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Stream: Aboriginal
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Deconstructing incorporation: Indigenous land owners and representation in PNG and Australia.

Indigenous landowners in both Australia and Papua New Guinea today enjoy a far greater level of participation in the development of their land than was the case a decade ago. The reasons for this enhanced participation in each case are different, but both situations have generated demands to better articulate between Anglo-Australian and Indigenous systems of natural resource control and management. This paper explores the way in which organisational forms, in particular representative bodies, are being used to bridge this gap.

Indigenous participation in resource development in PNG and Australia

In Papua New Guinea, the short and relatively benign history of colonisation has ensured that more than 99 percent of land remains under customary tenure. For much of the colonial period, and following independence in 1975, land management proceeded on the assumption that the state's sovereignty provided the only authority that was needed to impose a European style system of state-controlled land management, primarily through the establishment of plantation and small-holder agricultural projects. Development of mining and petroleum resources was founded on the basis of state-ownership of sub-surface resource, and exploitation of customary-owned timber afforded landowners a token share of the resource rent.

As government presence in rural areas declined, this pattern has changed. Customary landowners have reasserted the primacy of locally-based values and rejected the right of the state to impose its will over the disposition of natural resources (Jackson 1992). Through periodic and usually violent landowner 'strikes', customary landowners have demonstrated that the state does not have the capacity to control the resources it has legally alienated[1],

[1] While timber remains under customary ownership in Papua New Guinea, minerals and petroleum have been alienated to the State. Despite vigorous debate about the legality of this alienation the legal arguments are not clear, and no steps have yet been taken to finally decide the issue in the Supreme Court.

emphasising that in the matter of resource exploitation, a power of veto counts for more than ownership (McGill and Crough 1986).

Australia's land mass was legally alienated from its Indigenous owners at the moment of European occupation, and over the succeeding two centuries the frontier of occupation expanded to exclude Indigenous people from access to and occupation of the vast majority of their lands. In 1992 the High Court of Australia recognised the existence of native title over land, but only where subsequent Crown grants of title to others have not fully extinguished the pre-existing native title. The *Native Title Act* 1994 provides Indigenous landowners in Australia with a mechanism to lodge a claim for determination of their rights, and to exercise a 'right to negotiate' pending full determination. The rights to negotiate fall short of a full veto, but they have vastly increased their capacity of Indigenous people to influence and control the terms for development on native title land. The recent decision in the *Wik* case has opened up a large area of Australia's rural bush to claims for recognition of residual rights over pastoral leases, once considered to have extinguished all native title rights. This probably has greater implications for miners than for pastoralists, because it means that they will be required to reach agreement with Aboriginal native title claimants in relation to exploration on pastoral lease land even though pastoral lease holders do not enjoy that right[2].

Land in contrasting cultural contexts

Negotiating agreements for resource development with native title holders or customary landowners throws into sharp relief the cultural differences between the respective systems of law which govern these resources. The most significant of these is the contrast between the Introduced systems' demand for precision and certainty about all aspects of land—boundaries, the nature of the rights carried with the title, as well as the identification of owners—and the lack of certainty which characterises Indigenous relationships with land. The importance of certainty in dealings over land reflects its commodification in a Western economic context (Wooten 1995). Land provides the basis for much large scale investment in resource-based economies like those of Australia and Papua New Guinea. Land titling systems such as the Torrens system, pioneered in South Australia and now adopted by many industrialised nations, provide an absolute and transparent certainty about land ownership and the rights carried with it. Under such a system, any third party can determine who owns land by searching the register, and registration serves as absolute proof of ownership.

