Co-designing Benefits Management Structures

Ian Murray, Joe Fardin and James O’Hara
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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’.
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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
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<td>Australian Charities and Not-for-profits Commission</td>
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<td>AFS licence</td>
<td>Australian financial services licence</td>
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<td>AIATSIS</td>
<td>Australian Institute of Aboriginal and Torres Strait Islander Studies</td>
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<td>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</td>
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<td>Alaska Native Claims Settlement Act of 1971 43 USC (1971)</td>
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<td>BHP-Banjima Agreement</td>
<td>Comprehensive Agreement entered into in November 2015 between BHP and BNTAC and the Banjima People</td>
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<td>Comprehensive Agreement entered into in 2012 between the Nyiyaparli People and BHP</td>
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<td>BIA</td>
<td>Bureau of Indian Affairs</td>
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<td>BMS</td>
<td>Benefits management structure</td>
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<td>BNTAC</td>
<td>Banjima Native Title Aboriginal Corporation RNTBC</td>
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<td>CAEPR</td>
<td>Centre for Aboriginal Economic Policy Research, ANU</td>
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<td>CATSI Act</td>
<td>Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)</td>
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<td>CFRT</td>
<td>Crown Forestry Rental Trust</td>
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<td>CIC</td>
<td>Community interest company</td>
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<td>Corporations Act</td>
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<td>DOI</td>
<td>Department of the Interior</td>
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<td>GAC</td>
<td>Gumala Aboriginal Corporation</td>
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<td>Short Form</td>
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<td>GEAT</td>
<td>Groote Eylandt Aboriginal Trust</td>
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<td>GEPL</td>
<td>Gumala Enterprises Pty Ltd</td>
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<td>Gumala General Foundation</td>
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<td>Hunt et al's Contested Governance</td>
<td>Janet Hunt, Diane Smith, Stephanie Garling and Will Sanders (eds), <em>Contested Governance: Culture, Power and Institutions in Indigenous Australia</em> (ANU E Press, 2008)</td>
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<td>IBA</td>
<td>Impact and Benefits Agreement</td>
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<td>INAC</td>
<td>Department of Indigenous and Northern Affairs Canada</td>
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<td>Karlka</td>
<td>Karlka Nyiyaparli Aboriginal Corporation</td>
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<td>LALC</td>
<td>Local Aboriginal land council</td>
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<td>LTC</td>
<td>Licensed trustee company</td>
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<td>MFCo</td>
<td>Myer Family Company Ltd</td>
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<td>MG Corporation</td>
<td>Yawoorroong Miriuwung Gajerrong Yirrgeb Noong Dawang Corporation</td>
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<td>NAC</td>
<td>Ngarluma Aboriginal Corporation RNTBC</td>
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<td>Nettheim, Myers and Craig’s</td>
<td>Garth Nettheim, Gary Meyers and Donna Craig, <em>Indigenous Peoples and Governance Structures: A Comparative Analysis of</em></td>
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<td><strong>NSW ICAC</strong></td>
<td>New South Wales Independent Commission Against Corruption</td>
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<td><strong>OFA</strong></td>
<td>Ord Final Agreement</td>
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<td><strong>ORIC</strong></td>
<td>Office of the Registrar of Indigenous Corporations</td>
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<td><strong>OST</strong></td>
<td>Office of the Special Trustee</td>
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<td><strong>PBC</strong></td>
<td>Prescribed body corporate</td>
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<td><strong>PSGE</strong></td>
<td>Post Settlement Governance Entity</td>
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<td><strong>Rio Tinto-Banjima Agreement</strong></td>
<td>Claim-wide native title agreement entered into in April 2016 between Rio Tinto and BNTAC and the Banjima People</td>
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<td><strong>Rio Tinto-Nyiyaparli Agreements</strong></td>
<td>Native title agreements entered into between Rio Tinto and the Nyiyaparli People on and from March 2011</td>
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<tr>
<td><strong>RNTBC</strong></td>
<td>Registered native title body corporate</td>
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<tr>
<td><strong>Scott’s Institutions and Organizations</strong></td>
<td>W Richard Scott, <em>Institutions and Organizations</em> (Sage, 4th ed, 2014)</td>
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<tr>
<td><strong>SROI</strong></td>
<td>Social Return on Investment</td>
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<td><strong>YLUA</strong></td>
<td>Yandi Land Use Agreement</td>
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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:

<table>
<thead>
<tr>
<th>The need to support autonomy</th>
<th>Recognising every community, family and individual is different</th>
<th>Incorporation of traditional law and custom</th>
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<tr>
<td>Need for capacity building</td>
<td>Governance</td>
<td>Communication and participation in decision making</td>
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<td>Achieving equity</td>
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<td>Strategic planning to achieve BMS purposes</td>
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<td>Siloing</td>
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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.
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-focused 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.

<table>
<thead>
<tr>
<th>Improving BMS communication and participation by moving away from heavy reliance on general meetings and representatives (Part 7.1)</th>
<th>This might involve:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reporting mechanisms to ensure trustees are motivated to pursue communication and consultation.</td>
<td></td>
</tr>
<tr>
<td>Other procedural mechanisms to motivate communication and consultation such as a charter of good conduct, communication protocols and general board/committee coordination processes.</td>
<td></td>
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<tr>
<td>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.</td>
<td></td>
</tr>
</tbody>
</table>
- 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 Indigenous community members should be asked to vote on every BMS issue.

| 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) | 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:

- 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.

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:

- 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.

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.
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.

<table>
<thead>
<tr>
<th>Reducing transaction costs arising from interactions between overlapping decision making bodies through an Efficiency lens of building certainty and interpersonal trust as outlined in Part 7.3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uncertainty can be reduced through institutional mechanisms and opportunism can be reduced by building interpersonal trust. In particular, measures would include:</td>
</tr>
<tr>
<td>• 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.</td>
</tr>
<tr>
<td>• 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 Customisation and Incorporation of traditional law and custom &amp; 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/decision making bodies in place, but with a better delineation of responsibilities.</td>
</tr>
<tr>
<td>• More radical approaches might involve:</td>
</tr>
<tr>
<td>o 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.</td>
</tr>
</tbody>
</table>
- 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.

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**.

| The use of a future fund, in conjunction with the use of a charitable trust and a discretionary trust represents best practice to achieve **Equity**, but could better acknowledge the importance of non-monetary benefits for future generations and could permit alternative interpretations of intergenerational justice (Part 7.4) | 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. 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. |
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.

### Dealing with complexity in aid of achieving flexibility (Part 7.5)

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:

- 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.

The final example highlights the need to avoid a silo mentality and to coordinate with others, whether that be government, NGOs or other BMSs.

38. In addition:

### The ‘windows approach’ (Part 7.6)

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.

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
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.

### Professional trustees

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)

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).

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.

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:

- 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.

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.

### 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:

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:
   - Ian Murray – (08 ) 6488 8520; ian.murray@uwa.edu.au
   - Joe Fardin – joe.fardin@uwa.edu.au

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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).
Authors

Dr Ian Murray
Ian is a Senior Lecturer in the University of Western Australia Law School and a member of the Centre for Mining, Energy and Natural Resources Law. He researches in the areas of Resource Taxation and the intersection between Not-for-profit Law, Tax and Corporate Governance and has over a decade’s experience in relation to corporate and not-for-profit tax and governance matters. In particular, over the last 10 years, he has been extensively involved in advising on the taxation and governance issues arising under native title agreements, especially in relation to the BMSs established to hold native title payments. Ian gained much of this experience working for Ashurst, a law firm, looking at BMSs from the perspective of resource companies. Ian still undertakes work from time to time for Ashurst and Ian has undertaken work for Ashurst for BHP (and Rio Tinto) from time to time.

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.

Joe Fardin
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.
James O'Hara
James graduated in 2014, undertook an associateship with Justice Hall of the Supreme Court of Western Australia and has since worked at Minter Ellison and Herbert Smith Freehills. At the end of his associateship, James joined the research team and provided extensive research assistance for this monograph.
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, represent the principal means by which parties achieve practical recognition of Indigenous peoples' rights, culture and significance. Collectively, native title land use agreements involve billions of dollars per year. 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. 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, 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

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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.
project 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:

- 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. 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.

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8 Ethics approval was obtained from UWA’s Human Research Ethics Committee, RA/4/1/8511.
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.
13 See, eg, Scott’s Institutions and Organizations 56-64.
Neo-institutionalism asserts that institutions affect behaviour, and seeks to explain the ways in which institutions do so. 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. Neo-institutionalism is also cognisant that institutions at the organisation level fit within a broader institutional environment. 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, 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.

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.

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

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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 prescribibg 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, Dorte Håkonsson, 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).

Given the critical relationship to the relevant Indigenous community, autonomy and self-determination might typically be expected to be fundamental BMS goals and, 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

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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, 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. The practices and administration systems developed and adopted by professional trustees and other stakeholders also form a ready practical base for administration. As one stakeholder noted, ‘The Pilbara structures are driving traditional owner expectations and mining company compliance and behaviour around Australia and beyond’. This reflects neo-institutionalism’s insight that organisations performing similar functions tend toward homogeneity, with later organisations modelling themselves on earlier ones. 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.
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

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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.
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, 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. Charitable trusts also have potential tax advantages that Indigenous communities may wish to access, such as income tax exemption on accumulated income.

There are some disadvantages to using charitable trusts. In particular, distributions can only be made for limited, charitable purposes. The potential need to
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. 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, 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.

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. 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), which holds the native title rights on trust 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;
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

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\(^{47}\) 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
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. 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

<table>
<thead>
<tr>
<th>Independent or stakeholder decision making</th>
<th>Indigenous community decision making</th>
</tr>
</thead>
<tbody>
<tr>
<td>Independent trustee (eg professional trustee) holds and makes decisions about BMS assets.</td>
<td>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. For instance, the pilot BMS Charitable Trust requires the trustee to be a professional trustee company, but also permits, amongst other things: • 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.</td>
</tr>
</tbody>
</table>

Independent/stakeholder directors on Indigenous trustee company/Indigenous corporation or independent/stakeholder committee members on certain decision making committees.

Independent/stakeholder directors/committee members might have:
• 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

Indigenous trustee company / Indigenous corporation

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

Alternatively, provision might be made for different groupings to appoint representatives to boards or committees.

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.
52 Nyiyaparli Charitable Trust Deed S9.2.7(b).
54 See, especially, Gumala General Foundation, Consolidated Trust Deed (14 February 2012) cl 7, 26.
• 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. 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.

Advisory trustee or other adviser that can or must be consulted by the Indigenous trustee company / Indigenous corporation.

The advisory trustee may have the power to take actions to enforce the trust deed.

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’. The Advisory Trustee was part owned by the resource company, Hamersley, and by GAC and had two directors nominated by each of them. 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’, including providing advice on funding proposals received from the manager. The advice was not binding on the trustee.

However, the Foundation trust deed also sought to enhance the Advisory Trustee’s standing to ‘enforce the terms of this Deed’, 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.

Indigenous trustee company / Indigenous corporation

As above.

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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.
Further, different approaches can be adopted for different classes of decisions. Decisions could be classed according to significance, e.g. O’Faircheallaigh’s ‘fundamental’, ‘strategic’ and ‘day to day administrative’ decisions, 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. 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. 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, it can also be seen as involving another layer of administration along with some loss of decision making ability. 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, 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. 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. 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

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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.
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. 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. 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 base 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 Foundation and the requirement for an annual general meeting held by GIPL and for thrice annual meetings by GAC. It also appears that internal audit and risk committees have been established. There are also a range of provisions requiring consultation or consents between GIPL as trustee and GAC as manager.

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, and that there must be consultation with the traditional owners for cash distributions and for fundamental matters such as a trust winding up, or a trust review. 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, 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.
75 Ibid cl 7.1, 16.1.
78 Ibid cl 7.1, 16.1.
79 Ibid cl 11.2.
80 Ibid cl 32.
81 Ibid cl 33.
transparency deficiency in its decision making processes. 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. 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 meeting and the election and removal of directors. The lack of internal accountability by GAC to the traditional owners has been noted by Edmunds and also by Chaney and Lennon.

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) and charitable trusts (charitable purposes include the relief of poverty and sickness, advancement of education and advancement of religion).

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.

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

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85 GAC Rule Book r 7.16.
86 GAC Rule Book r 8.6.1 and r 8.10.1.
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,\textsuperscript{91} or partially supported,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{96} As one Pilbara Aboriginal Corporation CEO noted:\textsuperscript{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

\textsuperscript{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.

\textsuperscript{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.

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

\textsuperscript{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.

\textsuperscript{95}Trustee Officer 19 July 2018.

\textsuperscript{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.

\textsuperscript{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. A key element of this second goal was that benefits should accrue to future generations. As several focus group interviewees put it, BMSs should:

(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:

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.

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’.

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; and

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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).\textsuperscript{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:\textsuperscript{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,\textsuperscript{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;\textsuperscript{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.\textsuperscript{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.\textsuperscript{110} Indeed, a professional adviser noted that such compliance has

\textsuperscript{105} Pilbara Aboriginal Corporation Executive 10 May 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Executive 5 July 2018.
\textsuperscript{106} Pilbara Aboriginal Corporation Officer 12 March 2019.
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.\textsuperscript{111}

Trustee officers identified both the autonomy and self-determination goal and the social, economic and cultural development goal.\textsuperscript{112} However, trustees tended to treat autonomy and self-determination as instrumental means to achieve social, economic and cultural development.\textsuperscript{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.\textsuperscript{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;\textsuperscript{115} and
- the need for BMS to be self-sustaining.\textsuperscript{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.\textsuperscript{117}

\begin{thebibliography}{99}
\bibitem{111} Professional Adviser 3 May 2019.
\bibitem{112} Trustee Officer 28 June 2018.
\bibitem{113} See, especially, Trustee Officer 19 July 2018; Trustee Officer May and June 2018.
\bibitem{114} Cf Trustee Officer 28 June 2018.
\bibitem{115} Trustee Officer 28 June 2018.
\bibitem{116} Trustee Officer 28 June 2018; Trustee Officer May and June 2018.
\bibitem{117} Trustee Officer 19 July 2018; Trustee Officer 18 May 2017.
\end{thebibliography}

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. 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’, Scambary gives an account of a significant internal dispute between entities under the Gumala BMS. Scambary suggests that membership overlap and disunity of interests 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

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119 Scambary’s My Country 141, 170-179.

