMS corporation CEOs meet on a regular basis to discuss shared priorities, such as shared dialysis machines for the Pilbara.¹²⁴⁴ Another suggestion was that Pilbara BMSs could jointly fund a single member services unit for all Pilbara Aboriginal communities, to reduce administration costs and more holistically address concerns about 'double-dipping'.¹²⁴⁵ The synergies are potentially large, with one stakeholder estimating that in the next 10 years Pilbara BMSs would be administering more than \$3 billion of funds.¹²⁴⁶

¹²⁴⁰ Professional Adviser 31 January 2018.

¹²⁴¹ Pilbara Aboriginal Corporation Director 21 June 2018. See also Pilbara Aboriginal Corporation Executive 21 May 2018.

¹²⁴² Independent BMS Facilitator 21 March 2018; Professional Adviser 3 May 2019. Cf Resource Proponent Manager 10 August 2017.

¹²⁴³ See, eg, Resource Proponent Social Investment Manager 22 February 2017.

¹²⁴⁴ Pilbara Aboriginal Corporation Director 20 June 2018.

¹²⁴⁵ Pilbara Aboriginal Corporation Director 21 June 2018. See also Trustee Officer May and June 2018.

¹²⁴⁶ Pilbara Aboriginal Corporation Executive 4 July 2018.

- Greater cooperation with other Indigenous communities and organisations beyond the Pilbara region.
- Appointment of independent directors with the relevant expertise to a BMS corporation board.¹²⁴⁷
- Capacity building of specialist expertise by way of purchasing services in the short term (eg IT assistance, trust administration) but with service providers providing services in such a way as to progressively build capacity so as to shift more of their responsibilities to the Indigenous community and its representatives over time.¹²⁴⁸ For instance, this could include moving from a professional trustee company to an Indigenous community-controlled trustee company. In this regard, one Aboriginal corporation executive stated that every agreement with a service provider should have a component of training for community members, for instance by employing community members.¹²⁴⁹
- The use of a professional trustee company, as discussed in Part 7.7, is potentially an example of the above purchasing of expertise in the short term with a view to building capacity within the BMS in the longer term.
- Ensuring that there is a facilitation framework under the BMS so that community and committee members can raise ideas for BMS projects or BMS administration in such a way that there is support in formulating and testing the idea, so that it is contextualised and has an evidence base. Not just ‘people plucking ideas out of the air’.¹²⁵⁰

7.6 Windows approach

The ‘windows approach’¹²⁵¹ to incorporating Indigenous law and custom in BMSs is a beneficial feature supporting both ***Incorporation of traditional law and custom & intercultural adequacy*** and ***Certainty***. The ‘windows approach’, permits recourse to traditional law and custom for decision making under the BMS, but does so in a way that does not codify the rules of traditional law and custom in the BMS documents, thus permitting law and custom to continue to evolve. However, it is a more structured approach than an unfettered ability to make determinations by way of an undefined concept of ‘traditional law and custom’, which would otherwise raise the difficulty of trying

¹²⁴⁷ See nn 443 to 444 and accompanying text.

¹²⁴⁸ Trustee Officer 28 June 2018; Trustee Officer May and June 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Executive 10 May 2018; Pilbara Aboriginal Corporation Director 21 June 2018; Pilbara Aboriginal Corporation Executive 4 July 2018; Professional Adviser 31 January 2018; Resource Proponent Manager 24 January 2018.

¹²⁴⁹ Pilbara Aboriginal Corporation Executive 10 May 2018. Cf Trustee Officer 28 June 2018; Pilbara Aboriginal Corporation Executive 19 March 2019.

¹²⁵⁰ Pilbara Aboriginal Corporation Executive 19 March 2019.

¹²⁵¹ *Mantziaris and Martin’s Native Title Corporations* 309.

to obtain an authoritative declaration of laws and customs and the issue of timeliness of decisions. Instead, the windows approach provides an Indigenous community, or committees such as a Traditional Owner Council or Decision Making Committee, with the option of adopting traditional decision making processes. But in circumstances where the trust deeds or BMS Indigenous corporation constitution also provide a mechanism for recognising the selected traditional decision making process¹²⁵² and support for the implementation of that decision making process. Limits are also often imposed on the duration of the traditional decision making process.

The BMS pilot structures provide two practical examples of how the windows approach can be applied in practice. The first relates to the identification of the Aboriginal people comprising the relevant native title holders or claim group. Namely, the BMS contemplates the use of a 'Register of [The Aboriginal Community] People', which represents the native title claimants or holders from time to time.¹²⁵³ However there is no codification of the traditional laws and customs for member identification. Instead, administrative support is provided by way of the BMS Indigenous corporation's responsibility for maintaining and updating the register. For example, under Karlka's rule book inclusion on the relevant register is to be determined by the Karlka directors based on (i) any relevant court determination that a person is a Nyiyaparli Person; (ii) otherwise, in accordance with a decision of the current Nyiyaparli native title holders or claimants made by way of a traditional decision making process; and (iii) in the absence of the first two methods, Karlka can request and act upon the advice of the Nyiyaparli native title representative body or solicitor on the record for the Nyiyaparli claim.¹²⁵⁴ Accordingly, a register system is used, but unless a court determination is made, there is no codification of the traditional laws and customs for member identification. Instead, administrative support is provided, for instance, by way of Karlka's responsibility for maintaining and updating the register; traditional laws and customs are recognised and a mechanism is provided to translate a traditional decision into a legally recognised form. In addition, **Certainty** is assisted by Karlka's ability to act in the absence of a decision made in accordance with traditional law and custom.

The second practical example of the windows approach under the pilot BMS relates to general decision making processes. As outlined in Part 6.2.3, an 'Agreed Decision Making Process' is contemplated for Aboriginal community decisions which permits the adoption of traditional decision making processes and also provides administrative support for the holding of meetings and the recording of decisions. Traditional Owner Council and Decision Making Committee decisions are also typically made by consensus in accordance with traditional law and custom, as are Local Aboriginal Corporation board decisions in some cases. The pilot BMS documents thus provide administrative support and processes to enable and recognise decisions made according to traditional law and custom. However, this process is subject to limits in support of **Certainty**. For instance, a majority vote if traditional procedures do not

¹²⁵² So that an authoritative decision could be obtained from a court if required.

¹²⁵³ See Part 6.3.2.

¹²⁵⁴ Karlka Rule Book, r 5. Cf Constitution of BNTAC r 7.5.

permit a decision and integrity checks such as an independent director compliance veto (and, potentially, a trustee compliance veto) for the Decision Making Committee and trustee oversight of oppression for Aboriginal community decisions. Time limits also apply so that, for instance, a professional trustee can proceed without consent or consultation if it has twice attempted to obtain a valid decision over a 3 month period.

7.7 Professional trustees

Professional trustees are used or mandated (at least initially) for some BMSs. The main reasons are that professional trustees can help ensure **Legal adequacy** due to their governance capacity and asset protection function (Part 2.2), as well as their potential to support **Autonomy** in the longer term by way of capacity building for Indigenous communities and corporations which may have fairly limited lead time or funding to build trustee capacity (Parts 4.1 and 4.4). However, while professional trustees bring some potential advantages, they also pose a number of risks, so that it is controversial whether they constitute a best practice feature in all circumstances.

There is a key tension between impeding **Autonomy** in the short term and building **Autonomy** in the longer term. Autonomy is impeded in the short term as some decisions are necessarily placed in the hands of the professional trustee, rather than the Indigenous community and as a professional trustee potentially means missing out on some level of knock-on employment and capacity building effects from an Indigenous community controlled trustee.¹²⁵⁵ The discussion in Part 7.5 about purchasing specialist expertise also emphasises the importance of Indigenous communities taking over responsibility for functions as they gain capacity. In particular, as emphasised by representatives from all groups of stakeholders,¹²⁵⁶ this would include transitioning from a professional trustee company to an Indigenous community-controlled trustee company over time.¹²⁵⁷

Where a professional trustee is used, to help support **Autonomy** in the short term, there is often an increase in the number and overlap of decision making bodies within a BMS so as to ensure that the Indigenous community retains a decision making role in relation to a range of day-to-day, strategic and fundamental decisions (see Part 4.7). For example, Decision Making Committees and Traditional Owner Councils under the pilot BMS trusts. This has, in particular, **Efficiency** implications, for which potentially mitigating steps have already been considered in Part 7.3.

There is also some risk that a professional trustee might act in its own interests, rather than in pursuit of BMS goals. An Aboriginal director provided a practical example, which also highlights the potential for reduction in Indigenous community autonomy:¹²⁵⁸

¹²⁵⁵ See, eg, Trustee Officer 28 June 2018.

¹²⁵⁶ See n 388 and accompanying text.

¹²⁵⁷ See also Trustee Officer 8 March 2019.

¹²⁵⁸ Pilbara Aboriginal Corporation Director 8 May 2019.

An Indigenous trustee board is heavily involved and wants to achieve the best outcomes for their people. By outsourcing to a professional trustee, the care factor is not there. A professional trustee is not as invested in the community. At the same time, board members, even though they remain invested, step back a little and think that the professional trustee is taking care of things...

[T]he service provider we were using – their compliance was bad. A resource company would follow up saying where are X documents that you need to provide to us under our agreement? The service provider would then provide half-cocked documents. Minutes of meetings were always prepared very late and not in a great form.

The major element that is missing from the reports that come through from professional trustees is the Indigenous community perspective. For example, my organisation used to have a competition for the beneficiaries to see whose art would be displayed on the annual report. Since we changed to a professional trustee service provider there has been no use of community art and limited ownership of reports by the professional trustee service provider – they tend to pass the buck. Often this is due to management/time pressures.

Conflicts of interest are relevant for any BMS decision maker, but there are some conflict risks that are uniquely raised by professional trustees. ***Sensitivity to motivational complexity*** of professional trustees is a particular issue in respect of three matters.

First, conflicts of interest in the investment of BMS funds through the use of related entities within the professional trustee group of companies.¹²⁵⁹ One solution would therefore be for BMS trust deeds to mandate that the investment function must be carried out by an unrelated third party – eg that the investment adviser must be an unrelated third party to the professional trustee. Permitting related party transactions, but only with the prior informed consent of an Indigenous community may be another option, which may enable the efficiencies of vertical integration to continue being available, as conceded for the provision of financial services in the Hayne Royal Commission Final Report and also in relation to superannuation.¹²⁶⁰ However, any such consent ought to be renewed on a regular basis (perhaps every year, as recommended for annual renewals of ongoing fee arrangements in the Hayne Royal Commission Final Report) and coupled with full disclosure of the lack of independence.¹²⁶¹ A management plan for conflicts, as suggested by the Njamal People's Trust Inquiry (see Part 4.5), could also help. However, achieving fully informed consent is likely to be difficult and is unlikely to fully address the conflicts of interest.¹²⁶²

¹²⁵⁹ See n 634 and accompanying text.

¹²⁶⁰ Kenneth Hayne, 'Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry' (Final Report, Vol 1, 2019) 124-7, 190-6, 238-9. Cf Trustee Officer 8 March 2019.

¹²⁶¹ Kenneth Hayne, 'Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry' (Final Report, Vol 1, 2019) 25, 164, 172-6, 241-3.

¹²⁶² See, eg, *ibid* 178-9; Kenneth Hayne, 'Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry' (Interim Report, Vol 1, 2018) especially at 155-8, 330-2.

Second, as identified in Part 4.14, several stakeholders suggested that professional trustee fee arrangements might motivate trustees to focus more on technical compliance and quantum of services delivered, rather than on the ultimate goals of a BMS and of the relevant Indigenous community. Unbundling trustee services as proposed in Part 4.14 so that trustees concentrate on their core competencies would reduce the extent of the issue. In addition, incorporating extrinsic and intrinsic motivations for communication (Part 7.1) and processes for strategic planning (Part 7.2) should help alleviate the issue. For example, strengthening requirements for trustees to report on fees. More fundamentally, involving professional trustees more intimately in the process of drafting BMS documents and setting BMS objectives should achieve more intrinsic motivation through greater autonomy, competence and relatedness, given the frustration noted in Part 2.3 that BMS objectives and documents were often presented to trustees with limited ability for the trustee to provide input. As noted in Part 7.2, intrinsic motivation is more likely to be successful for achieving strategic planning in many circumstances, given the likely difficulties in linking fee-based KPIs with specific outcomes. Greater trustee engagement will also require trustee capacity building to better understand Indigenous communities, their native title rights and the importance of maintaining native title rights to the community and to ongoing land use payments.¹²⁶³

Third, a professional adviser noted that it was often difficult to change a professional trustee, largely because the change process was managed by the incumbent professional trustee, which had a disincentive to assist change.¹²⁶⁴ The difficulty arises from the fact that the party external to the Indigenous community managing change itself has an interest in the outcome. The issue could be ameliorated in some circumstances by providing a greater role to the BMS Indigenous corporation in managing the removal and replacement processes.