Against this kind of culturally-specific norm, resource developers find Indigenous land tenure systems bewilderingly complex and incapable of producing the kind of answers they regard as fundamental for investment security (see Hunt 1993). Most companies respond to this by seeking to document land holdings and land owners with as much precision as possible early in

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[2] In 1997 the conservative Australian Federal Government proposed to significantly curtail the right to negotiate through amendments to the *Native Title Act*. These amendments passed through the lower house but were significantly amended in the upper house, in which the government does not hold a majority. In April 1998 the amending legislation was again presented to the lower house in its original form and significantly amended by the Senate. These amendments were later formally rejected by the lower house, giving the government the power to call a double dissolution of both houses of Parliament.

the project. One Australian mining company even supported a research project which attempted to document Aboriginal land boundaries across the whole of Australia (Davis and Prescott 1992), and exercise which was subsequently subject to adverse criticism (***Sutton--check ref***).

The most striking feature of Indigenous systems of land tenure is the importance of kinship relationships. Whereas the 'absolute, unitary ownership' embodied in freehold title can be said to be 'property law for stranger relations' (Cooter 1991:41), customary rights to land are 'enmeshed in a web of other forms of relationship' (Ballard 1997:52). The criteria for determining rights, and the way in which they are brought to bear, are 'elements of a practice in which what tends to be indispensable are specific, known people, social identities, and areas of country' (Merlan 1997:12), rather than objective rules for the allocation of rights. Furthermore, the social meanings attached to discussion and identification of land may actively discourage openness with strangers about 'ownership' relationships (Weiner 1995:142; Palmer 1995:25), not least of all because 'knowledge constitutes proof of ownership' (Rose 1994).

It seems apparent from anthropological observations about Indigenous social processes that it is not possible to achieve the certainty which resource developers want without actually altering Indigenous social systems. For Indigenous people to moblise their resources to buy the social development so many aspire to, introduced systems of land management must find a mechanism to articulate with Indigenous systems in a way which delivers reasonable certainty about access to resources. Increasingly, Indigenous land-holding organisations are being used to achieve this.

Indigenous participation in community-controlled organisations

The rights of Indigenous people to enjoy self-determination across all spheres increasingly depend on the existence of Indigenous organisations to connect Indigenous and introduced cultural and legal systems. In simple terms, it is impossible for developers or government to deal with each landowner individually, even if their identity could be ascertained with certainty. The growth of community-controlled representative organisations has paralleled the recognition of Indigenous communities' rights to influence and participate in events which affect them. In Australia, the Commonwealth government encouraged the development of Aboriginal organisations to provide housing to Aborigines in remote areas soon after it took over administration of Aboriginal welfare programs at the end of the 1960's. Since the 1970's these organisations have proliferated into a social service delivery and political network numbering some 2,400 organisations (Smith 1995:66), and a significant proportion of Aboriginal social and political activity occurs under their umbrella.

The vast majority of Aboriginal organisations take the form of incorporated associations, a variety of corporate structure which developed in Australia last century as a vehicle for non-profit bodies, and which has no precedent in English law (Horsley 1976). In an attempt to give Aboriginal people a more culturally appropriate mechanism for forming incorporated associations, the Commonwealth government enacted the *Aboriginal Councils and Associations Act* in 1976. Although perhaps more flexible than some of the state Acts which allow associations to incorporate, the legislation follows a fairly conventional approach. Subsequent amendments have been enacted with the primary purpose of allowing greater levels of external supervision and intervention, driven mainly by bureaucratic and political demands

for Aboriginal organisations to be accountable in the way they manage public funds (Rowse 1992, Martin and Finlayson 1996, AIATSIS 1996). However, the capacity of the corporate regulatory authority (the Registrar of Aboriginal Corporations) is limited and in practice the most significant way in which Aboriginal organisations are regulated is through the enforcement of grant conditions.