120 Ibid 150-157.

121 Ibid 154, 158-169.
(and yet to be defined) governance framework. Murray and Wright have also examined BMSs in canvassing current practical issues in the tax treatment of native title payments. 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’.  

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. 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.

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.’ 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.'

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


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, including directors’ duties and replaceable rules.132 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

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.\textsuperscript{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’.\textsuperscript{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’.\textsuperscript{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’.\textsuperscript{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’.\textsuperscript{142} Moreover, ‘greater emphasis has been placed upon the need for greater “accountability” of Indigenous corporations for public monies’.\textsuperscript{143}

Unsurprisingly in this context, there are proposed amendments to the CATSI Act that would increase accountability and transparency, yet simultaneously ‘reduce regulatory burden’ and hence enhance flexibility and autonomy.\textsuperscript{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.\textsuperscript{145} Other measures to improve communications with members would apply to all corporations. For instance, providing for the recording and use of

\textsuperscript{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).


\textsuperscript{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].

\textsuperscript{142} Ibid.

\textsuperscript{143} Ibid.

\textsuperscript{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).

\textsuperscript{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. 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. 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, 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. 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.

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);
- 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.

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. External accountability could then be incorporated in service agreements where the accountability

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146 Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018 (Cth) pt 6.
148 Not publicly available.
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 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.\footnote{See Mantziaris and Fingleton debating Review proposals in the \textit{Indigenous Law Bulletin} (1997) 4(5) 10-14 and 4(6) 7-13, 4(6) 14-15 and 16.}

The ACA Act itself arose out of the 1973 and 1974 Woodward Reports.\footnote{\textit{Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures} 321, referring to the First report, AGPS, 1973 and Second report, AGPS, 1974.} 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.\footnote{\url{http://www.oric.gov.au/catsi-act/about-catsi-act}} 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’.\footnote{\textit{Nettheim, Myers and Craig's Indigenous Peoples and Governance Structures} 320.}

\textit{PBCs}

numerous publications. 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 interests and their activities and objects typically include:

- 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.

- 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.

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


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.\textsuperscript{169}

The National Native Title Tribunal commissioned major research into the NTA PBC regime at the turn of the century.\textsuperscript{170} In particular, Mantziaris and Martin considered the institutional design of PBCs.\textsuperscript{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.\textsuperscript{172} Their approach identified three overarching organisational design requirements in addition to tax considerations.\textsuperscript{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).\textsuperscript{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

\textsuperscript{169} See, eg, Deloitte Access Economics, \textit{Review of the Roles and Functions of Native Title Organisations} (March 2014) 82.
\textsuperscript{170} Each of the reports were Pre-CATSI Act, but are nonetheless useful in their statement of general principles.
\textsuperscript{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, \textit{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.
\textsuperscript{172} Mantziaris and Martin’s Native Title Corporations 258.
\textsuperscript{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, \textit{Holding Title and Managing Land in Cape York Indigenous Land Management and Native Title}, (National Native Title Tribunal, Perth, 2003) 79-90.
\textsuperscript{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.\textsuperscript{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;\textsuperscript{176} the revisability and robustness of the structure; and the desirability of simplicity and efficiency.\textsuperscript{177}

Martín 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.\textsuperscript{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.

\subsection*{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.\textsuperscript{179} He has observed some problems associated with trusts in BMSs such as the failure to incorporate traditional decision making processes\textsuperscript{180} and government paternalism.\textsuperscript{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.\textsuperscript{182} Levin

\begin{footnotes}
\item[175] Native Title Legislation Amendment Bill 2019 (Cth) sch 8; Explanatory Memorandum, Native Title Legislation Amendment Bill 2019 (Cth) 64-73.
\item[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.
\item[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.
\item[179] Levin’s Observations, 251-253.
\item[180] Ibid 248.
\item[181] Ibid 246.
\item[182] Ibid 253-256.
\end{footnotes}
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 Wales,192 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

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183 Ibid 249-51.
187 Murray & Wright, 106.
191 Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).
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. The ALRA does not specify a general purpose, other than that: royalti

es 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. 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. 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.

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.

Examples of specific initiatives include participatory planning sessions with Indigenous communities to identify priority aspirations, education and training initiatives, and medical initiatives. 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.

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. The literature appears to confirm that this problem

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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.
200 Ibid 235.
201 Ibid 235-6.
202 Of 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 Indigenous sector’ is the goal of royalties, 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. 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:

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.

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

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208 Nettheim, Myers and Craig’s Indigenous Peoples and Governance Structures 346.
209 Ibid 347.
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.’

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.

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. 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’. This reflected an earlier ICAC report in which NSW ICAC noted that, from a structural context, to address corruption there needed to be:

- ‘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’.

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211 Jon Altman, Aborigines and Mining Royalties in the Northern Territory (Australian Institute of Aboriginal Studies, 1983) vii.
212 Ibid 113.
214 Ibid 5.
• ‘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

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.


\(^{226}\) 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

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parties, and is often entrenched. 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. 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.

### 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. Smith has comprehensively analysed the relations between Indigenous communities and the state. Bauman and Williams also investigate Indigenous decision making processes, and Indigenous consensus building and dispute management processes. 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. However, in 2002, the National Native Title Tribunal supported a research project led by Nettheim, Meyers and Craig,

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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.
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.\textsuperscript{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’.\textsuperscript{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.\textsuperscript{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.\textsuperscript{243}

The design of effective Indigenous organisations has also been considered by McCrae, Nettheim and Beacroft.\textsuperscript{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’.\textsuperscript{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’.\textsuperscript{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.\textsuperscript{247} In relation to institutional design, McCrae, Nettheim and Beacroft refer to the Organising for Success policy report of the Australian Collaboration and AIATSIS.\textsuperscript{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:\textsuperscript{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

\textsuperscript{240} Nettheim, Myers and Craig’s Indigenous Peoples and Governance Structures.
\textsuperscript{241} Ibid 482, 484. This is inherent in the first three of Mantziaris and Martin’s four requirements of design.
\textsuperscript{244} McCrae, Nettheim & Beacroft’s Indigenous Legal Issues.
\textsuperscript{245} Ibid 376.
\textsuperscript{246} Ibid 378.
\textsuperscript{247} Ibid 175.
\textsuperscript{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. 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. Third, ‘investment and risk management framework’ covers spending rules, financial return, investment policies, performance benchmarks and regular reviews. Indigenous Business Australia refers to five guiding objectives which informed those principles, which relevantly include capacity building, economic independence, cultural heritage and risk management.

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. CAEPR at the ANU and Reconciliation Australia have also undertaken an ‘Indigenous Community Governance Project’. ‘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. As this definition suggests, most writers also agree that governance extends beyond formal legal structures to relationships and social

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251 Ibid 16-19.
252 Ibid 20-27.
253 Ibid 6.
255 For an overview of the project and its inception, see, eg, Mick Dodson, ‘Foreword’ in Hunt et al’s *Contested Governance* xvii.
norms and, in the Indigenous governance space, a number of writers have emphasised its intercultural character. 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. 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. 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. 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, as there may be less need for an authoritative declaration of laws and customs to validate such


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’.


260 Ibid 1.


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).


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. 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’ and other matters captured by the principles of ‘allegiance’ and ‘sensitivity to motivational complexity’. 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. 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. 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

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).
to a breach of board member legal duties. 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’. 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.

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’. 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. 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’; ensuring that the processes include planning for the future (eg cyclical annual or strategic plan processes); and working with beneficiaries to increase their capacity.

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.

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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.
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. This has helped to emphasise the political sovereignty of Indigenous communities in those jurisdictions and in some cases resulted in greater land use rights. 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 Nations and the types of payments

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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).

prescribed in agreements. The literature considering legal structures has canvassed the use of band-held corporations, implementation committees, and trusts. Several commentators note the importance of sharing decision making power and of resource proponents being willing to engage in collaborative capacity building. 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. 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 Plan and its Five-Year Review 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


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.  

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. 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 focuses 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’. 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, focussing on the legal development of Indian title and federal mismanagement of money contrary to the Federal-Indian trust doctrine.

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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

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\(^{302}\) ANCSA 43 USC § 1629e.


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.\textsuperscript{306} It can also result in poorer decision making and mission drift.\textsuperscript{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.\textsuperscript{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.\textsuperscript{309} However, the organisational structure of a PSGE is typically akin to that of a corporate group, with both charitable and for-profit arms,\textsuperscript{310} as depicted below.\textsuperscript{311}

\begin{footnotesize}

\textsuperscript{307} Ibid 222-4.


\end{footnotesize}
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.\textsuperscript{312} More detailed preferred structural features are also specified, although commentators have noted the importance of monitoring costs in implementing such features.\textsuperscript{313}

First, a PSGE should appropriately maintain a register of the membership of a claimant group.\textsuperscript{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.\textsuperscript{315}

\begin{itemize}
    \item \textsuperscript{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.
    \item \textsuperscript{314} Crown Forestry Rental Trust, ‘Guide for Claimants Negotiating Treaty Settlements’ (Crown Forestry Rental Trust, November 2007) 283.
    \item \textsuperscript{315} Ibid.
\end{itemize}
Second, there should be effective methods for the appointment and removal of trustees.\textsuperscript{316} For example, elections are to be held and trustees are democratically elected by the claim group.\textsuperscript{317} Moreover, there are comprehensive notice requirements where an election is conducted.\textsuperscript{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.\textsuperscript{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.\textsuperscript{320}

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

Fifth, there is some operational benefit obtained in practice by separating the key functions within a PSGE between separate companies.\textsuperscript{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.\textsuperscript{323}

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

Beyond legal structures, in the context of governance, McKay has sought to articulate ‘Good Maori Governance’ principles.\textsuperscript{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.\textsuperscript{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

\textsuperscript{316} Ibid 287.  
\textsuperscript{317} Ibid.  
\textsuperscript{318} Ibid 289-290.  
\textsuperscript{319} Ibid 292.  
\textsuperscript{320} Ibid 256.  
\textsuperscript{321} Ibid.  
\textsuperscript{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.  
\textsuperscript{323} Crown Forestry Rental Trust, ‘Guide for Claimants Negotiating Treaty Settlements’ (Crown Forestry Rental Trust, November 2007) 256  
\textsuperscript{324} The Te Arawa Lakes, Ngati Mutunga and Ngati Awa governance entity rules contemplate this type of trustee: ibid.  
\textsuperscript{325} Ibid.  
\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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:

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<tr>
<td>The need to support autonomy</td>
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<td>Need for capacity building</td>
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<td>Overlapping decision making bodies</td>
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<td>Achieving equity</td>
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<td>Geographical remoteness and dispersion</td>
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<td>Strategic planning to achieve BMS purposes</td>
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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.\(^\text{329}\) 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.\(^\text{330}\)

However, Levin has noted that externally required controls are something that must be balanced against the objective of self-determination.\(^\text{331}\) 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

334 Trustee Officer 18 May 2017.
335 See, eg, n 654 and accompanying text.
336 Pilbara Aboriginal Corporation Director 20 June 2018.
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.\(^\text{338}\) 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.\(^\text{339}\)

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:\(^\text{340}\)

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.\(^\text{341}\)

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.\(^\text{342}\) These general concerns have also been reflected in the literature dealing specifically with BMS trusts.\(^\text{343}\) The difficulty is in attempting to satisfy Western notions of corporate governance and traditional laws and customs.\(^\text{344}\) Stakeholder interviews displayed a range of views on the incorporation of traditional

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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.


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**

Sullivan\(^ {348}\) and Guest\(^ {349}\) 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

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347 See, eg, Director Pilbara Aboriginal Corporation 20 June 2018.
Agreement was signed.\textsuperscript{352} Thus the Miriuwung and Gajerrong people were able to work on their BMS as part of the land use agreement negotiations.

\textit{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’,\textsuperscript{353} such that each dawang group comprised a kinship group with traditional rights in relation to a piece of country.\textsuperscript{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):\textsuperscript{355}

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\textsuperscript{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.

\textsuperscript{354} Cf Patrick Sullivan, ‘The Ord River Stage 2 Agreement and Miriuwung Gajerrong native title corporations’, in: \textit{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).

\textsuperscript{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:  

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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
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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

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).
traditional laws and customs of the Miriuwung and Gajerrong people. 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.

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.

### 4.4 Need for capacity building – especially due to complexity

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

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. While a number of stakeholders expressed the need for caution about the time and cost of capacity building, 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. In particular, stakeholders emphasised the role of capacity building in

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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).


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


374 Levin’s Observations, 250.

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

376 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.

377 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;
381 Pilbara Aboriginal Corporation Executive 21 May 2018.
382 Trustee Officer May and June 2018. See also 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.
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.\textsuperscript{393} Two-way capacity building, in terms of cultural training for trustees and resource proponents was also highlighted.\textsuperscript{394}

\subsection*{4.5 Governance}

Indigenous organisations often lack sufficient administrative and governance capacity.\textsuperscript{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,\textsuperscript{396} conflicts of interest\textsuperscript{397} and inter-group and intra-group disputes.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\begin{footnotesize}
\begin{enumerate}
\item Resource Proponent Social Investment Manager 22 February 2018; Resource Proponent Manager 10 August 2017.
\item Karratha Workshop 3 May 2018.
\item 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.
\item 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.
\item Levin’s Observations, 246; Benedict Scambary, ‘Mining agreements, development, aspirations, and livelihoods’ in Altman and Martin’s Power, Culture, Economy 186-7.
\item Levin’s Observations, 249-51.
\item Ibid 250.
\item Pilbara Aboriginal Corporation Executive 7 March 2019.
\end{enumerate}
\end{footnotesize}
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.