¹²⁶³ Pilbara Aboriginal Corporation Executive 19 March 2019.

¹²⁶⁴ Professional Adviser 31 January 2018.

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9. Index

administration costs	72, 80-81, 203
allegiance	101, 108-110, 174-176, 195
asset protection	14-13, 148, 173, 206
autonomy	51-52, 118-121, 185-187, 195, 210, 215
benefits management structure or BMS	7-19, 141-158
BHP-Banjima Agreement	144
BHP-Niyaparli Agreement	142
BMS purposes/ goals	15-19
capacity / capacity building	58-61, 197-198, 210
certainty	107-108, 173, 213
communication/information sharing	67-72, 195-199
<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)</i> or CATSI Act	21-25
customisation	52-53, 103-104, 158-161, 210
decision making committee	73, 148-158, 205-206
decision making	10-14, 72-79, 148-158, 204
design considerations	98-103
durability	93-94, 115-116, 182-183
efficiency	116-118, 184-185, 204-208
transaction cost economics/transaction cost efficiency	184-185
Elders' council/committee	40, 66, 73, 79, 148-158, 177
entities	8-10, 20-35
equity	81-85, 121-123, 187-191
corrective justice	123
distributive justice	121
intergenerational equity	121
intragenerational equity	121
intergenerational justice	121-123
future fund	14, 188-190, 208-210
governance / governance structures	36-43, 61-67

conflicts of Interest	61-67, 89-92, 179-180, 216-217
inter-group and intra-group disputes	63
Harvard Project on Indian Economic Development	39-40, 45
independent	
directors/committee members	11, 151, 165, 180
<i>versus</i> expert	66
monitoring/reporting	127, 203, 207
trustee	11, 252
Indigenous corporation	8-10, 21-28, 85-87, 204-208
CATSI Act corporation	21-25
Prescribed Body Corporate or Registered Native Title Body Corporate	25-28
institutional design	4, 98-103
institutions	3
land council	29-35
legal adequacy	104-107, 161-173
legal capacity	105, 162
decision making procedures	106, 164-165
dispute resolution	106, 165-167, 181, 207-208
accountability	106, 167-171, 177
localism	41, 104
neo-institutionalism	3-5, 98-101
Prescribed Body Corporate (see Indigenous corporation)	
pursuit of purpose	123-129, 191-193, 199-204
inputs	124
outputs	124
outcomes	124
impacts	124
Registered Native Title Body Corporate (see Indigenous corporation)	
Rio Tinto-Banjima Agreement	145-146
Rio Tinto-Nyiyaparli Agreements	142-142
self-determination	119-120

self-determination theory	112-113
sensitivity to motivational complexity	112-115, 178-182, 216-217
siloing	95-97
simplicity	116-116, 183-184, 210-213
stakeholder	2, 254
strategic planning	93, 192, 199-204
traditional owner council/committee	148-158, 205-206
trustees	
advisory trustee	10-12
custodian trustee	13-14
professional trustee/licensed trustee company	11-13, 89-92, 215-217
trusts	8-10, 28-29
charitable trusts	8-9, 82-83, 87-88, 209
discretionary trusts	9, 209
windows approach	176, 213-215

Appendix A

List of Interviewees

Aboriginal Community and Corporation Representatives

Long Title	Abbreviation
Officer, Pilbara Aboriginal Corporation 12 March 2019	Pilbara Aboriginal Corporation Officer 12 March 2019
Aboriginal Former CEO of Aboriginal Corporation and Management Consultant 14 February 2019	Former Aboriginal Corporation CEO & Management Consultant 14 February 2019
CEO of Pilbara Aboriginal Corporation, 5 July 2018	Pilbara Aboriginal Corporation Executive 5 July 2018
CEO of Pilbara Aboriginal Corporation, 4 July 2018	Pilbara Aboriginal Corporation Executive 4 July 2018
Aboriginal Director of Pilbara Aboriginal Corporation, 6 and 21 June 2018 and 8 May 2019	Pilbara Aboriginal Corporation Director 6 & 21 June 2018 or 8 May 2019 (as applicable)
Aboriginal Director of Pilbara Aboriginal Corporation, 7 and 20 June 2018	Pilbara Aboriginal Corporation Director 7 & 20 June 2018
Executive Officer of Pilbara Organisation, 7 June 2018	Pilbara Corporation Executive 7 June 2018
CEO of Pilbara Aboriginal Corporation, 21 May 2018 and 19 March 2019	Pilbara Aboriginal Corporation Executive 21 May 2018 or 19 March 2019 (as applicable)
CEO of Pilbara Aboriginal Corporation, 10 May 2018	Pilbara Aboriginal Corporation Executive 10 May 2018
Ngarlawangga Traditional Owners and BMS committee members, 3 May 2018	Aboriginal Community Representatives 3 May 2018
Executive Officer of Pilbara Aboriginal Corporation, 2 May 2018 and 7 March 2019	Pilbara Aboriginal Corporation Executive 2 May 2018 or 7 March 2019 (as applicable)

Professional Advisers and BMS Facilitator

Long Title	Abbreviation
Independent Facilitator of BMS Matters, 21 March 2018 and 7 March 2019	Independent BMS Facilitator 21 March 2018 or 7 March 2019 (as applicable)

Partner, Jackson McDonald, 12 July 2017, 31 January 2018 and 5 March 2019	Professional Adviser 12 July 2017, 31 January 2018 or 5 March 2019 (as applicable)
Partner, Ashurst, 16 November 2017 and 3 May 2019	Professional Adviser 16 November 2017 or 3 May 2019 (as applicable)

Trustee Officers

Long Title	Abbreviation
Trustee Officer, Bulhari, 28 June 2018	Trustee Officer 28 June 2018
Professional Trustee Officer, Perpetual, 19 June 2018 and 9 April 2019	Trustee Officer 19 June 2018 or 9 April 2019 (as applicable)
Professional Trustee Officer, Australian Executor Trustees, 16 May 2018 and 5 June 2018, 8 March 2019	Trustee Officer May and June 2018 or 8 March 2019 (as applicable)
Background discussion with Professional Trustee Officer, 5 July 2017	N/A
Legal Counsel, Australian Executor Trustees, 18 May 2017	Trustee Officer 18 May 2017

Resource Proponent Representatives

Rio Tinto Heritage & Agreements Team Comments, 5 September 2018 and 17 June 2019	Resource Proponent Agreements Team 5 September 2018 or 17 June 2019 (as applicable)
Manager, Rio Tinto, 10 August 2017	Resource Proponent Manager 10 August 2017
Agreements Implementation Advisor, Communities, Rio Tinto, 10 August 2017	Resource Proponent Implementation Adviser 10 August 2017
BHP, Social Investment Manager, 22 February 2017	Resource Proponent Social Investment Manager 22 February 2017
BHP, Agreement Implementation Manager, 24 January 2017, 4 April 2019 and 19 May 2019	Resource Proponent Manager 24 January 2017, 4 April 2019, or 19 May 2019 (as applicable)

Multiple Groups of Stakeholders

Attendees at Rio Tinto organised BMS Forum in Karratha, 2-3 May 2018.	Karratha Workshop 3 May 2018
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<p>Attendees comprised Rio Tinto staff, executives and directors of a number of Pilbara Aboriginal corporations and BMSs, community members from several Pilbara Aboriginal communities, trustee officers and professional advisers. All groups of attendees were present during the workshop.</p>	
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Appendix B

Comparative Perspectives

1. Canada

1.1 Background

In Canada, the first Indigenous title recognized at common law was a very limited personal usufructuary right accepted in 1889 in *St Catharines Milling and Lumber Co v R*.¹²⁶⁵ A more expansive view of aboriginal title was recognised by the Supreme Court of Canada in the 1973 *Calder* decision, based on the pre-existing sovereignty of Indian societies.¹²⁶⁶ The subsequent *Delgamuukw* decision found aboriginal rights may extend to full beneficial use of areas of land, to carry out certain activities at particular sites, or relate to cultural or other traditional practices that are not site specific.¹²⁶⁷ Although the court in *Delgamuukw* expressly chose not to rule on whether aboriginal rights included rights to self-government,¹²⁶⁸ Nettheim, Meyers and Craig suggest that recognition of aboriginal title brings with it some 'measure of self-management of [the relevant] areas and resource interests'.¹²⁶⁹ This is especially so given aboriginal title to land is 'subject to the limitation that the land not be used in ways contrary to a people's traditional connection to the land',¹²⁷⁰ and the requirement in *Delgamuukw* for government consultation with Indigenous communities before acting in a way that would affect Indigenous title or rights.¹²⁷¹

As in the United States, the dependence of Indian societies on the federal government through federal government administration of Indian lands and people (among other things), has also resulted in recognition of a trust-like relationship and fiduciary duties owed by the federal government to Indian tribes.¹²⁷² In keeping with such fiduciary obligations in 1982 section 35(1) was included in the *Constitution Act 1982* to provide constitutionally entrenched protection to existing Indigenous and treaty rights.¹²⁷³ Canadian government policy is to interpret the protected rights as including the inherent

¹²⁶⁵ [1889] 13 Can SCR. 577; 14 App Cas 46.

¹²⁶⁶ *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145.

¹²⁶⁷ *Delgamuukw v British Columbia* 1997 CarswellBC 2358.

¹²⁶⁸ *Ibid* [171], [205].

¹²⁶⁹ *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 168.

¹²⁷⁰ *Delgamuukw v British Columbia* 1997 CarswellBC 2358, [131].

¹²⁷¹ *Ibid* [168].

¹²⁷² *Guerin v The Queen* [1984] 2 SCR 335, 364-91.

¹²⁷³ *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 86-88.

right of self-government.¹²⁷⁴ Such rights may still however be impaired or extinguished by the government in some circumstances, subject to compensation.¹²⁷⁵

The *Indian Act 1985* is the principal piece of federal legislation addressing aboriginal title.¹²⁷⁶ Its scope is wide. Significantly, the Minister for Indian Affairs and Northern Development is responsible for the control and management of the lands and property of Indians in Canada. The Act has been criticised for failing to reflect the modern economic and political development of Indigenous peoples.¹²⁷⁷

In addition to aboriginal land title, specific rights in relation to non-aboriginal title sites and some degree of self-management under aboriginal rights, Indigenous Canadians also hold rights to manage access to land and use of resources, and to a degree of self-government, under treaties and under the instruments creating Indian reserves.¹²⁷⁸ Though not as clearly expressed as in the United States, Indigenous title and reserve lands may give Indigenous communities an interest in the minerals, timber and other resources unless stated otherwise in a treaty.¹²⁷⁹ Many treaties also reserve timber rights and rights to mineral proceeds to Indigenous communities.¹²⁸⁰

In 1973, the Canadian Federal Government introduced a so-called Comprehensive Land Claims Policy.¹²⁸¹ The policy divides claims into two broad categories of comprehensive and specific claims. Specific claims are those arising from alleged non-fulfilment of treaties and other lawful obligations.¹²⁸² Specific claims therefore involve either government failure to pay compensation where lands were taken with legal authority, or the loss of reserve lands without lawful surrender by the relevant band.¹²⁸³ Comprehensive claims relate to areas where there is no prior treaty with the relevant Indigenous communities, in respect of which the government has endeavoured to reach negotiated land settlements (also known as modern treaties). Land claim settlements typically confirm and/or provide benefits such as full ownership of certain lands, harvesting rights, water, wildlife and environmental management, financial compensation for land and rights previously extinguished or given up, resource revenue-

¹²⁷⁴ Department of Indigenous and Northern Affairs Canada, 'The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government' (accessed November 2018) <www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844>.

¹²⁷⁵ Nettheim, Myers and Craig's *Indigenous Peoples and Governance Structures* 86-88.

¹²⁷⁶ *Indian Act*, RSC 1985, c I-5.

¹²⁷⁷ Shaunnagh Dorsett and Lee Godden, *A Guide to Overseas Precedents of Relevance to Native Title* (Native Title Research Unit, AIATSIS 1998) 21.

¹²⁷⁸ Nettheim, Myers and Craig's *Indigenous Peoples and Governance Structures* 169.

¹²⁷⁹ Garth Nettheim, Gary Meyers and Donna Craig, *Indigenous Peoples and Governance Structures A Comparative Analysis of Land and Resource Management Rights* (Aboriginal Studies Press, 2002) 102.

¹²⁸⁰ *Ibid.*

¹²⁸¹ Comprehensive Land Claims Policy 1973: Department of Indian Affairs and Northern Development, 'Statement Made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People' (Communiqué, 8 August 1973).