The *Native Title Act* has now raised new issues about the role of Indigenous organisations in management of those remnant lands in which native title still exists. The Act interposes 'prescribed bodies corporate' between common law[3] native title holders and the rest of the world (Sullivan 1997a), and requires those bodies to represent the land owners either as a trustee, or as an agent. As prescribed bodies corporate, Aboriginal organisations will control the funds they receive as income from mining and other development agreements without any of the external scrutiny requirements that apply to public grant funds. The effectiveness of these organisations is likely to be measured in the mainstream political arena by the equity and democracy they apply to these distributive functions, even if these values are not an accurate reflection of Aboriginal priorities. To maintain their legitimacy in the Anglo-Australian cultural system as a representative 'voice of the people', Indigenous organisations need to be seen to have treated their constituents equally, in the same way that a government is expected to treat its citizens.

There can be no doubt that twenty years' experience of participating in incorporated associations has given most Aboriginal people far more direct experience of corporate activity than many non-Indigenous people have had. With this widespread experience has also come disillusion (ICAC 1997; AIATSIS 1996). Most of the complaints about how Aboriginal organisations function relate to their inability to achieve 'representation' in the form identified as appropriate by the complainants. Accusations of 'unrepresentativeness' often involve allegations that a particular family group has captured an organisation through control of its office-holding positions, and diverted organisational resources to benefit family members at the expense of other organisational constituents. While other organisations are not immune from these problems, it appears that the mechanisms which address such complaints (or at least lessen their impact) within Anglo-Australian organisations do not operate so effectively within Indigenous ones. Part of the reason for this may lie in the generation of an expectation that the localism and dispute which are integral attributes of Indigenous social processes will be suppressed by the democratic pluralism of introduced organisational forms.

Although recognition and protection of customary land ownership has a much longer history in Papua New Guinea, incorporated organisations have been a part of the picture for a much shorter period. During the colonial period and up to around a decade ago, interactions between customary landowners and the state occurred through the medium of 'clan agents', headmen appointed to represent clan groups in decision-making and receive monetary benefits on their behalf. The most significant dealings during this time related to the sale of customary land for plantation and infrastructure development, and the sale of customary timber rights. Until 1991, purchase of timber rights was effected using an agreement in which the membership of each 'vendor' clan is listed on a page, against which the signatures of marks of

[3] In fact, as Justice Brennan emphasises in the *Wik* decision, native title rights do not emanate from Australian common law, but are capable of recognition and enforcement by it.

at least 75 percent are supposed to be registered. Each clan also nominates an agent, who maintains a bank account into which royalties are paid. Complaints against clan agents included allegations of misappropriation of clan resources, failure to distribute benefits, and failure to consult adequately. Although it seems clear that clan agents are effectively trustees at common law, and owe enforceable legal duties to their clansmen[4], few complaints were successfully redressed in this way. Furthermore, it appears the Papua New Guinea National Court is not willing to adjudicate disputes about whether particular individuals are authorised to represent their clan[5].

Concern about the inequities which resulted from this system contributed to the impetus for change during a forestry reform process instituted in 1991. This process followed on from the Barnett Commission of Inquiry into the Forest Industry (Barnett 1989), which revealed widespread inequity in the distribution of forest resource rents, not only involving foreign loggers but also locally-owned 'landowner companies'. Most of the landowner companies had formed during the late 1980's when a rapid expansion in the logging industry coincided with a policy of localising the forestry industry, with the result that by 1995, around 60 percent of timber permits were in the hands of landowner-owned companies (Whimp 1995). While the structure of many of these companies justified the criticism that they were unrepresentative, many of even those with broadly inclusive memberships (each clan holding a share, for example) did not appear to operate in the interests of their memberships. Instead, it was widely perceived by commentators in government and NGOs that they served the interests of an elite minority comprised of their directors and management. Although the logging operations were in practice run by the (mainly Malaysian) logging contractors they employed (Holzknecht 1996), landowner companies bore the legal responsibility for fulfilling permit conditions. By 'capturing' landowner company elites with salaried positions and loans, the logging contractors were able to ensure that the landowner companies would to serve as a buffer against the regulatory activities of the state.