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. Factionalised disputes over membership, representation and community access to benefits waste precious resources and may significantly impair the function of BMS entities. Intra-group disputes arise within one Indigenous community and might involve intergenerational conflict, disagreement about the cultural identity of a group, or in circumstances in which families and other groupings seek ways of monopolising control of a BMS and, consequently, benefit distribution.

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.

The Public Officer of GEAT pleaded guilty to offences relating to transactions involving the expenditure of approximately $600,000. 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. 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.

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421 Levin’s Observations, 246. See, eg, the Gumala example in Part 4.7.
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.
427 This figure was cited in the subsequent litigation in **GEAT v Deloitte, Touche Tohmatsu & Ors** [2016] NTSC 39 at [5] per Hiley J.
Resource proponent stakeholders emphasised the importance of having a durable BMS with good governance.431 One resource proponent representative noted that:

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.
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.
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.\textsuperscript{438} Other suggestions included separation of powers,\textsuperscript{439} secret ballots to deal with standover tactics,\textsuperscript{440} sanctioning by peers on committees\textsuperscript{441} and building interpersonal trust.\textsuperscript{442} While independent members of decision making bodies – a type of separation of powers – was suggested by some,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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’.\textsuperscript{448} A number of Aboriginal community and corporation representatives indicated that materially insufficient governance and financial literacy training was being provided,\textsuperscript{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

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\textsuperscript{438} Pilbara Aboriginal Corporation Executive 4 July 2018; Trustee Officer 28 June 2018.
\textsuperscript{439} Pilbara Aboriginal Corporation Executive 5 July 2018
\textsuperscript{440} Pilbara Aboriginal Corporation Executive 2 May 2018
\textsuperscript{441} Trustee Officer 18 May 2017.
\textsuperscript{442} See, eg, Trustee Officer 19 July 2018.
\textsuperscript{443} Resource Proponent Manager 24 January 2018 (eg professional trustee company).
\textsuperscript{444} Pilbara Aboriginal Corporation Director 21 June 2018; Trustee Officer 19 July 2018.
\textsuperscript{445} See n 559 and accompanying text.
\textsuperscript{446} Independent BMS Facilitator 21 March 2018.
\textsuperscript{447} Resource Proponent Implementation Adviser 10 August 2017. See also Professional Adviser 31 January 2018;
\textsuperscript{448} Pilbara Aboriginal Corporation Director 20 June 2018.
\textsuperscript{449} Pilbara Aboriginal Corporation Executive 2 May 2018; Aboriginal Community Representatives 3 May 2018.
\end{flushleft}
members. Other Aboriginal communities appeared to have more widely available governance and financial literacy training.

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. It was suggested that people living in poverty may have little interest in governance.

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, 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. 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.
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:

  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'.

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

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. 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.

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. Nevertheless, many trustee officers and other stakeholders indicated that general meetings (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. Corporation annual reports and websites were also important means of communicating corporation activities in some cases.

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.

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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.
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.
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 Mantziasis and Martin’s Native Title Corporations 185-6.
committees structured around familial representation. 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. Limerick proposes that structures should ideally be self-governing, to allow adequate expression of Indigenous authority and processes and therefore maximize representativeness. 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. Martin has also contended that the assumptions of democratic representation may be at odds with Indigenous culture. Rather, Indigenous culture may prioritise autonomy and resist being bound by the decisions of others outside the ‘religious and ritual arena’. Cultural influences such as these arise from the ‘localism’ discussed in Part 3.4.

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. 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’. 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.

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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.
484 Ibid.
485 Ibid 118-119.
486 Ibid 120-1.
487 Ibid 120-1.
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. Most stakeholders focussed mainly on the trustee and the BMS Indigenous corporation. As discussed below in Part 4.11, stakeholders generally considered the corporation best placed to liaise with the Indigenous community, including by providing information/capacity building about the BMS itself – with input from the trustee as requested by the corporation; 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. 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 operate and to communicating with the broader community the role and significance of BMSs.

### 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.

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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.
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.

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.
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.\footnote{Trustee Officer May and June 2018.} 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.\footnote{Cf Professional Adviser 3 May 2019.}

As directors typically consider broader strategy and impacts on stakeholders, as well as focusing 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.\footnote{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.}

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).\footnote{Independent BMS Facilitator 21 March 2018; Pilbara Aboriginal Corporation Executive 21 May 2018.} One trustee officer stated:\footnote{Trustee Officer 28 June 2018. See also Pilbara Aboriginal Corporation Executive 21 May 2018.}

\begin{quote}
   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.
\end{quote}

A Pilbara Aboriginal corporation director noted:\footnote{Pilbara Aboriginal Corporation Director 20 June 2018.}

\begin{quote}
   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. 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. 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. 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.

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.

The relationship between NTKML and NAC deteriorated after the board of NAC made allegations of financial mismanagement against the board of NTKML. 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’. 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.

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

511 *Ngarmuula 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. The money of the charitable trust was effectively tied up, causing financial difficulties.

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. However, the litigation was by NAC as a person beneficially interested in each trust. 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. Justice Allanson adjourned the proceedings in relation to the charitable trust to allow the Attorney-General to consider his position.

**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. The YLUA was entered into by Rio Tinto and GAC, a CATSI Act corporation 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).

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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.
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. The Foundation is the only trust still operating.

There are four key ‘entities’ 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 Foundation and is the sole member of GEPL and GIPL. GEPL is separately managed, however it receives some funding from the Foundation. GAC makes recommendations to GIPL on distribution decisions, and is the ‘on the ground Indigenous organisation’ to assist beneficiaries with funding proposals. The GIPL trustee, incorporated under the Corporations Act, is independent of GAC and has ultimate decision making powers in all matters relating to the Foundation. However, GAC owns the shares in GIPL, manages the Foundation and receives funding from it, 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. 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. 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.
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.
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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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).\textsuperscript{545}

\textsuperscript{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.
\textsuperscript{539} Sarah Holcombe, ‘Indigenous Entrepreneurialism and Mining Land Use Agreements’ in Altman and Martin’s Power, Culture, Economy 149, 159-60.
\textsuperscript{541} Ibid 11.
\textsuperscript{542} See n 563 and accompanying text.
\textsuperscript{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).
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.\(^{552}\)

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\(^{548}\) 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{555} Others suggested an advisory Elders’ Council with more diverse representation on the formal decision making bodies.\textsuperscript{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.\textsuperscript{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’.\textsuperscript{558} Several stakeholders also referred to the desire for sitting fees and travel allowances by some members.\textsuperscript{559}

• Family encouragement and a sense of obligation to represent and inform families about BMS decisions.\textsuperscript{560} However, other stakeholders also identified that voting on family lines for family representation could also preclude board diversity and experience.\textsuperscript{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 costs\textsuperscript{562} and also some real life examples of high costs.

\textsuperscript{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.

\textsuperscript{554} Pilbara Corporation Executive 7 June 2018; Pilbara Aboriginal Corporation Executive 5 July 2018.

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

\textsuperscript{556} Pilbara Aboriginal Corporation Director 20 June 2018.

\textsuperscript{557} Aboriginal Community Representatives 3 May 2018; Pilbara Aboriginal Corporation Director 20 June 2018.

\textsuperscript{558} Pilbara Aboriginal Corporation Director 20 June 2018. Cf Trustee Officer 18 May 2017.

\textsuperscript{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.

\textsuperscript{560} Aboriginal Community Representatives 3 May 2018.

\textsuperscript{561} Pilbara Aboriginal Corporation Executive 2 May 2018. Cf Trustee Officer 18 May 2017.

\textsuperscript{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. 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.

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. Internal reporting can involve development and reporting on personal financial plans by Indigenous community members. 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. 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. 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

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.
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’. 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, along with the differing ways in which land use may impact native title rights and holders over time.

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. 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. 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. 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

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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.


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

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575 See, eg, Plan B Trustees Ltd v Parker (No 2) [2013] WASC 216 [116] (Edelman J).
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.
distributional aspects of benefits and adverse impacts', especially between
generations.\textsuperscript{582} There is also a nexus here with notions of fair processes under
Indigenous institutions, as canvassed in the Harvard Project.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{586} However,
the stakeholder comments on levels of funding where fairly varied. Other stakeholders
indicated that where BMSs had lower levels of funds, intergenerational equity became
harder to achieve.\textsuperscript{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.\textsuperscript{588}

O’Faircheallaigh, along with some stakeholder interviews,\textsuperscript{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.\textsuperscript{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

\textsuperscript{582} Mick Dodson and Dianne Smith, ‘Governance for Sustainable Development: Strategic Issues and
\textsuperscript{583} M Jorgensen and JB Taylor, What Determines Indian Economic Success? Evidence from Tribal and
\textsuperscript{584} Toni Bauman, Lisa Strelein and Jessica Weir, ‘Navigating Complexity: Living with Native Title’ in:
\textit{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
\textsuperscript{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.
\textsuperscript{586} Trustee Officer May and June 2018.
\textsuperscript{587} Pilbara Aboriginal Corporation Executive 5 July 2018.
\textsuperscript{588} Aboriginal Community Representatives 3 May 2018; Resource Proponent Implementation Adviser
10 August 2017.
\textsuperscript{589} Independent BMS Facilitator 21 March 2018.
\textsuperscript{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, \textit{Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in
Australia and Canada} (Taylor and Francis, 2015) 41-4.

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.\footnote{See, eg, Pilbara Aboriginal Corporation Director 21 June 2018; Karratha Workshop 3 May 2018. Cf Pilbara Aboriginal Corporation Director 21 June 2018; Former Aboriginal Corporation CEO & Management Consultant 14 February 2019.}

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.\footnote{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.} 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,\footnote{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.} most especially of PBCs given their statutory duties.\footnote{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.} These concerns are equally applicable to BMS Indigenous corporations, especially those
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.\footnote{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.} 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.\footnote{See, eg, Trustee Officer 18 May 2017; Resource Proponent Manager 24 January 2017.} 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.\footnote{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.} 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.\footnote{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.} 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.\footnote{Pilbara Aboriginal Corporation Executive 21 May 2018; Professional Adviser 31 January 2018.} And because the corporation typically has more experience interacting with community members, holding community events and delivering general services directly to members.\footnote{Pilbara Aboriginal 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.} 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.\footnote{Professional Adviser 31 January 2018.} 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
Indigenous corporation took the lead role would depend on the context.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{611} Second, as identified in

\begin{footnotesize}
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\item \textsuperscript{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.
\item \textsuperscript{606} Pilbara Aboriginal Corporation Director 21 June 2018. Cf Levin’s Observations, 263.
\item \textsuperscript{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.
\item \textsuperscript{610} See, eg, Flynn v Mamanaka [1996] NTSC 16.
\item \textsuperscript{611} Cf Resource Proponent Social Investment Manager 22 February 2017.
\end{itemize}
\end{footnotesize}
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. 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.

4.13 Geographical remoteness and dispersion

The geographical remoteness and dispersion of members often makes in-person meetings difficult and expensive to convene. 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. 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. 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.

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. 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. 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.
615 Mantziaris and Martin’s Native Title Corporations 264-5.
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).
newsletters, emails and letters were often less successful than mobile telephone-based ones. The preferred website in stakeholder interviews, by both trustee officers and Aboriginal community and corporation representatives, was the Aboriginal corporation’s website, 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, 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.

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. 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.

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. 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, contains rules about LTC fees 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

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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.
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.
The AFS licence requirements bring further obligations. Some relate to the integrity, competence and organisational capacity of the LTC. 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’. 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. 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. 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. A trustee officer expressed the conflict as:

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. 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.

Several stakeholder interviews and focus group responses indicated an additional concern that professional trustee companies might be motivated to work for themselves
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:

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

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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, 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’. Tran and Stacey have also emphasised this issue more broadly in relation to PBCs and community/shire councils. 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.

Clearly, multiple BMSs can also generate multiple sites of authority, with potential for checks and balances and conflict. 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. 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. 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.

649 Will Sanders quoted in Nettheim, Myers and Craig’s Indigenous Peoples and Governance Structures 349.
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 See, eg, Pilbara Aboriginal Corporation Executive 4 July 2018; Pilbara Aboriginal Corporation Director 21 June 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. It is also emphasised in the Organising for Success report discussed in Chapter 3.

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. Separately, but relatedly, commentators highlight potential ‘managerial tensions and challenges, particularly in the areas of mission, finance and management of people’. An additional problem, lies in the difficulty of quantifying pursuit of purpose, and success therein.

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. 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. In interviews, all groups of stakeholders endorsed an ability to change BMS documents over time.

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657 See n 248.
661 Mantziaris 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). They also tended to support changes being developed by way of periodic reviews of BMSs held every 3-5 years.

- 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. One stakeholder suggested that 5 years was too long a period for review and change.

- 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. Additionally, trustee officers, like Aboriginal community and corporation representatives, appeared readier to amend BMSs to respond to difficulties in implementation.

### 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’. 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. However,

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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

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\(^{671}\) 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. Other stakeholders emphasised opportunities for greater cooperation with government, especially in areas where government has experience or advantages.

- **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.

- **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.

- **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. For example, one community member stated: 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. 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. However, moves to adopt regional approaches would likely need to retain respect for the localism discussed in

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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.
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.

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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, 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
- whatneo-institutionalism tells us more generally about the way that institutions affect the behaviour of individuals and are themselves affected in turn.

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.

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

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687 With much less focus on matters such as workforce planning and management practices.
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). Given the critical relationship to the relevant Indigenous community, autonomy and self-determination might typically be expected to be fundamental BMS goals and, 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. Furthermore, as organisations mature, their values and goals become more rigid. 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

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690 As to BMS goals, see Part 2.3.
691 As to BMS goals, see Part 2.3.
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.\textsuperscript{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.\textsuperscript{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 interests\textsuperscript{696} 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

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{696} See generally NTA ss 56, 57, 58; Native Title (Prescribed Body Corporate) Regulations 1999 (Cth) r 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:
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, although a number noted that much would depend on the

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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. 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.