¹²⁸² Specific Land Claims Policy 1973: Department of Indian Affairs and Northern Development, 'Statement Made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People' (Communiqué, 8 August 1973). See also *Specific Claims Resolution Act 2003* c.23.

¹²⁸³ Shaunnagh Dorsett and Lee Godden, *A Guide to Overseas Precedents of Relevance to Native Title* (Native Title Research Unit, AIATSIS 1998) 27.

sharing and, more recently, some measure of self-government.¹²⁸⁴ The degree of self-government assumed by Indigenous communities has increased in more recent negotiated settlements.

1.2 Government administration

Today, the Department of Indigenous and Northern Affairs Canada (**INAC**)¹²⁸⁵ is responsible for fulfilling the Government of Canada's obligations and commitments to Indigenous Canadians.¹²⁸⁶ Indigenous moneys are all moneys received and held in trust by INAC for the benefit of Indigenous Canadians.¹²⁸⁷

1.3 Impact and Benefits Agreements

An Impact and Benefits Agreement (also known as a Benefit Sharing Agreement)¹²⁸⁸ is an agreement between an Indigenous community and a resource proponent and or government.¹²⁸⁹

1.3.1 Agreements

The financial and economic benefits specifically provided for in an IBA include financial compensation, training, employment and business opportunities.¹²⁹⁰ IBAs also often include measures to limit the negative cultural and environmental effects of resource development.¹²⁹¹ Corresponding obligations on the Indigenous community have included things such as an undertaking to 'recognise and respect' the miner's rights or an undertaking not to 'engage in any unreasonable action that could ... delay or stop the

¹²⁸⁴ Ibid 26; *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 103-5. Earlier treaties may also confirm or provide some such benefits.

¹²⁸⁵ This body has also been known as Aboriginal Affairs and Northern Development Canada (**AANDC**).

¹²⁸⁶ Indigenous and Northern Affairs Canada, '2016-17 Report on Plans and Priorities' (2016) <www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/16-17_1457122360970_eng.pdf>.

¹²⁸⁷ Information retrieved from Indigenous and Northern Affairs Canada website at <<http://aadnc-aadnc.gc.ca/eng/1100100010002/1100100010021>>.

¹²⁸⁸ Woodward & Company, 'Benefit Sharing Agreements in British Columbia: A Guide for First Nations, Businesses and Governments' (Final Report, Undated) II-2; Ciaran O'Faircheallaigh, 'Shaping Projects, Shaping Impacts: Community-Controlled Impact Assessments and Negotiated Agreements' (2017) 38(5) *Third World Quarterly* 1181, 1188-90. Other commonly used phrases include: 'interim measures agreements', 'project support agreements', 'cooperation agreements', 'development agreements', 'protection and benefit agreements', 'market access agreements', 'standard-setting or certification agreements', 'participation agreements' and 'accommodation agreements'.

¹²⁸⁹ Brad Gilmour and Bruce Mellett, 'The Role of Impact and Benefits Agreements in the Resolution of Project Issues with First Nations' (2013) 51(2) *Alberta Law Review* 385, 387; Woodward & Company, 'Benefit Sharing Agreements in British Columbia: A Guide for First Nations, Businesses and Governments' (Final Report, Undated) II-2.

¹²⁹⁰ Brad Gilmour and Bruce Mellett, 'The Role of Impact and Benefits Agreements in the Resolution of Project Issues with First Nations' (2013) 51(2) *Alberta Law Review* 385, 392-395; Sandra Gogal, Richard Riegert and Joann Jamieson, 'Aboriginal Impact and Benefit Agreements Practical Considerations' (2005) 43(1) *Alberta Law Review* 129, 147-52.

¹²⁹¹ Ciaran O'Faircheallaigh, 'Shaping Projects, Shaping Impacts: Community-Controlled Impact Assessments and Negotiated Agreements' (2017) 38(5) *Third World Quarterly* 1181, 1189-90.

[miner]'.¹²⁹² Sosa and Keenan note that the legal status of an IBA is that it is treated as a private contract.¹²⁹³

Where there is more than one Indigenous community with entitlements concerning a development, and those Indigenous communities are not associated through a broader organisational structure, a company and or government may be required to enter into more than one IBA.¹²⁹⁴ IBAs can exist without any government involvement, although they are generally central to any government consultation process.¹²⁹⁵

An IBA can provide financial accommodation or compensation in many ways. A particular kind of payment is “revenue sharing”, which involves the provision of payments to Indigenous communities calculated by reference to the level of resource extraction or development.¹²⁹⁶ Payments tend to occur in three ways.¹²⁹⁷ First, cash payments may be made. Second, while the amounts may be paid to individuals, there is increasing interest in establishing trusts to manage the funds.¹²⁹⁸ Third, there may be equity participation, affording Indigenous communities an ownership stake in resource developments.¹²⁹⁹

In addition to IBAs, an environmental agreement may also be negotiated between an Indigenous community, the resource proponent and government. In the case of the Ekati diamond mine in Canada's Northwest Territories, for example, an environmental agreement establishing an environmental monitoring agency was established, whose board included four members nominated by relevant Indigenous communities.¹³⁰⁰

1.3.2 Legal structures

Indigenous Canadians generally have the right to choose their own governance structure.¹³⁰¹ However, in some areas in Canada, there is a legal requirement to incorporate an entity for the purposes of an IBA. For example, in British Columbia, the

¹²⁹² Ciaran O'Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (Taylor and Francis, 2015) 163.

¹²⁹³ Irene Sosa and Karyn Keenan, 'Impact Benefit Agreements between Aboriginal Communities and Mining Companies Their Use in Canada' (Report, 2001) 8.

¹²⁹⁴ Woodward & Company, 'Benefit Sharing Agreements in British Columbia: A Guide for First Nations, Businesses and Governments' (Final Report, Undated) II-6.

¹²⁹⁵ Thomas Isaac and Anthony Knox, 'Canadian Aboriginal Law Creating Certainty in Resource Development' (2004) 53 *University of New Brunswick Law Journal* 3, 30.

¹²⁹⁶ See eg Woodward & Company, 'Benefit Sharing Agreements in British Columbia: A Guide for First Nations, Businesses and Governments' (Final Report, Undated) II-31. See also Ciaran O'Faircheallaigh, 'Shaping Projects, Shaping Impacts: Community-Controlled Impact Assessments and Negotiated Agreements' (2017) 38(5) *Third World Quarterly* 1181, 1188-90; InterGroup Consultants, 'Aboriginal Engagement in Resource Development Lead Industry Leading Practices' (October 2008) 73-4.

¹²⁹⁷ InterGroup Consultants, 'Aboriginal Engagement in Resource Development Lead Industry Leading Practices' (October 2008) 72.

¹²⁹⁸ *Ibid* 73.

¹²⁹⁹ *Ibid* 82.

¹³⁰⁰ Ciaran O'Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (Taylor and Francis, 2015) 165.

¹³⁰¹ Woodward & Company, 'Benefit Sharing Agreements in British Columbia: A Guide for First Nations, Businesses and Governments' (Final Report, Undated) II-5.

Land Title Office does not recognise Indian Act Bands as being legal entities capable of land title ownership registration.¹³⁰²

From time to time, an IBA may involve a band-held corporation representing the interests of an Indigenous community. A band-held corporation typically involves a board of directors comprised of members of the Indigenous community and the shares in the company are held by a trustee on behalf of the members of the Indigenous community.¹³⁰³ That structure is typically only appropriate to joint venture and service agreements, not agreements that recognise or reflect Indigenous or treaty rights.¹³⁰⁴ Gibson and O’Faircheallaigh refer to ‘implementation committees’, ‘community-based implementation units’ and ‘community-based mining committees’ as being the bodies to implement the benefits of an IBA.¹³⁰⁵

As part of an IBA, a trust is commonly established.¹³⁰⁶ That trust may receive and distribute financial compensation and invest income for community development.¹³⁰⁷ This choice of vehicle is justified on the grounds of enabling access to a tax exemption.¹³⁰⁸ Once an Indigenous community incorporates and receives payments, the tax exemption is lost.¹³⁰⁹ Martin argues that the Canadian Government should pursue a broader range of tax exemptions for other entities receiving such payments than is currently available under the *Indian Act*.¹³¹⁰ Martin does not consider whether, in practice, the Indigenous trusts established as part of an IBA, distribute funds to related bodies such as companies.

There may be a gap in the literature in that there does not appear to be extensive Canadian consideration of the legal structures that, as a whole, manage the payments received under IBAs. It may well be that Australia is leading the way in terms of institutional design of BMSs. That view is supported by the fact that the recent publications by Loutit, Madelbaum and Szoke-Burke, referring to emerging practices, extensively and almost exclusively give examples of Australian governance arrangements for implementation.¹³¹¹ Loutit, Madelbaum and Szoke-Burke advocate the sharing of decision making power as a general concept and say that resource proponents should be willing to engage in collaborative capacity building.¹³¹²

¹³⁰² Ibid II-7.

¹³⁰³ Ibid.

¹³⁰⁴ Ibid.

¹³⁰⁵ Ginger Gibson and Ciaran O’Faircheallaigh, ‘IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements’ (Walter and Duncan Gordon Foundation, March 2010) 180-1.

¹³⁰⁶ Fiona Martin, "An Analysis of The Exemption From Income Tax of Canadian 'Indians' Either as Individuals or 'Bands'" (2010) 5(1) *Journal of The Australasian Tax Teachers Association* 165, 179.

¹³⁰⁷ Ibid.

¹³⁰⁸ Ibid 179-80.

¹³⁰⁹ Ibid 182.

¹³¹⁰ Ibid 183.

¹³¹¹ See Box 9 in Jennifer Loutit, Jacqueline Madelbaum and Sam Szoke-Burke, ‘Emerging Practices in Community Development Agreements’ (Columbia Center on Sustainable Development, February 2016) 12.

¹³¹² Jennifer Loutit, Jacqueline Madelbaum and Sam Szoke-Burke, ‘Emerging Practices in Community Development Agreements’ (2016) 7(1) *Journal of Sustainable Development Law & Policy* 65, 90.

1.4 Regional negotiated settlements & structures

An important feature of contemporary Canadian negotiated settlements is that they are regional, so broader than a single Indigenous community. They are also comprehensive in the sense that they are intended to encompass a broad range of matters relating to ownership, use and management of land and other resources as well as dealing with compensation and the creation of frameworks for other issues such as self-determination, environmental matters and cooperative coexistence of Indigenous and non-Indigenous persons.¹³¹³ The key objective of the settlements appears to be the attainment of a form of self-government that suits the Indigenous peoples in question.¹³¹⁴ The agreements therefore vary in scope and depth. While legislated regional settlements (and the structures established pursuant to those settlements to manage assets) generally reflect a broader range of socio-economic and political concerns than Australian land access agreements, many settlement structures include a range of trusts and corporations that receive and manage money and resources relating to the settlement. Public reporting and reviews of agreement implementation thus provide some information on settlement structures.¹³¹⁵ In particular, BMSs could draw on structural elements that specifically deal with asset management.

One such example is the *Inuvialuit Final Agreement*, which has been described as 'flexible and a good basis for ongoing negotiations and evolving management arrangements'.¹³¹⁶ The Agreement begins, importantly, with an objects clause:¹³¹⁷

1. The basic goals expressed by the Inuvialuit and recognized by Canada in concluding this Agreement are:
 - (a) to preserve Inuvialuit cultural identity and values within a changing northern society;
 - (b) to enable Inuvialuit to be equal and meaningful participants in the northern and national economy and society; and
 - (c) to protect and preserve the Arctic wildlife, environment and biological productivity.

A clear objects clause that sets out the goals of the Agreement and of the asset management structures created under the Agreement is an important inclusion that frames the rest of the Agreement. It provides a statement to which the parties can

¹³¹³ Douglas R Eyford, 'A New Direction: Advancing Aboriginal and Treaty Rights' (Report of the Ministerial Special Representative on Renewing the Comprehensive Land Claims Policy, 20 February 2015) 17-23; *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 436.

¹³¹⁴ Department of Indigenous and Northern Affairs Canada, 'The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government' (accessed November 2018) <www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844>; Aboriginal Affairs and Northern Development Canada, 'Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights' (Canadian Government, 2014).

¹³¹⁵ See, eg, Indigenous and Northern Affairs Canada, *Final Agreements and Related Implementation Matters* (28 May 2013) <www.aadnc-aandc.gc.ca/eng/1100100030583/1100100030584>.

¹³¹⁶ *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 438.

¹³¹⁷ *Inuvialuit Final Agreement 1984* (Canada) s 1.

return in times of disagreement, and which can guide the resolution of that disagreement. While Australia BMSs are unlikely to have the same breadth of purposes as the Inuvialuit settlement, the relevance of clearly identifying overarching goals is likely to be transferable.