Procedures for the acquisition and allocation of timber rights were redesigned as part of the reform process. In order to make the landowner input into forestry projects more equitable and representative, it was proposed that landowners should form into incorporated land groups (ILGs) before entering into agreements to sell their timber. The mechanism for incorporation is provided under the 1974 *Land Groups Incorporation Act*, which was intended to give recognition to what is widely regarded as the fundamental unit of Papua New Guinean social organisation, the clan. The idea was to 'recognise' existing customary groups, rather than to create a new body through a conventional incorporation approach. However, it appears that landowners were not aware of the Act or did not identify with its advantages: by 1992 only 250 applications for recognition had been received, and only eight ILGs had been recognised (Whimp 1995), as against around 11,000 business groups formed under the Act's companion legislation, the *Business Groups Incorporation Act*. The first real impetus to use the Act was in 1987, when the East Sepik Provincial Government passed customary land registration

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4 In Pung Nimp and others v Robi Rumants and others [1987] PNGLR 96, the National Court of Papua New Guinea found that clan representatives selling shares in a company which owned clan lands were in the position of trustees, and were bound to consult 'meaningfully' with clan members.

5 Nou Igo and others v Secretary Department of Provincial Affairs and others [1995] PNGLR 285.

legislation as part of a strategy to 'mobilise' customary land by registering mortgageable titles (Fingleton 1991). Although the registration program did not make much progress, the work done highlighted the value of the ILG mechanism, and it was adopted into the 1991 *Forestry Act*. Subsequently Chevron, the company responsible for operation of the Kutubu oil project in Southern Highlands, has used ILGs as the primary mechanism for landowner involvement in the project and, more importantly, for the distribution of project benefits.

While ILGs are more transparent than clan agency arrangements to the outside world, and therefore more easily permit intervention to resolve disputes, it has become apparent now that some ILGs have been in place for four to five years that they are also vulnerable to the same abuses, and to some new ones. As is the case with agents, the majority of the complaints arise out of the use of ILGs to distribute cash benefits, mainly in the form of periodic royalty and equity payments. Among them are the unauthorised withdrawal of funds from ILG bank accounts by using the ILG 'hide word' (a verbal PIN), and the splitting of single ILGs into two, apparently to maximise the benefits they will receive (this has occurred where benefits are split equally between all the ILGs, by decision of the umbrella landowner association for the project). It has also been said that ILGs which were established for the Kutubu oil project in the early 1990s 'reincorporated' under different names in 1995 for the Turama forestry project (Whimp and Taylor 1997), suggesting that either their members had not appreciated the nature of the 'corporate cloak' with which their customary group was already clothed, or else that the forestry officers who facilitated the second recognition process ignored their pleas that they were already incorporated.

The mechanism established by the ILG legislation makes a serious attempt to depart from the conventional model of associations incorporation legislation on which both the *Land Groups Incorporation Act* and the *Aboriginal Councils and Associations Act* are based. It allows for 'recognition' rather than 'incorporation', which (although the legal effect is the same) seeks to emphasise that the group had a customary identity prior to incorporation. It provides for custom to apply to decisions by the group, and requires disputes to go through a traditional dispute settlement process unless the parties agree otherwise. In contrast, the *Aboriginal Councils and Associations Act* leaves it to the rules of each association to adopt a form which adequately reflects customary law. However, both Acts arguably contain provisions which are antithetical to custom and may actually undermine it, as is discussed below. And despite whatever latitude for cultural appropriateness may have originally been envisaged, there is little evidence of organisations striking out to find corporate forms and governance structures which are truly culturally sympathetic.

Representation and political authority

Institutions and practices which embody some kind of representation are necessary in any large and articulated society (Pitkin 1967), and the concept of representation is central to the way in which Western societies are organised. The existence of representative bodies is said to be one of the defining characteristics of Western civilisation (Huntington 1996). A wide range of Western social and legal relationships and institutions display representative characteristics, many of which follow the broad model of participatory governance structures. They include the organs of civil society such as charities and non-government interest groups, as well as private commercial corporations, trusts, and non-profit associations such as sporting clubs.