5.1 Customisation

As already stated, customisation is a ‘critical need’ for BMSs. The process followed in designing a BMS should be tailored to the size, geographical dispersion, complexity, aspirations, and organisational culture 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 processes and native title rights. 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. 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. In this sense, customisation may imply either compatibility or contradiction with simplicity. The design of a BMS should also take into
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.\(^ {717}\)

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\(^ {710}\) Mantziaris and Martin’s Native Title Corporations 281-7.


\(^ {714}\) 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.\textsuperscript{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).\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{718} Ibid 295; Christos Mantziaris and David Martin, \textit{Guide to the Design of Native Title Corporations} (Commonwealth of Australia, National Native Title Tribunal, September 1999) 37.

\textsuperscript{719} Mantziaris and Martin’s \textit{Native Title Corporations} 299-300; Christos Mantziaris and David Martin, \textit{Guide to the Design of Native Title Corporations} (Commonwealth of Australia, National Native Title Tribunal, September 1999) 37-8.

\textsuperscript{720} Mantziaris and Martin’s \textit{Native Title Corporations} 306-7; Christos Mantziaris and David Martin, \textit{Guide to the Design of Native Title Corporations} (Commonwealth of Australia, National Native Title Tribunal, September 1999) 40-1.

\textsuperscript{721} Ibid 307.

\textsuperscript{722} Ibid 310-11.
title rights within a particular Indigenous community or between certain native title ‘sub-
areas’. 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.

Fifth, the BMS must stipulate its formal decision making procedures. 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. 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. 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.

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. 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. 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

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722 Professional Adviser 31 January 2018.
723 See nn 110 and 111 and accompanying text.
724 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.
725 Christos Mantziaris and David Martin, Guide to the Design of Native Title Corporations (Commonwealth
of Australia, National Native Title Tribunal, September 1999) 44.
726 See Part 5.4 and Resource Proponent Manager 24 January 2017.
727 See, eg, Trustee Officer May and June 2018.
728 Mantziaris and Martin’s Native Title Corporations 315-17.
itself, as well as between these entities and third parties.\textsuperscript{731} In practice, this may be determined by the constituent documents of the BMS entities (eg company constitutions and trust deeds).\textsuperscript{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’.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.

\section*{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{731} Ibid 321-22.
\textsuperscript{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, \textit{Guide to the Design of Native Title Corporations} (Commonwealth of Australia, National Native Title Tribunal, September 1999) 17-18.
\textsuperscript{734} Pilbara Aboriginal Corporation Director 21 June 2018.
\textsuperscript{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.
\textsuperscript{736} Mantziaris and Martin’s Native Title Corporations 322-3.
\textsuperscript{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

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738 Resource proponent manager 10 August 2017. The importance of Certainty was also echoed by a trustee stakeholder: Trustee Officer 28 June 2018.
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.
the Indigenous community feel that they do not have sufficient opportunities to take on a
decision making role, this may lead to community dissatisfaction.\footnote{Pilbara Aboriginal Corporation Executive 21 May 2018.}

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,\footnote{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.}
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.\footnote{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.}
A useful insight here is that as organisations mature, their values and goals become more rigid,\footnote{Brayden King, ‘Organizational Actors, Character and Selznick’s Theory of Organizations’ (2015) 44
Research in the Sociology of Organizations 148; 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.}
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.\footnote{Trustee Officer May and June 2018}
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.\footnote{Aboriginal Community Representatives 3 May 2018; Karratha Workshop 3 May 2018.}

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)\footnote{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 Subsidarity’
(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
Ross, ‘Beyond Native Title: The Murray Lower Darling Rivers Indigenous Nations’ in Benjamin Smith and}
(2) accountability (which might occur by way of disclosure
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’. 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. 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. 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. 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. 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. 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. 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. 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.
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’.\(^{769}\)

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761 Pilbara Aboriginal Corporation Director 20 June 2018.
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.
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.
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.\textsuperscript{770}

Most people are driven by a range of individual motives for acting, for instance: self-regarding, other-regarding, instrumental or ethically-based motives.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{774} and, potentially, the internalisation of those values.\textsuperscript{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.\textsuperscript{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.\textsuperscript{777} Extrinsic

\textsuperscript{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.
\textsuperscript{771} Ibid 41; Mantziaris and Martin’s Native Title Corporations 325.
\textsuperscript{773} 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.
\textsuperscript{775} Peter Hall and Rosemary Taylor, ‘Political Science and the Three New Institutionalisms’ (1996) 44(5) Political Studies 936, 955-6.
motivation can be effected in ways that support the internalisation of values, hence increasing perceptions of autonomy, e.g. 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. 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.

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. 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. 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. 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. 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.

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

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778 Ibid 334-5.
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 (CSRM, University of Queensland, 2012) 103.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{Efficiency}) and might make the validity of decisions more vulnerable to challenge (impeding \textit{Certainty} and \textit{Legal adequacy}), as well as potentially raising cultural difficulties.\textsuperscript{790}

Pettit’s third proposal is to adopt sanctions that are directed to the occasional wrong-doer but not applicable to all actors.\textsuperscript{791} Such sanctions should be imposed in an

\textsuperscript{786} Ibid 79-81.
\textsuperscript{787} Ibid 81-5.
\textsuperscript{788} Ibid 83-4.
\textsuperscript{789} This assumption appeared largely consistent with stakeholder feedback and with the purposes of BMSs discussed in Part 2.3.
\textsuperscript{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 \textit{Hunt et al’s Contested Governance} 177, 194.
‘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.
\(^794\) 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. 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. 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. There is a positive correlation between Simplicity and Certainty.

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. 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. 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. 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. Further, it is not assumed that all actors will always act in a self-

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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.
interested fashion, but rather that some will act opportunistically – that is, in a self-interested and dishonest fashion. 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.

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’. 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. 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, 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.

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

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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.


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). The creation of interpersonal trust may be particularly beneficial to reducing the size of the information costs of running an organisation. 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. 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.

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. 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

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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.
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 conceptually this community-level autonomy as ‘self-determination’ of the relevant Indigenous community.

To exercise such a right to self-determination requires the:

- 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.

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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 consent 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].
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

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830 To enable the establishment and then maintenance of just institutions.

generations, that cooperation can take place between generations and that it is possible to transfer resources between generations, even if there are difficulties.\textsuperscript{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.\textsuperscript{833} This potentially resonates with the importance for many Indigenous communities of maintaining culture and connection to country.\textsuperscript{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’.\textsuperscript{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.\textsuperscript{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.\textsuperscript{837} Alternatively, they may provide guidance on the principles of ‘local justice’\textsuperscript{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 \textit{Incorporation of traditional law and custom & intercultural adequacy} as well as with \textit{Autonomy}.\textsuperscript{839} A practical example supplied by one stakeholder is that ‘there is a cultural concept of sharing assets, but the


\textsuperscript{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) \textit{American University International Law Review} 19, 20-1.


\textsuperscript{836} Joerg Tremmel (ed), \textit{Handbook of Intergenerational Justice} (Edward Elgar, 2006), 34, 7-9, ch 1, ch 2.


\textsuperscript{839} Resource Proponent Manager 24 January 2017.
trust does not contemplate that this will be occurring’. However, liberal philosophical notions of equity are also relevant given the role of BMSs as intercultural institutions that exist in the wider Australian society. 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. 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.

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.

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. 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.

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.

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. The SROI method is based on cost benefit analysis. However, SROI adopts a much broader approach to the range of costs and benefits to be valued than is typically the case.

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. 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.

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’. 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.

**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’, or social enterprises, which pursue both purposes and profits has, however, attracted growing attention.

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856 Pilbara Corporation Executive 7 June 2018.


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


863 See generally, Community Interest Company Regulator, 'Chapter 4: Creating a CIC' (April 2013).


866 Ibid 252.

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’. 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, 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, it is the entity seeking B-Corp status 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 impact – with these benchmarks changing based on the geography, sector and (employee) size of the company. Critically, however, no enforcement provisions exist to compel B-Corp directors to balance dual performance objectives; they are only required to consider them.

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. In addition, the CIC legislation aims to reduce the tension

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868 Ibid 168.
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.
between social mission and accountability to investors by easing concerns of dual objectives and stakeholders. 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’). 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’). However, the annual CIC reporting requirements appear to focus on a CIC’s activities and distributions (ie on outputs), not on outcomes or impact.

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. This would likely involve BMSs measuring their goals by reference to activities or processes for the production of goods

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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

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:**

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<tr>
<th>Summary and Recommendation</th>
<th>In support of these considerations</th>
<th>Potentially contrary to these considerations</th>
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<tr>
<td>The features of the pilot BMS relevant to the following considerations are identified as beneficial features and provide examples of best practice.</td>
<td><em>Customisation, Legal adequacy, Certainty, Incorporation of traditional law and custom &amp; intercultural adequacy, Durability, Efficiency, Equity and Capacity to pursue purpose</em></td>
<td>N/A</td>
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<td>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</td>
<td><em>Customisation, Simplicity, Autonomy</em></td>
<td>The potential impact on <em>Efficiency</em> will depend on the form of measures adopted. Many of the measures raise cost considerations, but can also reduce uncertainty and opportunism, so aiding <em>Efficiency</em>.</td>
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<td>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.</td>
<td></td>
<td>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.</td>
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<td>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.</td>
<td>Customisation, Autonomy, Capacity to pursue purposes</td>
<td>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.</td>
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<td>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. It is recommended that consultation and communication with and participation in decision making by Aboriginal community members therefore be modified,</td>
<td>Legal adequacy, Allegiance, Autonomy, Capacity to pursue purpose</td>
<td>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. Simplicity 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.</td>
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<td>Summary and Recommendation</td>
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<td>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.</td>
<td><strong>Legal adequacy, Certainty, Efficiency</strong></td>
<td>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. Amalgamating the Decision Making Committee and Traditional Owner Council may reduce Customisation and Incorporation of traditional law and custom &amp; 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</td>
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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).

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>| Summary and Recommendation | In support of these considerations | Potentially contrary to these considerations |
|-----------------------------|---------------------------------|-------------------------------- nuru |
| 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. | | |
| 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 |</p>
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<td><strong>Karratha BMS operational excellence workshop held in May 2018.</strong></td>
<td><strong>Sensitivity to motivational complexity, Autonomy, Legal adequacy</strong></td>
<td><strong>Efficiency</strong>, 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. <strong>Certainty</strong> and <strong>Incorporation of traditional law and custom &amp; intercultural adequacy</strong> may be affected, in particular, by a requirement to provide reasons, although the impact on <strong>Certainty</strong> should be reduced if reasons are not required to be provided to the broader Aboriginal community.</td>
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| 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. 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. Additionally, there is scope to improve:  
  - 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 |
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<td>meetings, though not to disclose those reasons to the broader community.</td>
<td>Efficiency</td>
<td>Legal adequacy</td>
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<td>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.</td>
<td>Autonomy, Customisation</td>
<td>A robust independent compliance check in the form of a professional trustee company is likely to aid accountability for <strong>Legal adequacy, Certainty</strong> and <strong>Sensitivity to motivational complexity</strong> by providing for a separation of powers. Similar comments could be made about many external service providers. However, the transition need not pose a significant risk to asset protection (under <strong>Legal adequacy</strong>) 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. Even following capacity building, removing an independent decision maker is likely to reduce the effectiveness of a number of the <strong>Certainty</strong>-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.</td>
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<td>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.</td>
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### Summary and Recommendation

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<td>The lack of a transition may also improve <strong>Simplicity</strong> – 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.</td>
<td>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. This will become more important if participation in decision making is expanded as suggested above.</td>
<td><strong>Autonomy</strong></td>
</tr>
<tr>
<td>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, 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 <strong>Autonomy</strong>.</td>
<td><strong>Autonomy</strong></td>
<td><strong>N/A</strong></td>
</tr>
<tr>
<td>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</td>
<td><strong>Equity</strong></td>
<td>Creating more flexibility to better achieve <strong>Equity</strong> will reduce <strong>Simplicity</strong> and, potentially, <strong>Efficiency</strong>. Social impact investing also raises risks for asset</td>
</tr>
</tbody>
</table>

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887 See, eg, Nyiyaparli Charitable Trust Deed cl 7.2(c)(iii); Banjima Charitable Trust Deed cl 7.2(c)(iii).
### Summary and Recommendation

<table>
<thead>
<tr>
<th>In support of these considerations</th>
<th>Potentially contrary to these considerations</th>
</tr>
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<tbody>
<tr>
<td>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 <strong>Equity</strong>.</td>
<td>protection and hence <strong>Legal adequacy</strong>. However, some of the measures suggested below for strategic planning may assist in balancing pursuit of purpose and pursuit of monetary returns.</td>
</tr>
</tbody>
</table>

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.

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.

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

**Capacity to pursue purpose** and, as a result of improved outcomes, **Allegiance** 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-
Summary and Recommendation | In support of these considerations | Potentially contrary to these considerations
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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, 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, and BHP’s three recent comprehensive and project agreements.

The pilot BMS context, legal structure and operation is drawn from these recent arrangements. The Banjima and Nyiyaparli BMS arrangements have been used as

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888 National Native Title Tribunal, ‘Pilbara: Native Title Claimant Applications and Determination Areas’ (Map, 30 September 2018).
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 Nyiyaparli People and the Banjima People, provide some examples of context.

There are around 300 Nyiyaparli People, mainly living in Port Hedland, but with significant numbers spread across the whole Pilbara region.891 The Nyiyaparli 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 Nyiyaparli People entered into native title agreements in relation to Rio Tinto’s existing and future iron ore mining operations within the Nyiyaparli claim area, including the Hope Downs mine (Rio Tinto-Nyiyaparli Agreements).894 The Rio Tinto-Nyiyaparli Agreements are intended to:895

- provide Rio Tinto with the consents and cooperation it requires from the Nyiyaparli People and Karlka in order to conduct and potentially further develop Rio Tinto’s iron ore mining, exploration and infrastructure; and
- provide the Nyiyaparli People with financial and non-financial benefits (eg support for jobs and training); and
- provide agreed processes for Rio Tinto and the Nyiyaparli 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-Nyiyaparli Agreement, the Nyiyaparli People were given the opportunity to opt into a ‘Regional Framework Deed’.896 The

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). 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 (e.g., 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. The Banjima determination area is relevant to the mining operations of BHP, Rio Tinto, Fortescue Metals Group and Hancock Prospecting.