Structurally, the benefits management structure established under the Inuvialuit settlement bears some similarities to Australia BMSs, though perhaps more so to the Noongar south west settlement BMS than to many other Western Australia BMSs. Essentially, the Inuvialuit have a number of community corporations, which represent the interests of individual communities across the area covered by the regional Agreement. These community corporations together control an entity known as the Inuvialuit Regional Corporation, which acts as the central authority that controls, in turn, the Inuvialuit Land Corporation, the Inuvialuit Development Corporation and the Inuvialuit Investment Corporation. The latter three are sectoral corporations responsible for specific portfolios of issues and funds. In addition to the corporations, there is an Inuvialuit Trust, which holds the rights to the settlement monies and non-voting shares in the three sectoral corporations.¹³¹⁸

The Agreement also includes a number of principles that could be instructive. They include: that monetary benefits shall be shared equally among the enrolled Inuvialuit beneficiaries, excluding certain local land development projects controlled by the relevant local community corporation once the Inuvialuit Regional Corporation approves such development; that the Inuvialuit control their community corporations, which control the regional corporation, which has the central coordinating role in relation to the entire structure (rather than the trustee); and that the regional corporation may place restrictions from time to time on distributions from the sectoral corporations to preserve funds for future generations.¹³¹⁹ These principles acknowledge two notable issues: that a limited range of local developments may create acceptable inequality, but that the benefits from development in general should be spread equally across Inuvialuit people in the region; and that intergenerational equity may prevent funds from being distributed to the present generation.

Not all Canadian regional agreements are at the same level of detail. In contrast to the Inuvialuit settlement, the *Gwich'in Comprehensive Land Claim Agreement 1992* contemplates a wide variety of structures that could be used to manage the Agreement's benefits. The range of structures is noted simply as 'trusts, societies or corporations'.¹³²⁰ The delineation of authority and responsibilities appears to lie far more within the power of the Gwich'in Tribal Council, which is required to designate rights and obligations prior to the date of settlement pursuant to clause 7.1.1. The Tribal Council has continuing authority to change the structure provided that changes do not adversely affect rights or obligations contemplated in the Agreement.¹³²¹ Thus,

¹³¹⁸ Ibid s 6(1).

¹³¹⁹ Ibid s 6(4).

¹³²⁰ *Gwich'in Comprehensive Land Claim Agreement 1992* (Canada) cl 7.1.2.

¹³²¹ Ibid s 7.1.1.

the Gwich'in Agreement is significantly more flexible than the Inuvialuit Agreement, which itself retains a relatively high degree of flexibility for the Inuvialuit Regional Corporation. Likewise, the Gwich'in Tribal Council acts as the ultimate decision making entity of the Agreement.

Another example is the more recent *Maa-nulth First Nations Final Agreement 2010*. This document effectively creates a system of self-government for the Maa-nulth First Nations, whose powers stem from the Agreement, a constitution and laws enacted by each Maa-nulth First Nation Government.¹³²² The latter have legal capacity¹³²³ and are democratically elected by their citizens.¹³²⁴ Contested decisions can be appealed to the Supreme Court of British Columbia.¹³²⁵ This is quite a different system to that envisaged for Australian BMSs as it involves sovereignty in the public as well as private sphere.

The Canadian regional agreements also have well-established methods of reporting on implementation. The Gwich'in Implementation Plan¹³²⁶ and its Five-Year Review¹³²⁷ are particularly detailed, setting out individual projects and goals, persons or entities with responsibility to complete them, timing and a measure of success. The Implementation Committee is comprised of representative from the Governments of Canada and the Northwest Territories – federal and regional governments – and the Gwich'in Tribal Council. The Inuvialuit practice of annual reports is a less detailed version of the Gwich'in Implementation Plan. Both bear similarities to the periodic reviews conducted by resource proponents and Aboriginal communities for many Western Australia BMSs.

The system of comprehensive land claim settlements was reviewed in 2014-15 by Douglas Eyford, a Ministerial Special Representative appointed specifically for this purpose.¹³²⁸ The report made six recommendations, which are extracted below:

1. Canada should increase awareness, oversight, and accountability across departments about modern treaty obligations and improve internal structures for co-ordinating and fulfilling implementation activities.
2. Canada should centralize responsibility for the coordination and oversight of modern treaty implementation in a central agency.
3. Canada should continue to collaborate with the Land Claims Agreements Coalition to advance the parties' shared objectives.
4. Canada should ensure treaty provisions are interpreted and given effect in the manner intended by negotiators.

¹³²² See, generally, *Maa-nulth First Nations Final Agreement 2010* (Canada) ch 13.

¹³²³ *Ibid* s 13.2.0.

¹³²⁴ *Ibid* s 13.3.0.

¹³²⁵ *Ibid* s 13.4.0.

¹³²⁶ *Implementation Plan for the Gwich'in Comprehensive Land Claim Agreement* (Canadian Government, Government of the Northwest Territories and the Gwich'in Tribal Council, 1992).

¹³²⁷ *Five-Year General Review of the Gwich'in Implementation Plan* (Implementation Committee of the Gwich'in Comprehensive Land Claim Agreement, 1997).

¹³²⁸ Douglas Eyford, 'A New Direction: Advancing Aboriginal and Treaty Rights' (Report of the Ministerial Special Representative on Renewing the Comprehensive Land Claims Policy, 20 February 2015).

5. Canada should develop a training program for federal officials whose responsibilities involve treaty implementation.
6. Canada should, through the central agency responsible for the coordination and oversight of treaty implementation, file an annual report in Parliament about treaty implementation activities.

The focus on implementation (particularly the first and fifth recommendations), while at the level of overarching agreements, is also pertinent to benefits management structures under those agreements, and hence of relevance to BMSs. It is clear that even in Canada there are issues with internal structures, including with the knowledge of stakeholders within and outside the structures, that are rendering the implementation process more difficult. The Canadian government is currently engaging with Indigenous communities on the appropriate steps to take.

2. United States

2.1 Background

In the United States, Indian¹³²⁹ title in tribal lands or reserves, as well as broader self-government rights of Indian tribes, was recognised at common law in 1823.¹³³⁰ Indian title has been described as a possessory right in the sense that it is a right of occupation, not a property right.¹³³¹ It is an encumbrance on a fee simple title of the United States and typically amounts to a permission to occupy land and to control access to, protect and manage natural resources, albeit the rights are extinguishable by Congress.¹³³² Significant allotment of tribal lands or reserves occurred under the *General Allotment Act of 1887*, which altered the above land rights by resulting in allotments being held in trust for Indians or conveyed to individual Indians in fee simple.¹³³³ In addition, Indian tribes typically own mineral resources within tribal or reservation lands unless the applicable treaty or instrument reserved minerals to the federal government.¹³³⁴

¹³²⁹ In this section, the terms 'Indian' and 'Indian tribes' will be used in place of the terms 'Indigenous' and 'Indigenous communities' used elsewhere in this document, consistently with common practice in the United States literature.

¹³³⁰ *Johnson and Graham's Lessee v M'Intosh*, 8 Wheat. 543, 21 US 432 (1823); *Cherokee Nation v Georgia* 30 US (5 Pet.) 1 (1831), Marshall CJ; *Worcester v Georgia* 31 US (6 Pet.) 515 (1832), Marshall CJ.

¹³³¹ *Oneida Indian Nation v County of Oneida* 414 US 661, 667 (1974); *Tee-Hit-Ton v United States* 348 US 272 (1955); *Beecher v Wetherby* 95 US 517 (1877). See also Shaunnagh Dorsett and Lee Godden, *A Guide to Overseas Precedents of Relevance to Native Title* (Native Title Research Unit, AIATSIS 1998), 51-5.

¹³³² *Oneida Indian Nation v County of Oneida* 414 US 661 (1974), 667; *Tee-Hit-Ton v United States* 348 US 272 (1955); *Beecher v Wetherby* 95 US 517 (1877). See also Shaunnagh Dorsett and Lee Godden, *A Guide to Overseas Precedents of Relevance to Native Title* (Native Title Research Unit, AIATSIS 1998), 51-5.

¹³³³ *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 29.

¹³³⁴ *United States v Shoshone Tribe of Indians* 304 US 111 (1938). See also *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 42.

The above rights arise from two key sources.¹³³⁵ First, recognition of Indian tribes as holding inherent powers of limited sovereignty.¹³³⁶ Second, acceptance of a trust relationship between the United States Federal Government and Indian tribes, arising from recognition of the limited sovereignty of Indian tribes, with the United States Federal Government as ultimate sovereign. Recognition of limited sovereignty potentially permits significant powers for Indian tribes to occupy, control access to, protect and manage land and resources as independent governments. For instance, Indian tribal governments exercise legislative, judicial and regulatory powers and operate in areas such as policing, zoning, taxation, environmental protection and general business regulation.¹³³⁷ As demonstrated in *Cherokee Nation v Georgia*, this has implications for the application of Federal legislation to areas under the control of Indian tribes.¹³³⁸ Rights to occupy, control access to, protect and manage natural resources are also, and very extensively, contained in various treaties and legislation.¹³³⁹

In the United States, Indian claims to land may be resolved by litigation or by legislation.¹³⁴⁰

2.2 Litigated resolution

Litigation was formerly brought in the Indian Claims Commission (1946-1978),¹³⁴¹ now known as the United States Court of Federal Claims. The Indian Claims Commission was statutorily empowered to award compensation for the extinguishment of Indian title.¹³⁴² A litigated resolution is limited to an award of monetary compensation.¹³⁴³ Where a judgment is obtained by a tribe, the government generally administers the distribution and management of the money.¹³⁴⁴

2.2.1 Management of benefits and of Indian property: Federal-Indian trust doctrine

¹³³⁵ *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 31-5.

¹³³⁶ Limited in the sense that the incidents of sovereignty may have been extinguished to some extent by treaty, federal legislation, or by implication.

¹³³⁷ *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 166.

¹³³⁸ 30 US (5 Pet) 1 (1831).

¹³³⁹ *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 31-5.

¹³⁴⁰ Imre Sutton (ed), *Irredeemable America: The Indians' Estate and Land Claims* (University of New Mexico Press, 1985) 242.

¹³⁴¹ Pursuant to the *Indian Claims Commission Act of 1946* 25 USC §§ 70-70v-3.

¹³⁴² *Otoe & Missouri Tribe v United States* 131 F Supp 265 (1955). In that case, the statutory power of the ICC was distinguished from the general position as enunciated in *Tee-Hit-Ton v United States* 348 US 272 (1955): Shaunnagh Dorsett and Lee Godden, *A Guide to Overseas Precedents of Relevance to Native Title* (Native Title Research Unit, AIATSIS 1998), 266; Caroline Orlando, 'Aboriginal Title Claims in the Indian Claims Commission: *United States v Dann* and its Due Process Implications' (1986) 13(2) *Boston College Environmental Affairs Law Review* 241, 253; Kenneth Lysyk, 'Approaches to Settlement of Indian Title Claims: the Alaskan Model' (1973) 8 *University of British Columbia Law Review* 321, 326.

¹³⁴³ Kenneth Lysyk, 'Approaches to Settlement of Indian Title Claims: the Alaskan Model' (1973) 8 *University of British Columbia Law Review* 321, 324.

¹³⁴⁴ Russel Barsh, 'Indian Land Claims Policy in the United States' (1982) 58 *North Dakota Law Review* 7, 25-7.

The proceeds of a judgment are typically held on trust by the government.¹³⁴⁵ As noted above, Indian Nations are considered as having limited sovereignty and hence have been viewed as 'domestic dependent nations',¹³⁴⁶ which imposes trustee duties on the federal government in its dealings with Indian Nations.¹³⁴⁷ The courts have therefore imposed fiduciary responsibilities on the federal government in its management of compensation monies (or other Indian tribal property).¹³⁴⁸ A breach of that fiduciary duty by the government can give rise to monetary damages.¹³⁴⁹

The United States is considered the trustee of the Indian Trust Fund, with the Department of the Interior and the Treasury Department responsible for its administration. In practice those functions are further delegated to two government agencies: the Office of the Special Trustee and the Bureau of Indian Affairs.¹³⁵⁰ The OST was created to improve the accountability and management of Indian funds held in trust by the federal government. The BIA's activities include managing trust lands, the approval of leases, transfers of land and income collection.¹³⁵¹ There have been problems in the government's management of money and those problems have been ventilated in the form of litigation.¹³⁵²

2.2.2 Distribution of Benefits

The distribution of judgment funds is governed by legislation.¹³⁵³ That legislation requires the tribe who has obtained a judgment to develop a distribution plan and have it approved by the Secretary of the Interior.¹³⁵⁴ Thus the government has a role in administering judgment proceeds.¹³⁵⁵ The monetary sums have historically been received either on a per capita basis or allocated to a trust fund. Money from that trust fund has then been 'programmed' and distributed in relation to tribal programs such as community

¹³⁴⁵ Christopher Bowman, 'Indian Trust Fund: Resolution and Proposed Reformation to the Mismanagement Problems Associated with the Individual Indian Money Accounts in Light of *Cobell v Norton*' (2004) 53(2) *Catholic University Law Review* 543, 544. The history of this system traces back at least to the Indian General Allotment Act of 1887.