Virtually all these organisations involve some measure of authorisation or participation by the represented in the decisions made by their representatives.

Pitkin's exhaustive examination of the concept of representation (1967) identifies three broad contexts in which it is used: the descriptive sense in which a representative body resembles its constituency; the symbolic sense in which something represents that which is not present (as for example, the British Crown standing for the statehood of Britain and the units of the Commonwealth); and representation as the process of 'acting for' another in such a way that the other owns, or is bound by, the actions of the representative. In this final sense, Pitkin finds that representation is essentially a fiduciary relationship involving trust and obligation on both sides. A long-standing debate emerges from this concept: to be properly representative, must a representative act in accordance with what those who are represented want, or should s/he be free to act in pursuit their welfare as s/he judges it? Both of these positions are accommodated in English law through the rules attaching on the one hand to agents (who must represent the principal's wishes) and on the other to trustees (who must act on their own judgement in the interests of the beneficiary). Ultimately, Pitkin concludes that a representative may be independent, but his or her actions must be such that they do not normally come into conflict with the constituent's wishes: we must be able to see the constituent's views mirrored in the way the representative acts, or s/he is no longer 'representing'.

The relationships between representatives and their constituencies are at the heart of the cultural underpinning of Anglo-Australian corporations law. As Mantziaris observes, these common law principles developed 'within the socio-economic context of sixteenth to nineteenth century Britain and are reinforced by Judaeo-Christian moral tradition' (1997:8). At their core are the 'twin pillars of …corporate governance: the directors duties to the corporation (fiduciary duties and duties of care) and the members' ultimate control of the corporation through the general meeting' (ibid). Critical elements of the relationship between them are—

- the authorisation of representatives by their constituents,
- the obligation of representatives to act in the interests of constituents, instead of their own interest, and
- the right and ability of the group to withdraw the authorisation.

The essence of the fiduciary duty owed by a corporate representative to the members of the corporation can be expressed as a duty not to either (a) use his or her position, or knowledge or opportunity resulting from it, to his or her own, or a third party's advantage; or (b) within the scope of his or her role as an officer, maintain a personal interest or inconsistent obligation to a third party, unless the corporation's members have given their free consent (Finn 1992 cited in Mantziaris 1997:8). Mantziaris points out that such a duty presupposes a number of cultural artefacts which may be incompatible with Indigenous social processes, including ' the existence of excludable interests in the categories of "knowledge" or "opportunity"' which a corporate officer brings to bear in carrying out his or her functions; differentiation between the interests of the office holder and the corporation's members; and the concept of a 'position' or 'office', the 'scope' of which may be delimited from the broader social relationship between the office-holder and the membership (Mantziaris 1997:8).

It is therefore not surprising that issues of fiduciary accountability dominate a number of recent reviews and discussions of the functioning of Indigenous organisations in Australia, and ILGs and other landowner bodies in Papua New Guinea. Most of the issues which have given rise to these discussions relate either to the mishandling of money or manipulation of organisations by executive members, and to the frustration of ordinary members who appear unable to bring their representatives to account (ICAC 1997; AIATSIS 1996, Queensland Parliament 1993, Martin and Finlayson 1996, Whimp and Taylor 1997, Holzknecht 1996, Altman 1997). What is baffling to outside observers is that, even where the organisation's legal structure offers members a means to control their representatives, it is rare for the membership to use those mechanisms to withdraw their authorisation of the representatives in whom (from a legal perspective) they have placed their trust.

Representation in an Indigenous cultural context

The ways in which representation is produced and carried out within an organisation depends largely on the formal and informal rules which govern its structure and operation. Incorporated associations are established and function according to a framework of principles and practices which are relatively uniform. Examined closely, these principles and practices can be seen to lack a 'fit' with aspects of Indigenous social processes.