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 Banjima 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.

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898 Trustee Officer 18 May 2017.
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];
%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
907 See, eg, ibid; Tess Ingram, ‘BHP Billiton, Pilbara Traditional Owners Sign Multimillion Dollar Deal’
resources/bhp-billiton-pilbara-traditional-owners-sign-multimillion-dollar-deal-20151104-ghostl.html>;
ABC News, ‘Banjima People Celebrate after Pilbara Native Title Deal Signed in Kings Park Ceremony’
pilbara-native-title-deal/6913522>.

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• 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:

• 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).
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. 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-Nyiyaparli 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

By way of example, the charitable purposes of the Nyiyaparli Charitable Trust are to be pursued to benefit ‘current and future generations of Community members’, with ‘Community’ defined to mean (a) all persons of Aboriginal descent having a connection with or living within a geographic region within the Pilbara, (b) the Nyiyaparli 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.

The Banjima Charitable Trust charitable purposes are similar, with the purposes to be pursued to benefit ‘current and future generations of Community members’, with ‘Community’ defined to mean (a) all persons of Aboriginal descent having a connection with or living within a geographic region within the

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914 Nyiyaparli 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 Nyiyaparli 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 benefitting 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, Ngarlwangga, Ngarluma, Nyiyaparli,

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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.
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.
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. The Local Aboriginal Corporation for the Nyiyaparli BMS is Karlka Nyiyaparli Aboriginal Corporation and for the Banjima BMS is BNTAC. 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. Karlka and BNTAC are the respective PBCs for the Nyiyaparli People’s native title and the Banjima People’s native title. As is common, Karlka and BNTAC are also both registered with the ACNC as charities.

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.

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). 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.

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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.
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.\textsuperscript{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.\textsuperscript{936} In contrast, the Banjima BMS does not permit a transition to an Indigenous-
controlled trustee company,\textsuperscript{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.\textsuperscript{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.

\textsuperscript{935} Nyiyaparli Charitable Trust Deed sch 9, S9.2.4, S9.2.7.
\textsuperscript{936} Nyiyaparli Charitable Trust Deed sch 9, S9.2.7.
\textsuperscript{937} Banjima Charitable Trust Deed cl 4.2(a).
\textsuperscript{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') 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. 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. 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. 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. 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. Typically, however,

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938 Banjima Charitable Trust Deed cl 1.1.
940 Banjima Charitable Trust Deed S11.6(m).
941 Banjima Charitable Trust Deed S11.6(n).
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 Chairperson 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.\textsuperscript{945} The Agreed Decision Making Process itself must be recorded in writing by the trustee.\textsuperscript{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.\textsuperscript{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.\textsuperscript{948} Similar time limits apply to consultation and consent of the Banjima/Nyiyaparli Council and the Decision Making Committee.\textsuperscript{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.\textsuperscript{950} For Karlka, decisions are made by majority vote,\textsuperscript{951} for

\textsuperscript{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.

\textsuperscript{946} See, eg, Banjima Charitable Trust Deed S10.1.6(a)(iv).

\textsuperscript{947} See, eg, Banjima Charitable Trust Deed S2.8(l), S11.6(l).

\textsuperscript{948} Banjima Charitable Trust Deed cl 3.5(c); Nyiyaparli Charitable Trust Deed cl 3.5(c).

\textsuperscript{949} Banjima Charitable Trust Deed cl 3.6(b), 3.7(h); Nyiyaparli Charitable Trust Deed cl 3.6(b), 3.7(h).

\textsuperscript{950} Karlka Rule Book r 9.1, 9.24; Constitution of Banjima Native Title Aboriginal Corporation RNTBC rr 12.1, 12.2.

\textsuperscript{951} Karlka Rule Book r 12.6.1.
BNTAC, decisions are made by consensus and, failing that, by majority vote of the non-independent directors. 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. BNTAC’s constitution contemplates the existence of an Elders’ Council to provide guidance and recommendations to BNTAC on a range of matters.

Figure 6.2 - Interrelationship of Decision making Bodies and Benefit Recipients

<table>
<thead>
<tr>
<th>Direct Benefits Trust (DBT)</th>
<th>Aboriginal Community Controlled Entities</th>
<th>Aboriginal Community CATSI Act Corporation Membership</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Potential to change to another professional trustee company or an Aboriginal Community controlled trustee company</td>
<td>• Defines and provides quasi-member role for Aboriginal Community</td>
<td>• All adult Aboriginal Community members are eligible to be Members</td>
</tr>
<tr>
<td>• Creates and provides role for Traditional Owner Council (committee)</td>
<td>• Creates and provides role for Decision Making Committee (committee)</td>
<td></td>
</tr>
<tr>
<td>• Provides role for Decision Making Committee</td>
<td>• Provides role for Traditional Owner Council (committee)</td>
<td></td>
</tr>
</tbody>
</table>

Independent, Professional Trustee
- Trustee for both CT and DBT

Traditional Owner Council (TOC)
- Intended to be a fair and just representative group of the Aboriginal Community for making strategic decisions
- 8 – 14 members
- no independents

Decision Making Committee
- 6-10 members, including 1 independent, 1 TOC member, 1 LAC director – 1 non-voting trustee representative
- Intended to be a representative group of Aboriginal Community with greater financial and legal compliance expertise than TOC members and hence greater ability to make day-to-day decisions

Charitable Trust (CT)
- Potential to change to another professional trustee company or an Aboriginal Community controlled trustee company (Nch 4)
- Defines and provides quasi-member role for Aboriginal Community (d 3.4, 3.5)
- Provides role for Traditional Owner Council (committee) (d 3.2, 3.6)
- Provides for role of Decision Making Committee (committee) (Ncl 4.3, Bcl 3.2, 3.7)
- Provides for role of LAC cl 3.8

Local Aboriginal Corporation (LAC)
- 3 – 9 directors, with potential for up to 2 independent directors
- Potential for Elders Council
- Non-independent directors appoint independent directors
- Applies for funding and can implement projects
- Coordinates arrangements as agent for the trustee

Future Fund
- Capital and 90% income during accumulation period (protected endowment fund (ch 10))
- Implementation

Register of Traditional Owner Beneficiaries
- (must be on Register of Traditional Owner People)
- & Register of Other Beneficiaries

Resource Proponents

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 Nyiyaparli Charitable Trust Deed and Banjima Charitable Trust Deed. Where ‘N’ or ‘B’ precedes the clause reference, the reference is only to the Nyiyaparli Charitable Trust Deed or the Banjima Charitable Trust Deed, respectively.
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.

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957 Clause references are to both the Nyiyaparli Charitable Trust Deed and Banjima Charitable Trust Deed. Where ‘N’ or ‘B’ precedes the clause reference, the reference is only to the Nyiyaparli Charitable Trust Deed or the Banjima Charitable Trust Deed, respectively.
Table 6.2 – Selected Information Flows

<table>
<thead>
<tr>
<th>Item / Entity</th>
<th>Professional Trustee (Trustee)</th>
<th>Decision Making Committee (Committee)</th>
<th>Traditional Owner Council (Council)</th>
<th>Aboriginal Community</th>
<th>Local Aboriginal Corporation (LAC)</th>
<th>Resource Company (Contributor)</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>3 Year Strategic Plan (B Ch 14, N Ch 16)</td>
<td>Must prepare an initial draft with the Committee for each relevant 3 year period (Bcl 14.2, Ncl 16.2)</td>
<td>Prepares initial draft with Trustee (Bcl 14.2, Ncl 16.2) and can make a binding direction to Trustee</td>
<td>Trustee must consult with the Council and obtain Council consent (Bcl 14.2(c), (e), Ncl 16.2(d), (f))</td>
<td>No formal consultation, but Strategic Plan must be made available (Bcl 14.5(a), Ncl 16.6(a))</td>
<td>Trustee must consult with LAC (Bcl 14.2(c)(ii), Ncl 16.2(d)(ii)) and make finalised Strategic Plan available (Bcl 14.5(b), Ncl 16.6(b))</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Sets the long term objectives for the trusts to provide context for Annual Plans, including policy guidelines for distribution, investment and accumulation.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Annual Plan (B Ch 13, N Ch 15)</td>
<td>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)</td>
<td>Prepares initial draft with Trustee (Bcl 13.3, Ncl 15.3) and can make a binding direction to Trustee</td>
<td>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)</td>
<td>No formal consultation, but Annual Plan must be made available (Bcl 13.5(a), Ncl 15.6(a))</td>
<td>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))</td>
<td>No formal consultation, but modified Annual Plan must be made available (Bcl 13.5(b), Ncl 15.6(b))</td>
<td></td>
</tr>
</tbody>
</table>

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958 Clause and chapter references are to both the Nyiyaparli Charitable Trust Deed and Banjima Charitable Trust Deed. Where 'N' or 'B' precedes the clause reference, the reference is only to the Nyiyaparli Charitable Trust Deed or the Banjima Charitable Trust Deed, respectively.
<table>
<thead>
<tr>
<th>Item / Entity</th>
<th>Professional Trustee (Trustee)</th>
<th>Decision Making Committee (Committee)</th>
<th>Traditional Owner Council (Council)</th>
<th>Aboriginal Community</th>
<th>Local Aboriginal Corporation (LAC)</th>
<th>Resource Company (Contributor)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accountability for implementation of Strategic Plan and Annual Plan – Internal Report</td>
<td>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 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)</td>
<td>Trustee's Annual Report must be made available (Bcl 13.5(a), Ncl 15.6(a))</td>
<td>Trustee's Annual Report must be made available (Bcl 13.5(a), Ncl 15.6(a))</td>
<td>Trustee’s Annual Report must be made available (Bcl 13.5(a), Ncl 15.6(a))</td>
<td>Trustee’s Annual Report must be made available (Bcl 13.5(a), Ncl 15.6(b))</td>
<td>Modified version of Trustee’s Annual Report must be made available (Bcl 13.5(b), Ncl 15.6(b))</td>
</tr>
</tbody>
</table>

959 Not at the level of individual recipients.
<table>
<thead>
<tr>
<th>Item / Entity</th>
<th>Professional Trustee (Trustee)</th>
<th>Decision Making Committee (Committee)</th>
<th>Traditional Owner Council (Council)</th>
<th>Aboriginal Community</th>
<th>Local Aboriginal Corporation (LAC)</th>
<th>Resource Company (Contributor)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accountability for implementation of Strategic Plan and Annual Plan and Administration of Trusts – External Report</td>
<td>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)</td>
<td>Auditor’s Annual Report must be made available (Bcl 18.5(a), Ncl 20.5(a))</td>
<td>Auditor’s Annual Report must be made available (Bcl 18.5(a), Ncl 20.5(a))</td>
<td>Auditor’s Annual Report must be made available (Bcl 18.5(a), Ncl 20.5(a))</td>
<td>N/A for Karlka, but for BNTAC Auditor’s Annual Report must be made available (Bcl 18.5(a))</td>
<td>Auditor’s Annual Report must be made available (Bcl 18.5(b), Ncl 20.5(b))</td>
</tr>
<tr>
<td>Distribution Policy</td>
<td>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))</td>
<td>Prepares initial draft with Trustee (cl 6.9(b), N6.10) and can make a binding direction to the Trustee</td>
<td>Trustee must obtain Council consent (cl 6.9(b))</td>
<td>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))</td>
<td>No formal consultation and no requirement for provision of policy to Karlka, but distribution policy must be provided to BNTAC (Bcl 6.11(b))</td>
<td>Trustee must obtain Contributor consent (cl 6.9(b))</td>
</tr>
<tr>
<td>Standard Process for Varying the Trust Deeds (B Ch 16, N Ch 18)</td>
<td>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</td>
<td>Consults with the Trustee and can issue a binding direction to the Trustee as to variation of the trust deed (Bcl 16.2(b), Ncl 18.3(a))</td>
<td>No formal consultation, but variation must be made available (Bcl 16.4(a), Ncl 18.3(a))</td>
<td>No variation without consent of the Aboriginal Community (Bcl 16.2(c), Ncl 18.2(c)), with the trust deeds contemplating consent being</td>
<td>No formal consultation, but variation must be made available (Bcl 16.4(a), Ncl 18.3(a))</td>
<td>No variation without consent of Contributors (Bcl 16.2(c), Ncl 18.2(c))</td>
</tr>
<tr>
<td>Item / Entity</td>
<td>Professional Trustee (Trustee)</td>
<td>Decision Making Committee (Committee)</td>
<td>Traditional Owner Council (Council)</td>
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</tr>
<tr>
<td>--------------</td>
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</tr>
<tr>
<td>and technical variations to comply with laws or correct typographical errors.</td>
<td>direction from the Committee (Bcl 16.2(b), 16.3, Ncl 18.2)</td>
<td>16.3, Ncl 18.2(b))</td>
<td>evidenced by way of a determination at a general meeting</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
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:

- develop appropriate mechanisms for participation, consultation and information dissemination with the Nyiyaparli People which shall have regard to the following non-exhaustive objectives:
  1. encouraging participation by the Nyiyaparli People in the operation of the Benefits Management Structure;
  2. preparing the Nyiyaparli People for effective participation in meetings;
  3. ensuring transparency and accountability in decision making; and
  4. 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.

### 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. 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.

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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. 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. 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.

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. It also appears to have contributed to a greater delay in developing distribution and other policies and hence in applying BMS funds.

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

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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.


customised and felt like imposed templates. 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. 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, 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. Another trustee officer suggested that there may be greater scope for customisation once the initial BMS ‘learning’ phase has been completed. 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.