¹³⁴⁶ *Cherokee Nation v Georgia* 30 US (5 Pet.) 1 (1831) Marshall CJ; *Worcester v Georgia* 31 US (6 Pet.) 515 (1832).

¹³⁴⁷ *United States v Kagama* 118 US 375 (1886); *Lone-Wolf v Hitchcock* 187 US 553 (1903).

¹³⁴⁸ *Seminole Nation v United States*, 316 US 286 (1942). See also *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 35.

¹³⁴⁹ *United States v Mitchell (Mitchell II)* 463 US 206 (1982); Shaunnagh Dorsett and Lee Godden, *A Guide to Overseas Precedents of Relevance to Native Title* (Native Title Research Unit, AIATSIS 1998) 226.

¹³⁵⁰ These governmental arrangements were established by the *American Indian Trust Fund Management Reform Act* of 1994 (Public Law 103-412).

¹³⁵¹ Christopher Bowman, 'Indian Trust Fund: Resolution and Proposed Reformation to the Mismanagement Problems Associated with the Individual Indian Money Accounts in Light of *Cobell v Norton*' (2004) 53(2) *Catholic University Law Review* 543, 551.

¹³⁵² For example the 'Cobell litigation', which appears in judgments including *Cobell v Norton* 240 F3d 1081 (DC Cir 2001); *Cobell v Babbitt* 91 F Supp 2d 1 (DDC 1999). See generally *ibid*; David Getches et al, *Cases and Materials on Federal Indian Law* (Thomson Reuters, 6th ed, 2011) 343-6.

¹³⁵³ *Distribution of Judgment Funds Act of 1973*, 25 USCA §§ 1401-07. See David Getches et al, *Cases and Materials on Federal Indian Law* (Thomson Reuters, 6th ed, 2011) 270.

¹³⁵⁴ *Distribution of Judgment Funds Act of 1973*, 25 USCA §§ 1402 and 1403.

¹³⁵⁵ Russel Barsh, 'Indian Land Claims Policy in the United States' (1982) 58 *North Dakota Law Review* 7, 27.

development or economic development.¹³⁵⁶ While per capita payments have been preferred by claimants, the government has preferred to allocate the money to a trust fund.¹³⁵⁷ Fully per capita payments have only been made when the majority of recipients reside off-reservation.¹³⁵⁸

As a general rule, at least 20% of the award must be set aside for tribal needs. Approximately 10% is deducted for attorney's fees and a further 10% for expenses incurred by the BIA in administrative fees.¹³⁵⁹ The remainder is held in trust by the government.¹³⁶⁰

2.2.3 Mineral and petroleum rights

As noted above, Indian tribes typically own minerals and petroleum on tribal lands (noting this accords with the general scheme of private ownership in the United States). Indian tribes are typically precluded from selling the minerals or petroleum (in situ) without federal government approval.¹³⁶¹ However, Indian tribes typically participate in the extraction of minerals and petroleum by way of leasing tribal lands to third party mining companies. Largely, this occurs under the *Indian Mineral Leasing Act of 1938* and the *Indian Mineral Development Act of 1982*.¹³⁶² The relevant Indian tribal council must consent to a lease and the grant of leases is subject to a competitive bidding process and payment of 'bonus consideration'. However, the United States Federal Government (DOI) administers the advertising and bidding processes and there have been many instances identified in the past of inadequate bids being accepted for mineral leases.¹³⁶³ The 1982 legislation expanded the modes by which Indian tribes could involve third parties, including (subject to Secretary of the DOI approval) by way of joint venture, operating, production sharing, service, managerial, lease or other agreement for mining activities.

Indian tribes also have the right to tax the extraction of mineral and petroleum resources, due to their limited sovereignty.¹³⁶⁴

2.3 Legislative resolution

¹³⁵⁶ Ibid 31.

¹³⁵⁷ Imre Sutton (ed), *Irredeemable America: The Indians' Estate and Land Claims* (University of New Mexico Press, 1985) 367.

¹³⁵⁸ Russel Barsh, 'Indian Land Claims Policy in the United States' (1982) 58 *North Dakota Law Review* 7, 32

¹³⁵⁹ David Getches et al, *Cases and Materials on Federal Indian Law* (Thomson Reuters, 6th ed, 2011) 270.

¹³⁶⁰ *Distribution of Judgment Funds Act of 1973*, 25 USCA §§ 1401(b).

¹³⁶¹ *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 42.

¹³⁶² The *Federal Oil & Gas Royalty Management Act* and the *Indian Energy Resources Act of 1990* are also relevant.

¹³⁶³ Judith Royster, 'Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources' (1994) 29 *Tulsa Law Journal* 541.

¹³⁶⁴ *Merrion v Jicarilla Apache Tribe* 455 US 130 (1982); *Kerr-McGee Corp v Navajo Tribe of Indians* 471 US 195 (1985); *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 45.

In the United States, legislative settlement occurs from time to time.¹³⁶⁵ The terms of a legislative settlement can vary widely and there is no set formula. One particular case of legislative resolution which has gathered attention is the example of Alaska.¹³⁶⁶

In the 1960s, oil companies became aware of a lucrative quantity of oil in Alaska.¹³⁶⁷ However, Alaska Natives¹³⁶⁸ already had recognised title to much of the land.¹³⁶⁹ After protracted negotiations, Congress decided to legislatively settle the issue by introducing the *Alaska Native Claims Settlement Act* of 1971 43 U.S.C. (**ANCSA**). ANCSA conveyed a total of \$962.5 million and also conveyed 45 million acres of land to Alaska native corporations (being the regional and village corporations discussed below).¹³⁷⁰ The ANCSA has been described as unusual,¹³⁷¹ remarkable,¹³⁷² innovative, novel,¹³⁷³ unprecedented¹³⁷⁴ and unique.¹³⁷⁵ It established two tiers of native corporations:¹³⁷⁶ twelve regional corporations¹³⁷⁷ and over two hundred village corporations.¹³⁷⁸ In broad terms, regional corporations control monetary and other benefits (for instance, they obtained title to the subsurface minerals and petroleum in the surface land transferred to

¹³⁶⁵ Benjamin Kahn, 'Sword or Submission? American Indian Natural Resource Claims Settlement Legislation' (2012) 37(1) *American Indian Law Review* 109.

¹³⁶⁶ See, eg, Douglas Branson, 'Square Pegs in Round Holes Alaska Native Claims Settlement Corporations Under Corporate Law' (1979) 8 *UCLA-Alaska Law Review* 103; Imre Sutton (ed), *Irredeemable America: The Indians' Estate and Land Claims* (University of New Mexico Press, 1985); Martha Hirschfield, 'The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form' (1992) 101(6) *Yale Law Journal* 1331; David Blurton, 'ANCSA Corporation Lands and the Dependent Indian Community Category of Indian Country' (1996) 13(2) *Alaska Law Review* 211; Kenneth Lysyk, 'Approaches to Settlement of Indian Title Claims: the Alaskan Model' (1973) 8 *University of British Columbia Law Review* 321; Douglas Branson, 'Still Square Pegs in Round Holes? A Look at ANCSA Corporations, Corporate Governance, and Indeterminate Form or Operation of Legal Entities' (2007) 24 *Alaska Law Review* 203; Dixie Dayo and Gary Kofinas, 'Institutional Innovation in Less Than Ideal Conditions: Management of Commons by an Alaska Native Village Corporation' (2010) 4(1) *International Journal of the Commons* 142.

¹³⁶⁷ Douglas Branson, 'Square Pegs in Round Holes Alaska Native Claims Settlement Corporations Under Corporate Law' (1979) 8 *UCLA-Alaska Law Review* 103, 103.

¹³⁶⁸ The term 'Alaska Natives' will be used in place of the term 'Indigenous' used elsewhere in this document, consistently with common practice in the literature on Alaska.

¹³⁶⁹ Martha Hirschfield, 'The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form' (1992) 101(6) *Yale Law Journal* 1331, 1334 notes that by the *Alaska Statehood Act of 1958*, Pub L No 85-508, 72 Stat 339, the federal government authorized Alaska to select over 100 million acres from 'vacant, unappropriated, and unreserved' federal land.

¹³⁷⁰ Imre Sutton (ed), *Irredeemable America: The Indians' Estate and Land Claims* (University of New Mexico Press, 1985) 306.

¹³⁷¹ Martha Hirschfield, 'The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form' (1992) 101(6) *Yale Law Journal* 1331, 1334.

¹³⁷² Kenneth Lysyk, 'Approaches to Settlement of Indian Title Claims: the Alaskan Model' (1973) 8 *University of British Columbia Law Review* 321, 321.

¹³⁷³ Imre Sutton (ed), *Irredeemable America: The Indians' Estate and Land Claims* (University of New Mexico Press, 1985) 302.

¹³⁷⁴ Martha Hirschfield, 'The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form' (1992) 101(6) *Yale Law Journal* 1331, 1340.

¹³⁷⁵ Dixie Dayo and Gary Kofinas, 'Institutional Innovation in Less Than Ideal Conditions: Management of Commons by an Alaska Native Village Corporation' (2010) 4(1) *International Journal of the Commons* 142, 143.

¹³⁷⁶ Martha Hirschfield, 'The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form' (1992) 101(6) *Yale Law Journal* 1331; 1336.

¹³⁷⁷ ANCSA § 7(a).

¹³⁷⁸ ANCSA § 11(b).

the village corporations), while village corporations administer the land, although a number of regional corporations also received significant land holdings.¹³⁷⁹

2.3.1 Regional corporations

Regional corporations are for-profit corporations organised under Alaska state law.¹³⁸⁰ Under ANCSA, the regional corporations are authorised to provide benefits to promote the health, education or welfare of shareholders.¹³⁸¹ Monetary benefits include dividends, elder benefits, scholarships, memorial benefits, shareholders' equity and charitable donations.¹³⁸² The payments received by regional corporations were based on the number of native shareholders in the region.¹³⁸³ Non-monetary benefits include employment opportunities, cultural preservation, land management, economic development and advocacy.¹³⁸⁴

At the time of its introduction, ANCSA individually conferred on eligible Alaska Natives 100 generally inalienable shares in a regional corporation.¹³⁸⁵ However, shareholders of a regional corporation may now vote to amend the articles of incorporation to lift restrictions on share alienability.¹³⁸⁶ There are also potentially processes available for new Alaska Natives to enrol as shareholders. Within the area of a regional corporation, there are many village corporations. All directors of regional corporations are required to be Alaska Natives.¹³⁸⁷ Regional corporations are subject to the state's corporate laws, subject to a few exceptions.¹³⁸⁸

¹³⁷⁹ Martha Hirschfield, 'The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form' (1992) 101(6) *Yale Law Journal* 1331, 1336.

¹³⁸⁰ Douglas Branson, 'Square Pegs in Round Holes Alaska Native Claims Settlement Corporations Under Corporate Law' (1979) 8 *UCLA-Alaska Law Review* 103, 106.

¹³⁸¹ United States Government Accountability Office, *Regional Alaska Native Corporations: Status 40 Years after Establishment, and Future Considerations* (Report to Congressional Requesters, United States Government Accountability Office, December 2012) 38; referring to the ANCSA as amended in 1998 by Pub L No 105-333 § 12 (1998), codified as amended at 43 USC § 1606(r).

¹³⁸² United States Government Accountability Office, *Regional Alaska Native Corporations: Status 40 Years after Establishment, and Future Considerations* (Report to Congressional Requesters, United States Government Accountability Office, December 2012) 38-43.

¹³⁸³ Martha Hirschfield, 'The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form' (1992) 101(6) *Yale Law Journal* 1331, 1336.

¹³⁸⁴ United States Government Accountability Office, *Regional Alaska Native Corporations: Status 40 Years after Establishment, and Future Considerations* (Report to Congressional Requesters, United States Government Accountability Office, December 2012) 44-8.

¹³⁸⁵ Douglas Branson, 'Square Pegs in Round Holes Alaska Native Claims Settlement Corporations Under Corporate Law' (1979) 8 *UCLA-Alaska Law Review* 103, 106.