While some forms of representation in Western institutions imbue the representative with considerable power and authority to act without reference to constituents (elected politicians within a government structure, or directors of a public company, for example), representatives within incorporated associations are expected to be consultative and highly responsive to the wishes of the membership. It is implicit that each individual member has equal qualification with the others to serve as a representative, as evidenced by the process of appointing office-holders at elections. This may be incompatible with the nature of Aboriginal political authority, in which only some have the right to speak for land (Smith 1997). In this context, political authority may be an 'emerging product' which is 'subject to ongoing interpretation and construction' and, (despite the provisions of a corporate constitution allowing re-election only every 3 years) 'may need to be periodically re-enacted, so running the chance of being challenged as well as confirmed' (ibid:102).

The requirement for authorisation of representatives by the membership may also be problematic. In particular, the initiative to accord political authority by appointment of leaders may not lie entirely with the constituency which is represented. Instead, leaders may be expected to 'self-select' through the expression of positions and opinions in a larger forum (Smith 1997). The processes by which 'bigmen' emerge in Papua New Guinean societies may operate in a similar way. Public assessment of individuals (and the consequent according of social status) is made on the basis of their oratory style, on the 'effectiveness of their talk as socially transformative' (Weiner 1995). The impact of this in an organisational setting that decisions (including those about the selection of leaders) may be produced more by acquiescence than by consensus. Weiner's observations of Huli culture lead him to conclude that '[i]n a world where men of status are defined as such precisely because of the success they have in speaking for others, it is influence and not consensus that is the operative motor of discursive assessment'(ibid:144). Not only is a process such as this inconsistent with the principles of corporate governance, but it may allow representatives to acquire considerable power which they can use to the disadvantage of their constituents. This may not be seen as a

problem by those who are marginalised, until it 'leads to a subsequent distributive equity problem … [and] they are excluded from equal access to the benefits that flow from negotiated agreements' (Smith 1997:103). Significantly, it has been observed that those Aboriginal organisations with experience in the distribution of royalty moneys[6] appear to be particularly vulnerable to conflict (Altman 1997).

It is arguable that the inability of some Indigenous office-holders to fully recognise and accept their fiduciary obligations, and the inability of their constituents to do anything about it, reflects the predominance of countervailing forces in Indigenous societies at large. A line of theory identifies the tension between 'relatedness' and 'autonomy' as the dominant attribute of the 'Aboriginal commonality' (Sansom 1982, Edmunds 1990, Smith 1995, Martin and Finlayson 1996, Merlan 1997). This feature has also been described as the 'atomist-collectivist' tension (Sutton 1995), emphasising the idea that Aboriginal societies are constantly engaged in a process of fission and disaggregation (Peterson et al 1977, Finlayson 1997) while at the same time linked by strong collectivist forces generated by ethnic or language-group allegiances. Even when acting within a corporate structure, Aboriginal people often see themselves acting most directly on behalf of family (Sutton 1996, Merlan 1997). Within the family structure, hierarchies reflect a natural order, in which age accords older members an authority and responsibility to demonstrate their relatedness in the passing on of knowledge (Sullivan 1997b). Outside the family, within larger collectivities, social relations are said to be more aptly described as an 'ordered anarchy' (Hiatt, cited in Sullivan 1997b). This is the arena in which most Aboriginal organisations operate, and they are characterised by a high degree of factionalism (Martin and Finlayson 1996), the manifestation of 'internally focused political processes by which Aboriginal groups establish, negotiate and extend the range of internal social relationships and acquire *social capital'* (Finlayson 1997, citing Martin).