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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.
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, Mantziaris 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

<table>
<thead>
<tr>
<th>Facility</th>
<th>Pilot BMS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal capacity to hold and manage property</td>
<td>Entities within the BMS have this capacity, such as the professional</td>
</tr>
<tr>
<td>and bear rights and obligations</td>
<td>trustee as trustee of the Charitable Trust and the Direct Benefits Trust,</td>
</tr>
<tr>
<td></td>
<td>as well as the Local Aboriginal Corporation.</td>
</tr>
<tr>
<td>Means of establishing legal authority</td>
<td>Professional trustee company constitution, Local Aboriginal Corporation</td>
</tr>
<tr>
<td></td>
<td>rule book and general corporations law should permit the directors or</td>
</tr>
<tr>
<td></td>
<td>other individuals with delegated authority, to bind the corporations.</td>
</tr>
<tr>
<td>Method for identifying the native title group</td>
<td>The Direct Benefits Trust provides for the creation and maintenance of</td>
</tr>
<tr>
<td></td>
<td>a register of the Aboriginal community which represents the</td>
</tr>
</tbody>
</table>

978 We have assumed this would be standard for a licensed trustee company in the form of a public company.
979 See, eg, Karlka Rule Book rr 11.1, 11.4, 14.2; Constitution of BNTAC rr 14.1, 14.6, 19.2.
Facility | Pilot BMS
---|---
relevant group of native title claimants or holders from time to time.  
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. The provision provides for removal or inclusion as members die and reach 18 years of age. The rules also require the register to be made available to the BMS trustee and to others, subject in some cases to conditions. The register includes only a person’s name, birthdate and address.  
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. 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. In addition, Certainty 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.

Method of identifying the nature and extent of native title rights and interests of group members | The registers of the Aboriginal community members referred to above are not typically required by the pilot BMS to contain any such details.

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).

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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’).
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.
<table>
<thead>
<tr>
<th>Facility</th>
<th>Pilot BMS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>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.</td>
</tr>
<tr>
<td>Inclusion of formal decision making procedures</td>
<td>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:</td>
</tr>
<tr>
<td></td>
<td>• 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.</td>
</tr>
<tr>
<td></td>
<td>• 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 Efficiency (Part 6.3.9), as well as to allocation of liability for decisions, as discussed below.</td>
</tr>
<tr>
<td></td>
<td>• 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. The 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. 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. 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 Allegiance (Part 6.3.4).</td>
</tr>
<tr>
<td></td>
<td>• 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 decisions again reflects a ‘windows approach’ to recognising traditional law</td>
</tr>
</tbody>
</table>

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.
<table>
<thead>
<tr>
<th>Facility</th>
<th>Pilot BMS</th>
</tr>
</thead>
<tbody>
<tr>
<td>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 <em>Certainty</em>. 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. For instance, 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) 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).</td>
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Dispute resolution procedures | The pilot BMS trust deeds and Local Aboriginal Corporation rule book each contain procedures to help resolve and address the consequences of disputes. 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. In addition, the Aboriginal community typically has the ability to remove and replace Traditional Owner |

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 Committee members or directors with whom they are dissatisfied.\textsuperscript{996} These mechanisms permit a mix of Indigenous mechanisms and more mainstream approaches as recommended by Mantziaris and Martin.\textsuperscript{997} However, stakeholders suggested that most formal processes were rarely used\textsuperscript{998} 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1002} However, there is no one size fits all as cultures differ and are also dynamic in nature.\textsuperscript{1003} Dodson and Smith have also observed that dispute resolution procedures should be formalised at least to a degree.\textsuperscript{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.\textsuperscript{1005} Additionally, there

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\textsuperscript{996}{See, eg, Banjima Charitable Trust Deed S11.5; Constitution of BNTAC r 12.10; Karlka Rule Book r 9.8.}
\textsuperscript{997}{Mantziaris and Martin's Native Title Corporations 316.}
\textsuperscript{998}{Trustee Officer 19 July 2018; Trustee Officer May and June 2018; Pilbara Aboriginal Corporation Executive 4 July 2018.}
\textsuperscript{999}{Professional Adviser 31 January 2018; Trustee Officer 8 March 2019.}
\textsuperscript{1000}{Pilbara Aboriginal Corporation Executive 5 July 2018.}
\textsuperscript{1003}{Toni Bauman, 'Final Report of the Indigenous Facilitation and Mediation Project' (Report No. 6, AIATSIS, 2006) 17.}
\textsuperscript{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.}
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<td>is space for ‘external’ dispute mechanisms such as independent mediation or arbitration.(^{1006})</td>
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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.

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<td>• 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.</td>
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<td>• 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.</td>
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<td>• 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).</td>
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<td>• 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})</td>
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<td>• 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</td>
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\(^{1007}\) 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.
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.

- 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, 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. 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. 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, 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'.

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 asking for problems'. An Aboriginal corporation executive noted that:

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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.
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<td>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. A resource proponent representative noted their view in relation to the role of committee members that:1016 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. 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 • 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 Sensitivity to motivational complexity (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 Sensitivity to motivational complexity. • 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</td>
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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 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.

External

- 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.\(^\text{1021}\) However, perceptions of Autonomy were negatively affected, with one Aboriginal community representative noting that: \(^\text{1022}\)
  
  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.

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’.\(^\text{1023}\) 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.

- The pilot BMS Charitable Trust and, often, the Local Aboriginal Corporation, as registered charities would also be required to

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\(^\text{1023}\) Pilbara Aboriginal Corporation Executive 10 May 2018.
Facility | Pilot BMS
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- 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.
- 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

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.

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.\(^ {1027}\)

Second, overlapping responsibility for decisions on a range of matters affects the clarity of allocation of liability. In particular, the trustee

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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
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(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:\footnote{Pilbara Aboriginal Corporation Director 20 June 2018.}

> 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.

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.\footnote{See Part 4.14.}

As noted above for external accountability, it also raises the risk that the Aboriginal community allocates moral, if not legal, liability to the trustee.\footnote{As to the risks of externalising moral responsibility, see Mantziaris and Martin’s Native Title Corporations 321-2.}

Asset protection | 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.\footnote{See, eg, Nyiyaparli Charitable Trust Deed cl 11.1(b).}

In addition, the BMS trust deeds contain risk mitigation provisions in relation to the investment of trust assets.\footnote{See, eg, Nyiyaparli Charitable Trust Deed ch 7, 8; Banjima Charitable Trust Deed ch 7, 8.} 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...
Facility | Pilot BMS
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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. 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.

In terms of financial management and administrative systems, monitoring, acquittal and evaluation of trust distributions is discussed under Allegiance 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.

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. 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...’.

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1033 See, eg, Nyiyaparli Charitable Trust Deed cl 8.1(d); Banjima Charitable Trust Deed cl 8.1(d).
1034 See, eg, Nyiyaparli Charitable Trust Deed cl 7.6; Banjima Charitable Trust Deed cl 7.6.
1035 See, eg, Nyiyaparli Charitable Trust Deed cl 17.2; Karlka Rule Book r 18; Banjima Charitable Trust Deed cl 15.2.
1036 See, eg, Nyiyaparli 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’. 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’. More broadly for community ownership of structures, a ‘key issue is ensuring that communities understand the complex documents and processes’, As discussed in Part 4.6, some form of broad community participation is vital, with a Karratha workshop response that:

> 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’.

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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.\textsuperscript{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’.\textsuperscript{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.\textsuperscript{1043}

While processes are important, a BMS’s ability to achieve outcomes for the Aboriginal community matters too,\textsuperscript{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.\textsuperscript{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

\textsuperscript{1041} Resource Proponent Manager 24 January 2017.
\textsuperscript{1042} Professional Adviser 16 November 2017.
\textsuperscript{1043} See, eg, Pilbara Aboriginal Corporation Director 8 May 2019.
\textsuperscript{1044} In the PBC context, cf Mantziaris and Martin’s \textit{Native Title Corporations} 325.
\textsuperscript{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.\footnote{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.\footnote{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.\footnote{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,\footnote{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’.\footnote{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

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\footnote{1046} In the PBC context, cf Mantziaris and Martin’s Native Title Corporations 325.
\footnote{1048} Pilbara Aboriginal Corporation Executive 21 May 2018.
\footnote{1049} Trustee Officer 19 July 2018.
\footnote{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; Nyiyaparli Charitable Trust Deed Ch 14.

\(^{1053}\) See, eg, Banjima Charitable Trust Deed S1 (definition of ‘Community’); Nyiyaparli 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, the Investment Adviser, the Executive Office (with administration responsibilities), the Auditor, members of the Decision Making Committee and the independent directors of an Indigenous-controlled trustee company. 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.

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. Alternatively, some non-independent directors or committee members are required to undertake governance training within a certain time of commencing as a director, 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. 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 Committee and very similar provisions for Traditional Owner Council members. 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. 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

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1066 See, eg, Nyiyaparli Charitable Trust Deed cl 3.3(a) (good governance practices), 3.4 (consultation with the Nyiyaparli 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. 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. That is because the pilot BMS documents provide (where a conflict exits) 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. 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. The Decision Making Committee also has independent members with a similar compliance veto. 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.

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

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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).
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.\(^\text{1076}\) 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’.\(^\text{1077}\) 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),\(^\text{1078}\) people in general ‘very respectful of different views’.\(^\text{1079}\) Others noted that decision makers ‘feel the weight of the decisions that they have made – they don’t take them lightly’.\(^\text{1080}\) 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.\(^\text{1081}\)

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.

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\(^\text{1076}\) See, eg, Nyiyaparli Charitable Trust Deed cl 3.7(c), (d), S9.2.7; Banjima Charitable Trust Deed S11.6(l).
\(^\text{1077}\) Nyiyaparli CT cl 17.7(b), (c); Banjima Charitable Trust Deed cl 15.7(b), (c).
\(^\text{1078}\) Independent BMS Facilitator 21 March 2018.
\(^\text{1079}\) Pilbara Aboriginal Corporation Executive 21 May 2018.
\(^\text{1080}\) Pilbara Aboriginal Corporation Director 21 June 2018.
\(^\text{1081}\) 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. 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). 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. Amendments to the Local Aboriginal Corporation rule book are typically subject to far fewer restrictions, 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. 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

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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, Karika 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 Nyiyaparli 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

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. 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. 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. ‘Translation is the key issue’. 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 Nyiyaparli Charitable Trust Deed requires the trustee to:

- ensure that meetings of the Nyiyaparli People, the Decision Making Committee and the Nyiyaparli 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. 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

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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 Nyiyaparli 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.\textsuperscript{1096}

Stakeholders particularly emphasised the transaction costs associated with decision making\textsuperscript{1097} and with compliance activities of controlling the managers\textsuperscript{1098} 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).\textsuperscript{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.\textsuperscript{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

\textsuperscript{1096} See further Parts 5.9 and 6.3.2.
\textsuperscript{1097} See, eg, Part 4.7; Resource Proponent Manager 24 January 2017.
\textsuperscript{1098} See, eg, Independent BMS Facilitator 21 March 2018.
\textsuperscript{1099} See Part 6.3.2.
\textsuperscript{1100} See, eg, Nyiyaparli 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, 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. 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. 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 members and general statements are contained in the trust deeds about supporting governance practices or encouraging participation, 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. 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,  

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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.\footnote{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 example\footnote{1108} 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’.\footnote{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.\footnote{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.

\textbf{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,\footnote{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

\footnotesize{\textsuperscript{1107} Parts 4.1 and 4.4. \\
\textsuperscript{1108} See, eg, Nyiyaparli Charitable Trust Deed cl 4.4. \\
\textsuperscript{1109} Nyiyaparli Charitable Trust Deed S2.1. \\
\textsuperscript{1110} Pilbara Aboriginal Corporation Executive 10 May 2018. \\
\textsuperscript{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:\(^\text{1112}\)

- 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 \textit{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 \textit{Equity} by way of:\(^\text{1113}\)

- 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);\textsuperscript{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,\textsuperscript{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’.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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.

\textsuperscript{1115} See, eg, Nyiyaparli Charitable Trust Deed cl 10.3(a); Banjima Charitable Trust Deed cl 10.3(a).

\textsuperscript{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.

\textsuperscript{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

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\(^{1119}\) 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.

benefitting from resource development and BMS opportunities and others who have not.\textsuperscript{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.\textsuperscript{1124} If a similar degree of equity could be achieved with one less entity that would have very material \textit{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.\textsuperscript{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,\textsuperscript{1126} although this would need to be investigated and would tend to reduce the \textit{Simplicity} gains.\textsuperscript{1127}

\subsection*{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 charity\textsuperscript{1128} 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.

\begin{itemize}
\item \textsuperscript{1124} Professional Adviser 5 March 2019.
\item \textsuperscript{1125} See Part 2.3.
\item \textsuperscript{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, \textit{Tasmanian Electronic Commerce Centre Pty Ltd v FCT} (2005) 142 FCR 371; \textit{Northern Land Council v Commissioner of Taxes (NT)} [2002] ATC 5117, 5133-4 (Thomas J). And in the context of ‘community service’ organisations, see \textit{FCT v Wentworth District Capital Ltd} [2011] FCAFC 42 (facilitation of banking services).
\item \textsuperscript{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.
\item \textsuperscript{1128} BNTAC and Karlka, for example, are registered charities: ACNC, \textit{Search for a Charity} <https://www.acnc.gov.au/charity>.
\end{itemize}
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;\textsuperscript{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.\textsuperscript{1130} Indeed, one trustee officer acknowledged that this can sometimes be an issue and provided the following example:\textsuperscript{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.\textsuperscript{1132} Further, a trustee officer also suggested that high turnover of board or committee members under

\textsuperscript{1129}Trustee Officer 28 June 2018; Trustee Officer May and June 2018; Pilbara Aboriginal Corporation Executive 21 May 2018.
\textsuperscript{1131}Trustee Officer 28 June 2018.
\textsuperscript{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.\footnote{1133}

In terms of measuring achievement of outcomes, the pilot BMS does contains procedures, some optional, for ongoing monitoring and acquittal of funding and evaluating the use of funding.\footnote{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.\footnote{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,\footnote{1136} the specific foci are BMS costs, activities and distributions – not the effect of these actions – outcomes and impacts.\footnote{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’)\footnote{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.