¹³⁸⁶ United States Government Accountability Office, *Regional Alaska Native Corporations: Status 40 Years after Establishment, and Future Considerations* (Report to Congressional Requesters, United States Government Accountability Office, December 2012) 9.

¹³⁸⁷ ANCSA § 7(f).

¹³⁸⁸ United States Government Accountability Office, *Regional Alaska Native Corporations: Status 40 Years after Establishment, and Future Considerations* (Report to Congressional Requesters, United States Government Accountability Office, December 2012) 16. The exceptions are referred to as principally being provisions relating to capitalisation and issuance of shares.

Among regional corporations, there is wide variation in governance practices.¹³⁸⁹ Their constituent documents vary. However, there is some commonality. For example, almost all regional corporations' boards have written codes of ethics outlining directors' responsibilities, such as conflicts of interest. Many of those discuss how to avoid a conflict of interest and explain what information is to be disclosed in such a situation.¹³⁹⁰ Directors' terms are 3 years and staggered, so that generally one-third of the director positions are up for election each year.¹³⁹¹ About half of regional corporations have nominating committees to assess and recommend potential candidates.¹³⁹² At least one regional corporation requires that at least one director come from each of the region's villages,¹³⁹³ which would appear to promote representativeness. Voting power is equal among shareholders.¹³⁹⁴ Some regional corporations have reported difficulty in achieving a quorum at annual directors' elections.¹³⁹⁵ Regional corporations have made an effort to promote shareholder involvement through annual shareholder meetings, streaming annual meetings online, and shareholder advisory committees.¹³⁹⁶ A shareholder advisory committee is comprised of volunteer shareholders, and report to the board of directors. Each committee consists of nine members chosen randomly from those who volunteer.¹³⁹⁷

2.3.2 Village corporations

Village corporations are also for-profit corporations, which are funded by regional corporations and carry out activities such as land management, local business, fishing and hunting.¹³⁹⁸ A restriction is imposed on village corporation membership on geographical grounds, such that only Alaska Natives who reside in the village boundaries are shareholders of that village corporation.¹³⁹⁹

2.3.3 Relations between corporations

The relationship between regional corporations and village corporations was contemplated by ANCSA. For example regional corporations approved articles of incorporation for all village corporations within their region.¹⁴⁰⁰ Village corporations are required to submit expenditure plans to regional corporations for approval, and funding may be withheld until that occurs.¹⁴⁰¹ Despite these control mechanisms, regional

¹³⁸⁹ Ibid.

¹³⁹⁰ Ibid 19.

¹³⁹¹ Ibid 22.

¹³⁹² Ibid 23.

¹³⁹³ Ibid 22.

¹³⁹⁴ Ibid 25.

¹³⁹⁵ Ibid.

¹³⁹⁶ Ibid 26-27.

¹³⁹⁷ Ibid 27.

¹³⁹⁸ Douglas Branson, 'Square Pegs in Round Holes Alaska Native Claims Settlement Corporations Under Corporate Law' (1979) 8 *UCLA-Alaska Law Review* 103, 107-108.

¹³⁹⁹ Ibid 108.

¹⁴⁰⁰ Ibid.

¹⁴⁰¹ ANCSA § 7(1); Martha Hirschfield, 'The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form' (1992) 101(6) *Yale Law Journal* 1331, 1337.

corporations are not parent companies of village corporations; they have no ownership interest.¹⁴⁰² However, there are ‘complex interdependencies’ established between regional corporations and village corporations by ANCSA.¹⁴⁰³

In addition, regional corporations must distribute 70% of their annual revenue from natural resource development to the other regional corporations based on the number of native shareholders in the region of each corporation. This was intended to provide some equalisation of benefit from the non-equal distribution of natural resources.¹⁴⁰⁴

2.3.4 Settlement trust

A village corporation or regional corporation may take advantage of what is known as a settlement trust. A settlement trust authorises the transfer of certain ANCSA assets, like land, to trusts.¹⁴⁰⁵ For that reason, they seem to be used predominantly by village corporations. Establishing a settlement trust requires shareholder approval.¹⁴⁰⁶ The purpose of a settlement trust is to “promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives”.¹⁴⁰⁷ However, a settlement trust cannot operate as a business¹⁴⁰⁸ or alienate any interest in a trust asset.¹⁴⁰⁹ The village corporation or regional corporation that establishes a settlement trust has exclusive authority to appoint and remove trustees, who must be natural persons.¹⁴¹⁰ There are asset protection benefits in this.¹⁴¹¹ However, Hirschfield is critical of settlement trusts and concludes that the inalienability of land held in trust makes its potential limited.¹⁴¹²

2.3.5 Evaluation of Alaskan model

The primary aim of ANCSA was to ‘achieve native self-determination’, but it appears that the path envisaged for such self-determination was based on increasing Native Alaskans’ economic resources: providing land and other capital, corporate forms and business opportunities to native Alaskans so as to improve socio-economic conditions by way of market mechanisms.¹⁴¹³ The establishment of for-profit regional and village native corporations, along with certainty about the assets held by those corporations,

¹⁴⁰² Douglas Branson, ‘Square Pegs in Round Holes Alaska Native Claims Settlement Corporations Under Corporate Law’ (1979) 8 *UCLA-Alaska Law Review* 103, 120

¹⁴⁰³ Martha Hirschfield, ‘The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form’ (1992) 101(6) *Yale Law Journal* 1331, 1337.

¹⁴⁰⁴ *Nettheim, Myers and Craig’s Indigenous Peoples and Governance Structures* 65.

¹⁴⁰⁵ Martha Hirschfield, ‘The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form’ (1992) 101(6) *Yale Law Journal* 1331, 1343.

¹⁴⁰⁶ ANCSA 43 U.S.C. § 1629e(a)(1)(B).

¹⁴⁰⁷ ANCSA 43 U.S.C. § 1629e(b)(1).

¹⁴⁰⁸ ANCSA 43 U.S.C. § 1629e(b)(1)(A).

¹⁴⁰⁹ ANCSA 43 U.S.C. § 1629e(b)(1)(B).

¹⁴¹⁰ ANCSA 43 U.S.C. § 1629e(b)(2).

¹⁴¹¹ Martha Hirschfield, ‘The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form’ (1992) 101(6) *Yale Law Journal* 1331, 1343.

¹⁴¹² *Ibid* 1344.

¹⁴¹³ Thomas Berger, *Village Journey: The Report of the Alaska Native Review Commission* (Hill & Wang 1985) 161; *Nettheim, Myers and Craig’s Indigenous Peoples and Governance Structures* 64.

was intended to permit 'productive investments so as to maximise shareholder interests'.¹⁴¹⁴

A number of commentators have thus criticised ANCSA native corporations as being too focussed on maximising shareholder interests – measured financially by reference to profits, rather than by reference to other matters such as preservation and protection of country or culture.¹⁴¹⁵ The decision making processes under the native corporations have also been criticised as not sufficiently reflecting native Alaskan governance, in particular by replacing 'customs of sharing [and] subsistence culture', thus not sufficiently supporting self-determination.¹⁴¹⁶

Others, however, have suggested that Alaska Natives have generated innovative ways to pursue purposes other than profits, both through formal ANCSA provisions and also by overlaying informal (and potentially contrary) institutions on top of the formal ANCSA structures.¹⁴¹⁷ Branson, for instance, notes that Alaskan native corporations perform a variety of non-corporate functions such as delivery of social services,¹⁴¹⁸ provision of elder benefits,¹⁴¹⁹ and dispensation of political patronage.¹⁴²⁰ Nevertheless, stretching formal ANCSA provisions beyond their initially envisaged use and relying on informal institutions enhances some risks. In particular, greater uncertainty and risk of liability for directors, as well as increased potential for conflicts of interest.¹⁴²¹ It can also result in poorer decision making and mission drift.¹⁴²²

The Alaskan model was intended to give native people a collective economic power and greater political influence, supplanting government paternalism.¹⁴²³ However, many of the highest paying and most influential roles in some regional corporations have been

¹⁴¹⁴ *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 65.

¹⁴¹⁵ AFN Final Report, *Achieving Alaska Native Self-Governance – Toward Implementation of the Alaska Natives Commission Report*, (The Economics Resource Group Inc and the Institute of Social and Economic Research, University of Alaska, 1999) 23; Thomas Berger, *Village Journey: The Report of the Alaska Native Review Commission* (Hill & Wang 1985) 32, 40

¹⁴¹⁶ Thomas Berger, *Village Journey: The Report of the Alaska Native Review Commission* (Hill & Wang 1985) 43.

¹⁴¹⁷ Dixie Dayo and Gary Kofinas, 'Institutional Innovation in Less Than Ideal Conditions: Management of Commons by an Alaska Native Village Corporation' (2010) 4(1) *International Journal of the Commons* 142, 143; Douglas Branson, 'Still Square Pegs in Round Holes? A Look at ANCSA Corporations, Corporate Governance, and Indeterminate Form or Operation of Legal Entities' (2007) 24 *Alaska Law Review* 203, 218-20, 235-6.

¹⁴¹⁸ Douglas Branson, 'Still Square Pegs in Round Holes? A Look at ANCSA Corporations, Corporate Governance, and Indeterminate Form or Operation of Legal Entities' (2007) 24 *Alaska Law Review* 203, 218.

¹⁴¹⁹ *Ibid* 219.

¹⁴²⁰ *Ibid* 220.

¹⁴²¹ *Ibid* 218-24; Douglas Branson, 'Square Pegs in Round Holes Alaska Native Claims Settlement Corporations Under Corporate Law' (1979) 8 *UCLA-Alaska Law Review* 103, 119.

¹⁴²² Douglas Branson, 'Still Square Pegs in Round Holes? A Look at ANCSA Corporations, Corporate Governance, and Indeterminate Form or Operation of Legal Entities' (2007) 24 *Alaska Law Review* 203, 222-4.

¹⁴²³ Imre Sutton (ed), *Irredeemable America: The Indians' Estate and Land Claims* (University of New Mexico Press, 1985) 302.

held by non-natives, reflecting, in practice, a native capacity deficit.¹⁴²⁴ In addition, the proportion of native Alaskans employed by native corporations has only been a small proportion of all native Alaskans, such that employment benefits were relatively narrowly distributed.¹⁴²⁵ The capacity deficit also resulted in difficulties in obtaining and evaluating advice such that the process of obtaining the necessary skills and experience to manage native corporations came with a significant opportunity, time and psychological cost.¹⁴²⁶

In 2012 the Government Accountability Office prepared a report to Congress on regional corporations.¹⁴²⁷ The performance of regional corporations seems to be mixed.¹⁴²⁸ Further, the two tiered system has given rise to tension between regional corporations and village corporations.¹⁴²⁹ The report notes that many of the regional corporations struggled financially in the 1980s and 1990s.¹⁴³⁰ Two were declared bankrupt.¹⁴³¹ However, it balances this by stating that, in 2011, the 12 regional corporations were ranked as top businesses in Alaska.¹⁴³² Further, it observes that one regional corporation in particular, the Arctic Slope Regional Corporation, has been ranked as the number one Alaska-owned corporation for 17 consecutive years, with gross revenues of \$2.3 billion in 2010.¹⁴³³

3. New Zealand

3.1 Background

In New Zealand, the Treaty of Waitangi (1840) is foundational.¹⁴³⁴ It documents the agreement between the British Crown and the Maori¹⁴³⁵ people which provided for the sharing of power and presupposed independent legal and political capacity on the part of the Maori.¹⁴³⁶ It gave the British Crown the right to govern but that right was dependent

¹⁴²⁴ Ibid 303.

¹⁴²⁵ Thomas Berger, *Village Journey: The Report of the Alaska Native Review Commission* (Hill & Wang 1985) 30

¹⁴²⁶ Ibid. Cf Douglas Branson, 'Still Square Pegs in Round Holes? A Look at ANCSA Corporations, Corporate Governance, and Indeterminate Form or Operation of Legal Entities' (2007) 24 *Alaska Law Review* 203, 224.

¹⁴²⁷ United States Government Accountability Office, *Regional Alaska Native Corporations: Status 40 Years after Establishment, and Future Considerations* (Report to Congressional Requesters, United States Government Accountability Office, December 2012).

¹⁴²⁸ See also Nell Newton, 'Compensation, Reparations, & Restitution: Indian Property Claims in the United States' (1994) 28 *Georgia Law Review* 453.

¹⁴²⁹ Ibid 475.

¹⁴³⁰ United States Government Accountability Office, *Regional Alaska Native Corporations: Status 40 Years after Establishment, and Future Considerations* (Report to Congressional Requesters, United States Government Accountability Office, December 2012) 12.

¹⁴³¹ Ibid.

¹⁴³² Ibid.

¹⁴³³ Ibid 13.

¹⁴³⁴ Shaunnagh Dorsett and Lee Godden, *A Guide to Overseas Precedents of Relevance to Native Title* (Native Title Research Unit, AIATSIS 1998) 32.

¹⁴³⁵ In this section, the term 'Maori' will be used in place of the term 'Indigenous' used elsewhere in this document, consistently with common practice in the New Zealand literature.

¹⁴³⁶ Marina Nehme, 'Indigenous Corporate Governance in Australia and Beyond' in David Frenkel, *Economy and Commercial Law – Selected Issues* (2013, Athens Institute for Education and Research, Greece) 100;

upon the Crown meeting its obligations to Maori people under that Treaty.¹⁴³⁷ These obligations have been interpreted in fiduciary terms in contemporary cases.¹⁴³⁸

Pursuant to the Treaty of Waitangi, the Crown had a right of pre-emption such that Maori could not freely sell their customary lands to third parties. Over time, the Crown pursued numerous purchases of Maori land to provide more land for settlers. In connection with this, in 1862 the Native Land Court was established under the *Maori Affairs Act*¹⁴³⁹ to replace Crown right of pre-emption of customary land with free trade.¹⁴⁴⁰ The effect was that after 1863, once Maori had their customary title investigated by the Native Land Court, they received freehold title and that title was alienable.¹⁴⁴¹

Historically, the New Zealand courts have considered Indigenous title in only a few cases.¹⁴⁴² However, the modern era of Maori/non-Indigenous relations can be said to begin with the adoption of the *Treaty of Waitangi Act 1975* (NZ), establishing the Waitangi Tribunal.¹⁴⁴³ More recent cases have confirmed that aboriginal title is recognised by the common law and that it includes rights in land and waters, the scope and nature of which depend upon the particular traditional uses of the lands and waters.¹⁴⁴⁴ These often include rights in natural resources including minerals.¹⁴⁴⁵

In terms of Maori participation in government, the *Resource Management Act 1991* (NZ) provides for Maori involvement in decisions about the use of land, air and water resources. This involves incorporating Maori words and concepts – including in relation to environmental stewardship and providing for extensive public consultation and standing – that apply to Maori (and non-Maori) residents.¹⁴⁴⁶

3.2 Management of settlement assets

From the 1990s, the Maori claimants and the Crown have typically endeavoured to achieve negotiated settlements of customary title claims.¹⁴⁴⁷ Settlements typically involve

¹⁴³⁷ Shaunnagh Dorsett and Lee Godden, *A Guide to Overseas Precedents of Relevance to Native Title* (Native Title Research Unit, AIATSIS 1998) 32.

¹⁴³⁸ *New Zealand Maori Council v A-G (NZ)* [1987] NZLR 641; *New Zealand Māori Council v A-G (NZ)* [2007] NZCA 269

¹⁴³⁹ *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 124-5.

¹⁴⁴⁰ Shaunnagh Dorsett and Lee Godden, *A Guide to Overseas Precedents of Relevance to Native Title* (Native Title Research Unit, AIATSIS 1998) 92.

¹⁴⁴¹ *Ibid.*

¹⁴⁴² See *R v Symonds* (1847) NZPCC 387; *Re London and Whitaker Claims* (1872) 2 NZCA 41; *Wi Parata v Bishop of Wellington* (1878) 3 NZ Jur 72; *Nireaha Tamaki v Baker* (1894) 11 NZLR 483.

¹⁴⁴³ *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 130.

¹⁴⁴⁴ *Te Runanga o Muriwhenua v Attorney-General* [1990] 2 NZLR 641; *Te Runanganui o te Ika Whenua Inc Society v Attorney General 2* [1994] 2 NZLR 20.

¹⁴⁴⁵ For instance, rights to extract/harvest coal (*Tanui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513) and timber: *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 136-7.

¹⁴⁴⁶ *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 139-40.

¹⁴⁴⁷ See, eg, *ibid* 144.

allocation of land to the Maori Iwi, recognition of rights in specified resources, compensation and co-management over matters such as conservation areas.¹⁴⁴⁸

Following successful negotiations, a Post Settlement Governance Entity (**PSGE**) is established.¹⁴⁴⁹ A PSGE is an Iwi entity approved by the relevant Iwi and the Crown as suitable to receive redress (in the form of various types of assets) from the settlement of historical treaty claims of that particular Iwi.¹⁴⁵⁰ The function of a PSGE is to hold and manage those assets.¹⁴⁵¹ The organisational structure of a PSGE is typically akin to that of a corporate group, but with both charitable and commercial arms.¹⁴⁵²

According to government guidance, fundamentally, a PSGE should be representative, accountable and transparent.¹⁴⁵³

3.2.1 Types of entities

Sadler and MacKinnon give an account of the variety of entities used in the past to receive assets for settlement redress,¹⁴⁵⁴ including outlining the advantages and disadvantages of each. Sanderson, Arcus and Stokes, as well as McKay and Gibbs, have also undertaken a similar analysis.¹⁴⁵⁵ The main entities have included:

Charitable Trust

An advantage of this entity is that the income of a charitable trust is exempt from taxation.¹⁴⁵⁶ However, a charitable trust cannot benefit individuals specifically, but instead benefit a wider group. It has been noted that the terms of a charitable trust are difficult to modify and may require approval from both the Attorney General and the

¹⁴⁴⁸ *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 144.

¹⁴⁴⁹ Hone Sadler and Callum MacKinnon, 'Pathways for Ngapuhi's Future: Post Settlement Governance Entity' (2014) 7(5) *International Journal of Arts & Sciences* 749, 759

¹⁴⁵⁰ *Ibid* 752; Kel Sanderson, Mathew Arcus and Fiona Stokes, 'Functions and Costs of Operating a Post-Settlement Governance Entity' (Report to the Crown Forestry Rental Trust, December 2007) 3.

¹⁴⁵¹ Hone Sadler and Callum MacKinnon, 'Pathways for Ngapuhi's Future: Post Settlement Governance Entity' (2014) 7(5) *International Journal of Arts & Sciences* 749, 760; Kel Sanderson, Mathew Arcus and Fiona Stokes, 'Functions and Costs of Operating a Post-Settlement Governance Entity' (Report to the Crown Forestry Rental Trust, December 2007) 3.

¹⁴⁵² Hone Sadler and Callum MacKinnon, 'Pathways for Ngapuhi's Future: Post Settlement Governance Entity' (2014) 7(5) *International Journal of Arts & Sciences* 749, 760.

¹⁴⁵³ Crown Forestry Rental Trust, 'Guide for Claimants Negotiating Treaty Settlements' (Crown Forestry Rental Trust, November 2007) 253; Office of Treaty Settlements, 'Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown' "Red Book" (March 2015) 70-2.

¹⁴⁵⁴ Hone Sadler and Callum MacKinnon, 'Pathways for Ngapuhi's Future: Post Settlement Governance Entity' (2014) 7(5) *International Journal of Arts & Sciences* 749, 761-6.

¹⁴⁵⁵ Kel Sanderson, Mathew Arcus and Fiona Stokes, 'Functions and Costs of Operating a Post-Settlement Governance Entity' (Report to the Crown Forestry Rental Trust, December 2007) 4; Liam McKay, 'Waka Umanga: Has the Government Missed the Boat on Maori Collective Assets Management?' (LLM Thesis, University of Otago, 2012); Meredith Gibbs, 'What Structures are Appropriate to Receive Treaty of Waitangi Settlement Assets?' (2004) 21 *New Zealand Universities Law Review* 197, 198.

¹⁴⁵⁶ Hone Sadler and Callum MacKinnon, 'Pathways for Ngapuhi's Future: Post Settlement Governance Entity' (2014) 7(5) *International Journal of Arts & Sciences* 749, 762; Liam McKay, 'Waka Umanga: Has the Government Missed the Boat on Maori Collective Assets Management?' (LLM Thesis, University of Otago, 2012) 42.

courts.¹⁴⁵⁷ That creates future challenges for an Iwi group whose culture and membership changes with the passage of time. Sadler and MacKinnon state that it is often desirable to require the trustees to appoint an investment advisor.¹⁴⁵⁸

Incorporated Society

This is a group registered under the *Incorporated Societies Act 1908*. It is a separate legal entity. An Incorporated Society may be entitled to some income tax exemptions. The *Incorporated Societies Act 1908* imposes various governance requirements.¹⁴⁵⁹ This entity was described as having relatively low set-up and compliance costs.¹⁴⁶⁰ Transparency is promoted by the requirement that annual financial statements be prepared and filed with the Registrar.¹⁴⁶¹ However, an overwhelmingly unsatisfactory attribute of this entity is that it is precluded from engaging in any activities that involve pecuniary gain.¹⁴⁶²

Company

Companies may be established under the *Companies Act 1993* (NZ). That Act comprehensively prescribes rules for the company and its officers, including corporate governance mechanisms. Those regulatory aspects have been assumed to be a positive attribute of this entity.¹⁴⁶³ However, some of the difficulties associated with companies have been canvassed as including fair apportionment between members¹⁴⁶⁴ and a failure to incorporate notions of collectivism and community inherent in Maori culture.¹⁴⁶⁵

Private Trust

A private trust is created by a trust deed within the legal framework applicable to trusts.¹⁴⁶⁶ It does not enjoy separate legal personality.¹⁴⁶⁷ Commentators refer to this as the most common PSGE.¹⁴⁶⁸ Its advantages are said to be that it is accountable to

¹⁴⁵⁷ Sections 32 to 35 *Charitable Trusts Act 1957*; Liam McKay, 'Waka Umanga: Has the Government Missed the Boat on Maori Collective Assets Management?' (LLM Thesis, University of Otago, 2012) 42.

¹⁴⁵⁸ Hone Sadler and Callum MacKinnon, 'Pathways for Ngapuhi's Future: Post Settlement Governance Entity' (2014) 7(5) *International Journal of Arts & Sciences* 749, 762

¹⁴⁵⁹ *Ibid* 763-764

¹⁴⁶⁰ Liam McKay, 'Waka Umanga: Has the Government Missed the Boat on Maori Collective Assets Management?' (LLM Thesis, University of Otago, 2012) 35.

¹⁴⁶¹ *Incorporated Societies Act 1908* s 23; *ibid* 36.

¹⁴⁶² *Incorporated Societies Act 1908* s 20; Liam McKay, 'Waka Umanga: Has the Government Missed the Boat on Maori Collective Assets Management?' (LLM Thesis, University of Otago, 2012) 36.

¹⁴⁶³ See, eg, Liam McKay, 'Waka Umanga: Has the Government Missed the Boat on Maori Collective Assets Management?' (LLM Thesis, University of Otago, 2012) 37-38.

¹⁴⁶⁴ *Ibid* 37.

¹⁴⁶⁵ *Ibid*.

¹⁴⁶⁶ *Trustee Act 1956*. Sadler and MacKinnon refer to this entity as a 'Common Law Trust'.

¹⁴⁶⁷ Unless incorporated under the *Charitable Trusts Act 1957* s 7; Liam McKay, 'Waka Umanga: Has the Government Missed the Boat on Maori Collective Assets Management?' (LLM Thesis, University of Otago, 2012) 40.

¹⁴⁶⁸ Kel Sanderson, Mathew Arcus and Fiona Stokes, 'Functions and Costs of Operating a Post-Settlement Governance Entity' (Report to the Crown Forestry Rental Trust, December 2007) 9; New Zealand Law Commission, *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase* (Advisory Report SP13,

beneficiaries, independent of government, flexible,¹⁴⁶⁹ and able to be adapted to the particular needs of the Iwi.¹⁴⁷⁰ The disadvantages are described as costliness, complexity, and time consuming processes.¹⁴⁷¹ McKay gives an example of a governance entity known as Te Runanga o Ngati Mutunga, which manages the Treaty settlement assets of the Ngati Mutunga Iwi of Taranaki. That trust has five trustees. All of those trustees are Iwi members.¹⁴⁷²

Maori Trust Board

These entities are contemplated by the *Maori Trust Board Act 1956* (NZ). They have a body corporate status allowing for perpetual succession and limited liability. There are also associated reporting and accountability obligations. Similar to the *Companies Act*, that regulatory regime has been assumed by some to be an inherently positive attribute of this entity.¹⁴⁷³ The beneficiaries elect members of the board. However, these entities are ultimately accountable to the Minister of Maori Affairs which is seen as being paternalistic.¹⁴⁷⁴ Another disadvantage of this entity is its inflexibility, with many created some time ago and not accurately reflecting current Iwi identity.¹⁴⁷⁵ Additionally, with this structure, beneficiaries do not have a beneficial interest in the trust property.¹⁴⁷⁶

Statutory Body

This is an entity created by statute. An example of this entity being used is the Ngai Tahu people. The body was created by the *Te Runanga o Ngai Tahu Act 1996* (NZ). This type of entity was utilised because it allowed a policy of decentralisation and autonomy.¹⁴⁷⁷ This body includes a charitable trust, a holding corporation, statutory office and various other corporations. Trustee board members are elected democratically by the Iwi.¹⁴⁷⁸ A

2002) 38; Hone Sadler and Callum MacKinnon, 'Pathways for Ngapuhi's Future: Post Settlement Governance Entity' (2014) 7(5) *International Journal of Arts & Sciences* 749, 764; Liam McKay, 'Waka Umanga: Has the Government Missed the Boat on Maori Collective Assets Management?' (LLM Thesis, University of Otago, 2012) 39.