\footnote{1133}{Trustee Officer 18 May 2017.}
\footnote{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.}
\footnote{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.}
\footnote{1136}{See, eg, Nyiyaparli Charitable Trust Deed cl 15.5(c); Banjima Charitable Trust Deed cl 13.4(c).}
\footnote{1137}{See Table 6.3.}
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

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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.\(^\text{1142}\) 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 3\(^\text{1143}\) 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.\(^\text{1144}\) 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

\(^{\text{1142}}\) 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.

\(^{\text{1143}}\) See nn 261 to 263 and accompanying text.

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. 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.

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. 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.\textsuperscript{1148} The cultural appropriateness of protocols was highlighted.\textsuperscript{1149}

Also of benefit, according to stakeholders, were:\textsuperscript{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 \textit{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.\textsuperscript{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’.\textsuperscript{1152} Capacity building could occur, for instance, at the same time as community members develop their personal financial plans with the trustee/financial planners,\textsuperscript{1153} or at general community meetings.\textsuperscript{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

\textsuperscript{1148} Karratha Workshop 3 May 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Independent BMS Facilitator 21 March 2018.
\textsuperscript{1149} Karratha Workshop 3 May 2018.
\textsuperscript{1150} Karratha Workshop 3 May 2018.
\textsuperscript{1151} Karratha Workshop 3 May 2018. See also Pilbara Aboriginal Corporation Executive 19 March 2019.
\textsuperscript{1152} Pilbara Aboriginal Corporation Director 8 May 2019.
\textsuperscript{1153} Trustee Officer May and June 2018.
\textsuperscript{1154} Karratha Workshop 3 May 2018.
means, family groups as discussed below) and allocation of responsibilities (eg as between trustee and BMS corporation). 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.

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. A similar suggestion involves the use of ‘citizen juries’ or ‘citizen parliaments’ comprising a randomly selected group of affected community members. 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. In a similar vein, one stakeholder recommended holding an information day before a decision making day. The desire for face-to-face forums identified by one Aboriginal director feeds into such approaches. 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. 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. Research in Canada indicates similar success has been enjoyed there, as does more general

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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.
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.
Australian research on information technology use by Indigenous communities. The Australian research indicates that Indigenous Australians have a 20% higher use of social media than the average for all Australians. 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. Indeed, stakeholders noted the importance of two-way communication, especially between the BMS corporation and the trustee. 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.

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. It would also need to be culturally appropriate and tailored to the different approaches to information technology use within a community. Cognizance would need to be taken of privacy and security issues.

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:

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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.


1171 Cf Pilbara Aboriginal Corporation Executive 21 May 2018.

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 objectives 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

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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.
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;\textsuperscript{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.\textsuperscript{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.\textsuperscript{1181} It is also demonstrated by the Regional Implementation Committee report into indicators of Aboriginal wellbeing in the Pilbara.\textsuperscript{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.\textsuperscript{1183}

Relatudly, several stakeholders emphasised the importance of acquiring capacity to undertake community development activities,\textsuperscript{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.\textsuperscript{1185} For example, advancing an Indigenous community’s economic

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\textsuperscript{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.


\textsuperscript{1183} Former Aboriginal Corporation CEO & Management Consultant 14 February 2019.

\textsuperscript{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.

\textsuperscript{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.\textsuperscript{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.\textsuperscript{1187} Mission drift raises the issue of \textit{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.\textsuperscript{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

\textsuperscript{1186} Trustee Officer 19 July 2018.
\textsuperscript{1187} See, eg, Pilbara Aboriginal Corporation Executive 4 July 2018; Pilbara Aboriginal Corporation Executive 10 May 2018; Independent BMS Facilitator 21 March 2018.
\textsuperscript{1188} As to the importance of performance reporting by trustees, see, eg, Alan Sefton, ‘Report on Njamal People’s Trust’ (Inquiry under Section 20 of the \textit{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 interpersonal 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 interpersonal 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.
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. 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. Other stakeholders referred to holding joint trust committee and BMS Indigenous corporation board meetings at least 2 to 4 times per year. 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. 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. However, this raises the risk of loss of separate functions, with reduced certainty, 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.
1196 Trustee Officer May and June 2018; Pilbara Aboriginal Corporation Executive 21 May 2018.
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 Innuvialuit 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

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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.
1203 Cf Professional Adviser 3 May 2019; Pilbara Aboriginal Corporation Officer 12 March 2019.
1204 Pilbara Aboriginal Corporation Director 21 June 2018.
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.\textsuperscript{1209} One Aboriginal community member noted that ‘It’s all about accountability and clearer expectations help accountability’.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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

\footnotesize{\textsuperscript{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.  
\textsuperscript{1210} Pilbara Aboriginal Corporation Director 20 June 2018.  
\textsuperscript{1211} Karratha Workshop 3 May 2018; Independent BMS Facilitator 7 March 2019.  
\textsuperscript{1212} Cf Thanh-Bing Phun, ‘Using Freelancers and In-house Employees in Computer Programming: A Transaction Cost Perspective’ (2\textsuperscript{nd} International Conference on Management, Economics and Social Sciences, June-July 2012, Bali) 80, 82.  
\textsuperscript{1213} Trustee Officer 28 June 2018. Cf Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Officer 12 March 2019.  
\textsuperscript{1214} Trustee Officer 28 June 2018.}
the proposed dispute resolution processes and less dispute about whether a particular process is legally mandatory or not.\textsuperscript{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.\textsuperscript{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:\textsuperscript{1217}

\begin{quote}
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.
\end{quote}

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.\textsuperscript{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

\begin{flushright}
\textsuperscript{1216} See especially Pilbara Aboriginal Corporation Officer 12 March 2019 and cf Part 4.11.
\textsuperscript{1217} Pilbara Aboriginal Corporation Director 8 May 2019.
\end{flushright}
of trustees, but perhaps also due to the risk tolerance of some communities.\textsuperscript{1219} That conservatism reflects the fact that social impact investing does raise risks for asset protection and hence \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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);\textsuperscript{1223} the difficulty in defining and quarantining financial hardship and health hardship funds;\textsuperscript{1224} trustees being assessed largely by community members on their ability to deliver services and thus being incentivised to distribute immediate funds;\textsuperscript{1225} and greater scope for disagreement about precisely what longer term developments should be pursued.\textsuperscript{1226} The issue was also more pronounced where many current members of a native title group are in necessitous circumstances.\textsuperscript{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.

\textsuperscript{1219} Cf Pilbara Aboriginal Corporation Director 8 May 2019.
\textsuperscript{1220} Professional Adviser 5 March 2019.
\textsuperscript{1221} Cf Resource Proponent Manager 10 August 2017.
\textsuperscript{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.
\textsuperscript{1223} Pilbara Aboriginal Corporation Executive 5 July 2018.
\textsuperscript{1224} See, eg, Pilbara Aboriginal Corporation Executive 10 May 2018; Pilbara Aboriginal Corporation Executive 5 July 2018; Pilbara Aboriginal Corporation Director 21 June 2018.
\textsuperscript{1225} Professional Adviser 31 January 2018.
\textsuperscript{1226} See, eg, Resource Proponent Manager 24 January 2017.
\textsuperscript{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’. 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. A compliance matrix (as a cut down version of a full operations manual) was also suggested. 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.

- Regular fora for BMS officers and stakeholders (in relation to one BMS and as between multiple BMSs) to meet and share implementation experience.

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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.\textsuperscript{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.\textsuperscript{1234}

• An organizational chart and/or role descriptions setting out roles and responsibilities to assist with Issue 7 – Overlapping decision making bodies.\textsuperscript{1235} Other stakeholders put greater emphasis on relationship building than formal documents.\textsuperscript{1236}

• Templates and guidance for developing strategic plans and measures, along with a monitoring framework.\textsuperscript{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 \textit{Sensitivity to motivational complexity} and the role of trust and uncertainty under \textit{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.\textsuperscript{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 \textit{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:\textsuperscript{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

\begin{footnotesize}
\textsuperscript{1233} Professional Adviser 31 January 2018; Independent BMS Facilitator 21 March 2018; Karratha Workshop 3 May 2018.
\textsuperscript{1234} Independent BMS Facilitator 21 March 2018; Pilbara Aboriginal Corporation Executive 21 May 2018; Pilbara Aboriginal Corporation Executive 4 July 2018.
\textsuperscript{1235} Independent BMS Facilitator 21 March 2018; Pilbara Aboriginal Corporation Director 20 June 2018; Pilbara Aboriginal Corporation Executive 5 July 2018.
\textsuperscript{1236} See, eg, Trustee Officer 19 July 2018; Pilbara Aboriginal Corporation Executive 10 May 2018.
\textsuperscript{1237} Professional Adviser 31 January 2018; Pilbara Aboriginal Corporation Executive 21 May 2018.
\textsuperscript{1238} See nn 677 to 678; Pilbara Aboriginal Corporation Officer 12 March 2019.
\textsuperscript{1239} Stakeholder references already included in Part 4.19 are not repeated below.
\end{footnotesize}
and providing member services to Indigenous community members. 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:

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. 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.

- 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. 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’. 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.

1240 Professional Adviser 31 January 2018.
1241 Pilbara Aboriginal Corporation Director 21 June 2018. See also Pilbara Aboriginal Corporation Executive 21 May 2018.
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.  

• 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. 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.

• 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’.

7.6 Windows approach

The ‘windows approach’ 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

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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.
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 process\textsuperscript{1252} 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.\textsuperscript{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.\textsuperscript{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,
\textit{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 \textit{Certainty}. For instance, a majority vote if traditional procedures do not

\textsuperscript{1252} So that an authoritative decision could be obtained from a court if required.
\textsuperscript{1253} See Part 6.3.2.
\textsuperscript{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. 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, this would include transitioning from a professional trustee company to an Indigenous community-controlled trustee company over time.

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:

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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...

[The 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. 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. 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. 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.

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1259 See n 634 and accompanying text.
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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Appendix A

List of Interviewees

Aboriginal Community and Corporation Representatives

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Professional Advisers and BMS Facilitator

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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.
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

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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. Such rights may still however be impaired or extinguished by the government in some circumstances, subject to compensation.

The Indian Act 1985 is the principal piece of federal legislation addressing aboriginal title. 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.

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. 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. Many treaties also reserve timber rights and rights to mineral proceeds to Indigenous communities.

In 1973, the Canadian Federal Government introduced a so-called Comprehensive Land Claims Policy. 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. 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. 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-

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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.
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. 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) is responsible for fulfilling the Government of Canada's obligations and commitments to Indigenous Canadians. Indigenous moneys are all moneys received and held in trust by INAC for the benefit of Indigenous Canadians.

1.3 Impact and Benefits Agreements

An Impact and Benefits Agreement (also known as a Benefit Sharing Agreement) is an agreement between an Indigenous community and a resource proponent and or government.

1.3.1 Agreements

The financial and economic benefits specifically provided for in an IBA include financial compensation, training, employment and business opportunities. IBAs also often include measures to limit the negative cultural and environmental effects of resource development. 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

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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).
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

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1293 Irene Sosa and Karyn Keenan, ‘Impact Benefit Agreements between Aboriginal Communities and Mining Companies Their Use in Canada’ (Report, 2001) 8.
1298 Ibid 73.
1299 Ibid 82.
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.
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.
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:
   \(\text{(a) to preserve Inuvialuit cultural identity and values within a changing northern society;}
   \)
   \(\text{(b) to enable Inuvialuit to be equal and meaningful participants in the northern and national economy and society: and}
   \)
   \(\text{(c) to protect and preserve the Arctic wildlife, environment and biological productivity.}
   \)

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

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\(^{1316}\) *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,
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. The latter have legal capacity and are democratically elected by their citizens. Contested decisions can be appealed to the Supreme Court of British Columbia. 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 Plan and its Five-Year Review 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. 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.

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1323 Ibid s 13.2.0.
1324 Ibid s 13.3.0.
1325 Ibid s 13.4.0.
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, Indian title in tribal lands or reserves, as well as broader self-government rights of Indian tribes, was recognised at common law in 1823. Indian title has been described as a possessory right in the sense that it is a right of occupation, not a property right. 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. 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. 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.

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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 McIntosh, 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.
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. First, recognition of Indian tribes as holding inherent powers of limited sovereignty. 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. As demonstrated in *Cherokee Nation v Georgia*, this has implications for the application of Federal legislation to areas under the control of Indian tribes. Rights to occupy, control access to, protect and manage natural resources are also, and very extensively, contained in various treaties and legislation.

In the United States, Indian claims to land may be resolved by litigation or by legislation.

### 2.2 Litigated resolution

Litigation was formerly brought in the Indian Claims Commission (1946-1978), 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. A litigated resolution is limited to an award of monetary compensation. Where a judgment is obtained by a tribe, the government generally administers the distribution and management of the money.

#### 2.2.1 Management of benefits and of Indian property: Federal-Indian trust doctrine

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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.
1341 Pursuant to the *Indian Claims Commission Act of 1946* 25 USC §§ 70-70v-3.
The proceeds of a judgment are typically held on trust by the government. As noted above, Indian Nations are considered as having limited sovereignty and hence have been viewed as ‘domestic dependent nations’, which imposes trustee duties on the federal government in its dealings with Indian Nations. The courts have therefore imposed fiduciary responsibilities on the federal government in its management of compensation monies (or other Indian tribal property). A breach of that fiduciary duty by the government can give rise to monetary damages.

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. 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. There have been problems in the government’s management of money and those problems have been ventilated in the form of litigation.