¹⁴⁶⁹ Liam McKay, 'Waka Umanga: Has the Government Missed the Boat on Maori Collective Assets Management?' (LLM Thesis, University of Otago, 2012) 40.

¹⁴⁷⁰ Hone Sadler and Callum MacKinnon, 'Pathways for Ngapuhi's Future: Post Settlement Governance Entity' (2014) 7(5) *International Journal of Arts & Sciences* 749, 765.

¹⁴⁷¹ Ibid.

¹⁴⁷² Ngati Mutunga "Organisational Structure" (2011) Ngati Mutunga <www.ngatimutunga.iwi.net>. Liam McKay, 'Waka Umanga: Has the Government Missed the Boat on Maori Collective Assets Management?' (LLM Thesis, University of Otago, 2012) 39.

¹⁴⁷³ Liam McKay, 'Waka Umanga: Has the Government Missed the Boat on Maori Collective Assets Management?' (LLM Thesis, University of Otago, 2012) 42.

¹⁴⁷⁴ Hone Sadler and Callum MacKinnon, 'Pathways for Ngapuhi's Future: Post Settlement Governance Entity' (2014) 7(5) *International Journal of Arts & Sciences* 749, 761; *ibid* 43; Kel Sanderson, Mathew Arcus and Fiona Stokes, 'Functions and Costs of Operating a Post-Settlement Governance Entity' (Report to the Crown Forestry Rental Trust, December 2007) 4.

¹⁴⁷⁵ Liam McKay, 'Waka Umanga: Has the Government Missed the Boat on Maori Collective Assets Management?' (LLM Thesis, University of Otago, 2012) 43.

¹⁴⁷⁶ Kel Sanderson, Mathew Arcus and Fiona Stokes, 'Functions and Costs of Operating a Post-Settlement Governance Entity' (Report to the Crown Forestry Rental Trust, December 2007) 4.

¹⁴⁷⁷ Hone Sadler and Callum MacKinnon, 'Pathways for Ngapuhi's Future: Post Settlement Governance Entity' (2014) 7(5) *International Journal of Arts & Sciences* 749, 771.

¹⁴⁷⁸ *Ibid* 771-772.

potential advantage is said to be its ability to offer a tailor-made vehicle, as each statute is developed for a particular claim group.¹⁴⁷⁹ However, if that is an advantage, then it must be one which equally applies to almost all of the other PSGE types. That is because all PSGEs have some founding document (eg trust deed, articles of incorporation, company constitution, etc), which can be tailored in any event. A disadvantage of this entity is the time and effort required to pass legislation.¹⁴⁸⁰

3.2.2 Crown Forestry Rental Trust

In New Zealand, there is an independent agency called the Crown Forestry Rental Trust. The CFRT was created as a result of a dispute between Maori and the New Zealand government over the proposed sale by the government of rights to harvest and sell timber on land the subject of Maori title claims.¹⁴⁸¹ The proceeds from timber sales are held on trust by the CFRT pending resolution of the claims. The CFRT does not negotiate or settle claims. Rather, it supports claimant groups to prepare, present and negotiate claims.¹⁴⁸² That includes providing advice and funding settlement related activities.¹⁴⁸³ The CFRT receives rental fees from forestry companies and manages those fees in accordance with a trust deed that established the CFRT.¹⁴⁸⁴ The CFRT holds over \$570 million in trust.¹⁴⁸⁵ The CFRT's ability to assist with initial funding for claimant groups in the early stages seems to address monetary and human capacity deficits.

3.2.3 Current practice

The Crown requires a suitable PSGE to be established before a treaty settlement can be completed.¹⁴⁸⁶ The Crown's key requirements for a PSGE are: claimant group representation; transparent decision making processes and dispute resolution processes; and accountability to claimant group members.¹⁴⁸⁷

The Crown's current policy is that it will not accept the following types of PSGEs: Maori Trust Boards;¹⁴⁸⁸ incorporated societies;¹⁴⁸⁹ statutory body post governance entities;

¹⁴⁷⁹ Liam McKay, 'Waka Umanga: Has the Government Missed the Boat on Maori Collective Assets Management?' (LLM Thesis, University of Otago, 2012) 46-47.

¹⁴⁸⁰ Ibid.

¹⁴⁸¹ *Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures* 137.

¹⁴⁸² Crown Forestry Rental Trust, 'Guide for Claimants Negotiating Treaty Settlements' (Crown Forestry Rental Trust, November 2007) 23.

¹⁴⁸³ Ibid.

¹⁴⁸⁴ Ibid.

¹⁴⁸⁵ Ibid.

¹⁴⁸⁶ Ibid 253.

¹⁴⁸⁷ Ibid; Office of Treaty Settlements, 'Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown' "Red Book" (March 2015) 70-2.

¹⁴⁸⁸ Established under the *Maori Trust Boards Act 1955*.

¹⁴⁸⁹ Under the *Incorporated Societies Act 1908*.

companies;¹⁴⁹⁰ and charitable trusts.¹⁴⁹¹ The Crown has not positively and exhaustively listed what it will accept, but this leaves limited choice. However, the Crown has specifically stated that a model the Crown *will* accept is the private trust.¹⁴⁹² The private trust model also generally involves subsidiary trusts or companies to manage the settlement assets.¹⁴⁹³ It has been stated to be the Crown’s preferred approach.¹⁴⁹⁴

The current practice is depicted in the following diagram:¹⁴⁹⁵

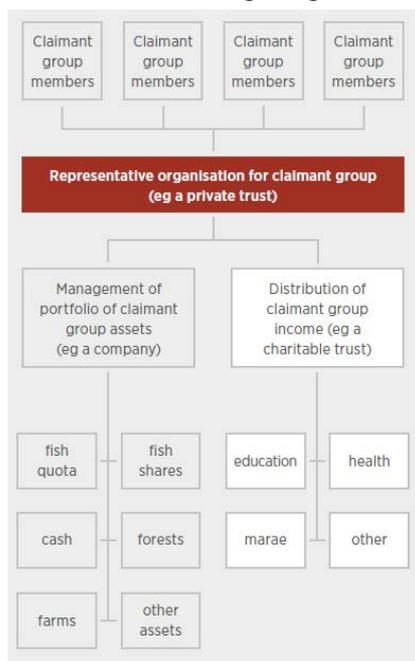


Figure 2.15: example of a governance entity for distribution of settlement assets (based on a model developed by Te Ohu Kai Moana)

There are several preferred structural features of PSGEs. First, a PSGE should appropriately maintain a register of the membership of a claimant group.¹⁴⁹⁶ A Membership Validation Committee is commonly established for the purpose of reviewing all applications and is comprised of members of the claimant group, appointed by the

¹⁴⁹⁰ Established under the *Companies Act 1993*.

¹⁴⁹¹ For an explanation of the reasons outlining the inappropriateness of these entities, see: Crown Forestry Rental Trust, ‘Guide for Claimants Negotiating Treaty Settlements’ (Crown Forestry Rental Trust, November 2007) 256-7.

¹⁴⁹² Office of Treaty Settlements, ‘Post Settlement Governance Entities: A Guide’ (Office of Treaty Settlements, 2012) 8.

¹⁴⁹³ *Ibid.*

¹⁴⁹⁴ Law Commission Review of the Law of Trusts – Preferred Approach (NZLC IP31, 2012) [1.14]–[1.17]; Law Commission, Review of the Law of Trusts A Trusts Act for New Zealand (Report 130, Wellington, New Zealand, August 2013) [2.3].

¹⁴⁹⁵ Office of Treaty Settlements, ‘Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown’ “Red Book” (March 2015) 68.

¹⁴⁹⁶ Crown Forestry Rental Trust, ‘Guide for Claimants Negotiating Treaty Settlements’ (Crown Forestry Rental Trust, November 2007) 283.

PSGE, who have knowledge of the claimant group which is brought to bear when considering applications.¹⁴⁹⁷

Second, there should be effective methods for the appointment and removal of trustees.¹⁴⁹⁸ For example, democratic election of trustees by the claim group.¹⁴⁹⁹ Moreover, there are comprehensive notice requirements where an election is conducted.¹⁵⁰⁰ The office of a trustee may be terminated if they, for instance, retire, become bankrupt, are convicted of an indictable offence, or are physically or mentally incapacitated.¹⁵⁰¹

Third, it is common for a PSGE to provide for what is referred to as a Kumatura Committee. That is a particular committee which is established to provide non-binding advice to the elected trustees.¹⁵⁰²

Fourth, while it is not usually a legal requirement, many PSGEs prepare annual and five year plans to enhance accountability.¹⁵⁰³

Fifth, there is some operational benefit obtained in practice by separating the key functions within a PSGE between separate companies. Those separate companies administer assets on behalf of the claimant group. The management of each company is separated, but there is some risk that trustees may interfere with the day to day operations of those companies.¹⁵⁰⁴

Sixth, there may be a custodian or nominee trustee.¹⁵⁰⁵ Transfer costs are purportedly reduced, enhancing efficiency.¹⁵⁰⁶

3.2.4 Evaluation

The importance of an appropriate PSGE has been acknowledged in New Zealand in the following way:¹⁵⁰⁷

The development of a governance entity to hold and manage collective assets is perhaps the most important decision to be made by iwi during the settlement process. Given the likelihood that the entity will have responsibility for a significant number of diverse assets

¹⁴⁹⁷ Ibid.

¹⁴⁹⁸ Ibid 287.

¹⁴⁹⁹ Ibid.

¹⁵⁰⁰ Ibid 289-290.

¹⁵⁰¹ Ibid 292.

¹⁵⁰² Ibid 256.

¹⁵⁰³ Ibid.

¹⁵⁰⁴ Ibid.

¹⁵⁰⁵ The Te Arawa Lakes, Ngati Mutunga and Ngati Awa governance entity rules contemplate this type of trustee: *ibid.*

¹⁵⁰⁶ Ibid.

¹⁵⁰⁷ Liam McKay, 'Waka Umanga: Has the Government Missed the Boat on Maori Collective Assets Management?' (LLM Thesis, University of Otago, 2012) 33.

potentially worth millions of dollars, it is essential that it is transparent and appropriately accountable to its members and meets their needs.

Sanderson, Arcus and Stokes argue that there are several business functions necessary to the operation of an economically sustainable PSGE.¹⁵⁰⁸ 'Business functions' in this case refers to governance, administration and establishment of companies.¹⁵⁰⁹ The authors acknowledge that while good governance may be an institutional ideal, the practical cost implications associated with high level corporate governance may not always be justified.¹⁵¹⁰ However, proper administration is considered to be an aspect of a PSGE that is indispensable. For example, administration staff advertise meetings, and keep the Iwi informed. That is essential for a representative PSGE. If it holds commercial assets, a PSGE should establish commercial businesses to receive and manage commercial assets. The separation of these companies from the governance of the PSGE is said to be good business practice and also allows the separation of key roles.¹⁵¹¹ An added benefit of this is capacity building and technical knowledge, for example, in relation to land use capability, forestry, fisheries, horticulture and agriculture.¹⁵¹² Common experience is that Iwi struggle to develop the business functions of their PSGE.¹⁵¹³

McKay concludes, after considering the advantages and disadvantages of the different types of PSGE, that 'there is no single legal entity that meets all of the commercial, cultural, social and political needs of Māori collectives in the management of their collective assets'.¹⁵¹⁴

¹⁵⁰⁸ Kel Sanderson, Mathew Arcus and Fiona Stokes, 'Functions and Costs of Operating a Post-Settlement Governance Entity' (Report to the Crown Forestry Rental Trust, December 2007) 6.

¹⁵⁰⁹ Ibid 13.

¹⁵¹⁰ Ibid 15.

¹⁵¹¹ Ibid 17.

¹⁵¹² Ibid 19.

¹⁵¹³ Ibid 20.

¹⁵¹⁴ Liam McKay, 'Waka Umanga: Has the Government Missed the Boat on Maori Collective Assets Management?' (LLM Thesis, University of Otago, 2012) 50.



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