2.2.2 Distribution of Benefits

The distribution of judgment funds is governed by legislation. 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. Thus the government has a role in administering judgment proceeds. 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

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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).
development or economic development.\textsuperscript{1356} While per capita payments have been preferred by claimants, the government has preferred to allocate the money to a trust fund.\textsuperscript{1357} Fully per capita payments have only been made when the majority of recipients reside off-reservation.\textsuperscript{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.\textsuperscript{1359} The remainder is held in trust by the government.\textsuperscript{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.\textsuperscript{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 \textit{Indian Mineral Leasing Act of 1938} and the \textit{Indian Mineral Development Act of 1982}.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1364}

### 2.3 Legislative resolution

\textsuperscript{1356} Ibid 31.
\textsuperscript{1357} Imre Sutton (ed), \textit{Irredeemable America: The Indians’ Estate and Land Claims} (University of New Mexico Press, 1985) 367.
\textsuperscript{1360} Distribution of Judgment Funds Act of 1973, 25 USCA §§ 1401(b).
\textsuperscript{1361} Nettheim, Myers and Craig’s Indigenous Peoples and Governance Structures 42.
\textsuperscript{1362} The \textit{Federal Oil & Gas Royalty Management Act} and the \textit{Indian Energy Resources Act of 1990} are also relevant.
\textsuperscript{1364} \textit{Merrion v Jicarilla Apache Tribe} 455 US 130 (1982); \textit{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. 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.

In the 1960s, oil companies became aware of a lucrative quantity of oil in Alaska. However, Alaska Natives already had recognised title to much of the land. 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). The ANCSA has been described as unusual, remarkable, innovative, novel, unprecedented and unique. It established two tiers of native corporations: twelve regional corporations and over two hundred village corporations. 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

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.
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.\textsuperscript{1379}

### 2.3.1 Regional corporations

Regional corporations are for-profit corporations organised under Alaska state law.\textsuperscript{1380} Under ANCSA, the regional corporations are authorised to provide benefits to promote the health, education or welfare of shareholders.\textsuperscript{1381} Monetary benefits include dividends, elder benefits, scholarships, memorial benefits, shareholders’ equity and charitable donations.\textsuperscript{1382} The payments received by regional corporations were based on the number of native shareholders in the region.\textsuperscript{1383} Non-monetary benefits include employment opportunities, cultural preservation, land management, economic development and advocacy.\textsuperscript{1384}

At the time of its introduction, ANCSA individually conferred on eligible Alaska Natives 100 generally inalienable shares in a regional corporation.\textsuperscript{1385} However, shareholders of a regional corporation may now vote to amend the articles of incorporation to lift restrictions on share alienability.\textsuperscript{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.\textsuperscript{1387} Regional corporations are subject to the state’s corporate laws, subject to a few exceptions.\textsuperscript{1388}

\begin{footnotesize}
\begin{enumerate}
\item[1387] ANCSA § 7(f).
\item[1388] United States Government Accountability Office, \textit{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.
\end{enumerate}
\end{footnotesize}
Among regional corporations, there is wide variation in governance practices. 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. Directors’ terms are 3 years and staggered, so that generally one-third of the director positions are up for election each year. About half of regional corporations have nominating committees to assess and recommend potential candidates. At least one regional corporation requires that at least one director come from each of the region’s villages, which would appear to promote representativeness. Voting power is equal among shareholders. Some regional corporations have reported difficulty in achieving a quorum at annual directors’ elections. Regional corporations have made an effort to promote shareholder involvement through annual shareholder meetings, streaming annual meetings online, and shareholder advisory committees. 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.

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. 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.

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. Village corporations are required to submit expenditure plans to regional corporations for approval, and funding may be withheld until that occurs. 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.
1399 Ibid 108.
1400 Ibid.
corporations are not parent companies of village corporations; they have no ownership interest. However, there are 'complex interdependencies' established between regional corporations and village corporations by ANCSA.

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.

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. For that reason, they seem to be used predominantly by village corporations. Establishing a settlement trust requires shareholder approval. 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". However, a settlement trust cannot operate as a business or alienate any interest in a trust asset. The village corporation or regional corporation that establishes a settlement trust has exclusive authority to appoint and remove trustees, who must be natural persons. There are asset protection benefits in this. However, Hirschfield is critical of settlement trusts and concludes that the inalienability of land held in trust makes its potential limited.

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. The establishment of for-profit regional and village native corporations, along with certainty about the assets held by those corporations,
was intended to permit 'productive investments so as to maximise shareholder interests'.

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. 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.

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. Branson, for instance, notes that Alaskan native corporations perform a variety of non-corporate functions such as delivery of social services, provision of elder benefits, and dispensation of political patronage. 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. It can also result in poorer decision making and mission drift.

The Alaskan model was intended to give native people a collective economic power and greater political influence, supplanting government paternalism. However, many of the highest paying and most influential roles in some regional corporations have been

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1414 Nettheim, Myers and Craig’s Indigenous Peoples and Governance Structures 65.
1419 Ibid 219.
1420 Ibid 220.
held by non-natives, reflecting, in practice, a native capacity deficit.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1426}

In 2012 the Government Accountability Office prepared a report to Congress on regional corporations.\textsuperscript{1427} The performance of regional corporations seems to be mixed.\textsuperscript{1428} Further, the two tiered system has given rise to tension between regional corporations and village corporations.\textsuperscript{1429} The report notes that many of the regional corporations struggled financially in the 1980s and 1990s.\textsuperscript{1430} Two were declared bankrupt.\textsuperscript{1431} However, it balances this by stating that, in 2011, the 12 regional corporations were ranked as top businesses in Alaska.\textsuperscript{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.\textsuperscript{1433}

3. New Zealand

3.1 Background

In New Zealand, the Treaty of Waitangi (1840) is foundational.\textsuperscript{1434} It documents the agreement between the British Crown and the Maori\textsuperscript{1435} people which provided for the sharing of power and presupposed independent legal and political capacity on the part of the Maori.\textsuperscript{1436} It gave the British Crown the right to govern but that right was dependent

\begin{itemize}
\item \textsuperscript{1424} Ibid 303.
\item \textsuperscript{1425} Thomas Berger, \textit{Village Journey: The Report of the Alaska Native Review Commission} (Hill & Wang 1985) 30
\item \textsuperscript{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 \textit{Alaska Law Review} 203, 224.
\item \textsuperscript{1427} United States Government Accountability Office, \textit{Regional Alaska Native Corporations: Status 40 Years after Establishment, and Future Considerations} (Report to Congressional Requesters, United States Government Accountability Office, December 2012).
\item \textsuperscript{1428} See also Nell Newton, ‘Compensation, Reparations, & Restitution: Indian Property Claims in the United States’ (1994) 28 \textit{Georgia Law Review} 453.
\item \textsuperscript{1429} Ibid 475.
\item \textsuperscript{1430} United States Government Accountability Office, \textit{Regional Alaska Native Corporations: Status 40 Years after Establishment, and Future Considerations} (Report to Congressional Requesters, United States Government Accountability Office, December 2012) 12.
\item \textsuperscript{1431} Ibid.
\item \textsuperscript{1432} Ibid.
\item \textsuperscript{1433} Ibid 13.
\item \textsuperscript{1434} Shaunnagh Dorsett and Lee Godden, \textit{A Guide to Overseas Precedents of Relevance to Native Title} (Native Title Research Unit, AIATSIS 1998) 32.
\item \textsuperscript{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.
\item \textsuperscript{1436} Marina Nehme, ‘Indigenous Corporate Governance in Australia and Beyond’ in David Frenkel, \textit{Economy and Commercial Law – Selected Issues} (2013, Athens Institute for Education and Research, Greece) 100;
\end{itemize}
upon the Crown meeting its obligations to Maori people under that Treaty. These obligations have been interpreted in fiduciary terms in contemporary cases.

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* to replace Crown right of pre-emption of customary land with free trade. 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.

Historically, the New Zealand courts have considered Indigenous title in only a few cases. 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. 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.

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.

### 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. Settlements typically involve

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1437 Shaunnagh Dorsett and Lee Godden, *A Guide to Overseas Precedents of Relevance to Native Title* (Native Title Research Unit, AIATSIS 1998) 32.
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 Lundon 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.
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, ibid144.
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.
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.
courts.\textsuperscript{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.\textsuperscript{1458}

\textit{Incorporated Society}

This is a group registered under the \textit{Incorporated Societies Act 1908}. It is a separate legal entity. An Incorporated Society may be entitled to some income tax exemptions. The \textit{Incorporated Societies Act 1908} imposes various governance requirements.\textsuperscript{1459} This entity was described as having relatively low set-up and compliance costs.\textsuperscript{1460} Transparency is promoted by the requirement that annual financial statements be prepared and filed with the Registrar.\textsuperscript{1461} However, an overwhelmingly unsatisfactory attribute of this entity is that it is precluded from engaging in any activities that involve pecuniary gain.\textsuperscript{1462}

\textit{Company}

Companies may be established under the \textit{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.\textsuperscript{1463} However, some of the difficulties associated with companies have been canvassed as including fair apportionment between members\textsuperscript{1464} and a failure to incorporate notions of collectivism and community inherent in Maori culture.\textsuperscript{1465}

\textit{Private Trust}

A private trust is created by a trust deed within the legal framework applicable to trusts.\textsuperscript{1466} It does not enjoy separate legal personality.\textsuperscript{1467} Commentators refer to this as the most common PSGE.\textsuperscript{1468} Its advantages are said to be that it is accountable to

\begin{itemize}
  \item \textsuperscript{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.
  \item \textsuperscript{1458} Hone Sadler and Callum MacKinnon, ‘Pathways for Ngapuhi’s Future: Post Settlement Governance Entity’ (2014) 7(5) \textit{International Journal of Arts & Sciences} 749, 762
  \item \textsuperscript{1459} Ibid 763-764
  \item \textsuperscript{1460} Liam McKay, ‘Waka Umanga: Has the Government Missed the Boat on Maori Collective Assets Management?’ (LLM Thesis, University of Otago, 2012) 35.
  \item \textsuperscript{1461} \textit{Incorporated Societies Act 1908} s 23; ibid 36.
  \item \textsuperscript{1462} \textit{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.
  \item \textsuperscript{1464} Ibid 37.
  \item \textsuperscript{1465} Ibid.
  \item \textsuperscript{1466} Trustee Act 1956. Sadler and MacKinnon refer to this entity as a ‘Common Law Trust’.
  \item \textsuperscript{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.
  \item \textsuperscript{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, \textit{Treaty of Waitangi Claims: Addressing the Post-Settlement Phase} (Advisory Report SP13,
beneficiaries, independent of government, flexible, and able to be adapted to the particular needs of the Iwi. The disadvantages are described as costliness, complexity, and time consuming processes. 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.

**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. 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. Another disadvantage of this entity is its inflexibility, with many created some time ago and not accurately reflecting current Iwi identity. Additionally, with this structure, beneficiaries do not have a beneficial interest in the trust property.

**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. This body includes a charitable trust, a holding corporation, statutory office and various other corporations. Trustee board members are elected democratically by the Iwi.
potential advantage is said to be its ability to offer a tailor-made vehicle, as each statute is developed for a particular claim group. 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.

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. 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. That includes providing advice and funding settlement related activities. The CFRT receives rental fees from forestry companies and manages those fees in accordance with a trust deed that established the CFRT. The CFRT holds over $570 million in trust. 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. 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.

The Crown’s current policy is that it will not accept the following types of PSGEs: Maori Trust Boards; incorporated societies; statutory body post governance entities;

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1480 Ibid.
1481 Nettheim, Myers and Craig’s Indigenous Peoples and Governance Structures 137.
1483 Ibid.
1484 Ibid.
1485 Ibid.
1486 Ibid 253.
1488 Established under the Maori Trust Boards Act 1955.
1489 Under the Incorporated Societies Act 1908.
companies,\textsuperscript{1490} and charitable trusts.\textsuperscript{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 \textit{will} accept is the private trust.\textsuperscript{1492} The private trust model also generally involves subsidiary trusts or companies to manage the settlement assets.\textsuperscript{1493} It has been stated to be the Crown’s preferred approach.\textsuperscript{1494}

The current practice is depicted in the following diagram:\textsuperscript{1495}

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{diagram.png}
\caption{Example of a governance entity for distribution of settlement assets (based on a model developed by Te Ohu Kai Moana)}
\end{figure}

There are several preferred structural features of PSGEs. First, a PSGE should appropriately maintain a register of the membership of a claimant group.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{1490} Established under the \textit{Companies Act 1993}.
\item \textsuperscript{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.
\item \textsuperscript{1493} Ibid.
\item \textsuperscript{1496} Crown Forestry Rental Trust, ‘Guide for Claimants Negotiating Treaty Settlements’ (Crown Forestry Rental Trust, November 2007) 283.
\end{itemize}
PSGE, who have knowledge of the claimant group which is brought to bear when considering applications.\textsuperscript{1497}

Second, there should be effective methods for the appointment and removal of trustees.\textsuperscript{1498} For example, democratic election of trustees by the claim group.\textsuperscript{1499} Moreover, there are comprehensive notice requirements where an election is conducted.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1502}

Fourth, while it is not usually a legal requirement, many PSGEs prepare annual and five year plans to enhance accountability.\textsuperscript{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.\textsuperscript{1504}

Sixth, there may be a custodian or nominee trustee.\textsuperscript{1505} Transfer costs are purportedly reduced, enhancing efficiency.\textsuperscript{1506}

### 3.2.4 Evaluation

The importance of an appropriate PSGE has been acknowledged in New Zealand in the following way: \textsuperscript{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

\textsuperscript{1497} Ibid.\textsuperscript{1498} Ibid 287.\textsuperscript{1499} Ibid.\textsuperscript{1500} Ibid 289-290.\textsuperscript{1501} Ibid 292.\textsuperscript{1502} Ibid 256.\textsuperscript{1503} Ibid.\textsuperscript{1504} Ibid.\textsuperscript{1505} The Te Arawa Lakes, Ngati Mutunga and Ngati Awa governance entity rules contemplate this type of trustee: ibid.\textsuperscript{1506} Ibid.\textsuperscript{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.\textsuperscript{1508} ‘Business functions’ in this case refers to governance, administration and establishment of companies.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1512} Common experience is that Iwi struggle to develop the business functions of their PSGE.\textsuperscript{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’.\textsuperscript{1514}

\textsuperscript{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.

\textsuperscript{1509} Ibid 13.

\textsuperscript{1510} Ibid 15.

\textsuperscript{1511} Ibid 17.

\textsuperscript{1512} Ibid 19.

\textsuperscript{1513} Ibid 20.

Co-designing Benefits Management Structures

Ian Murray, Joe Fardin and James O’Hara