These impact of these forces in tension may undermine the effectiveness of fiduciary obligations in generating internal accountability by representatives of organisations to their members in two ways. On the one hand, loyalties to kin generate a web of obligations and relationships which cannot easily be set aside when assigning roles in organisations (Martin and Finlayson 1996), and on the other, the sustaining of cooperative effort required to maintain and enforce delegation to representatives may be difficult (ibid). 'The dimensions of what—and who—is actually being 'represented' by an Aboriginal organisation…may differ according to context and circumstances, and be contested between the organisation and its constituents' (Smith 1995, cited in Martin and Finlayson 1996:7)

In Papua New Guinea, loyalties are directed overwhelmingly to small, localised groups (Jackson 1992). While the impact of this social characteristic has been mostly considered in its larger context, that of relations between those groups and the State, there is also evidence to suggest that at the local level societies exist in a state of near-anarchy (Filer—check ref), a condition which is exacerbated profound social change accompanying resource development projects. The origins of the Bougainville rebellion, for example, are arguably to be found in

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6 Under the *Aboriginal Land Rights (Northern Territory) Act* 1976, traditional landowners who have successfully claimed land are entitled to receive royalties from mining on their land. While a proportion of the money is retained in a statutory fund, a proportion is distributed to associations formed for the purpose of representing landowners and distributing this income.

disputes within clans about the distribution of compensation money (Filer 1990). In the face of uncertainty about present and future group affiliations, groups may coalesce in ever smaller units—families rather than clans in some cases—which are engaged in a constant process of realignment for strategic advantage. ILG registration papers have become the 'new bows and arrows' of inter-clan conflict, as people change their ILG affiliations to reflect changing circumstances (personal communication, Laurence Goldman 1998).

Incorporation and group identity

Incorporation creates a legal personality which is separate and distinct from the individuals which comprise the corporation. The practice of incorporation began with English town corporations over five hundred years ago, apparently motivated by the need to protect town officials from personal liability to the Crown for the payment of royal dues (Stoljar 1973). The creation of a separate corporate 'individual' distinguishes between its collective liability and that of each member. By limiting the corporation's liability (in the case of a company, for example, to the amount of its issued share capital), officers and members can engage in a joint activity without risk that they may become liable for actions of their corporate companions.

Indigenous social processes may not necessarily lend themselves to the imposition of permanent divisions between one group and another. Neither may it be an easy thing to determine the appropriate level of social organisation at which the series of organisational fences should be constructed. It appears from the observations of anthropologists that there is considerable ambiguity about the social organisation and composition of Aboriginal land holding groups (Rose 1997), and their membership is rarely unequivocally defined (Peterson 1995). Although customary law emphasises small-scale possessory relationships, the assertion of them also 'includes the expression of a wider responsibility for decisions affecting small areas physically, but large numbers of landowners socially, culturally or politically' (Sutton 1995:7), in an expression of something perhaps most closely compared with political sovereignty. In parts of Papua New Guinea and Australia, land tenure systems accommodate temporary occupation as well as historical claims (Banks, cited in Young 1997; Levitus 1991). The distribution of decision-making rights between different elements of the social structure may not necessarily parallel modern property law distinctions between owners and users (Sullivan 1997a), and the constituency which exercise use rights may be both large (Rose 1997), and subject to a process of ongoing negotiation (Levitus 1991). Organisational structures can accommodate this fluidity and ambiguity only up to a point; ultimately, it becomes necessary to decide where one unambiguous boundary will fall: that between members and non-members' (Levitus 1991:163)

So while constituencies of landowning groups may be 'fluid and context dependent' (Martin and Finlayson 1996:5), and 'the size of a decision about a place or some land always casts the net of both political and religious responsibility to a certain size as well' (Sutton 1995:5), incorporation may serve to impose an artificial permanence on one among many group permutations. In mining and oil projects in Papua New Guinea, for example, the constituency of 'project landowners' is defined with reference to the boundaries of rectangular graticular blocks which constitute mining and petroleum tenements. It is of particular concern if the body which is formed to 'represent' a group of landowners who happen to be involved in a particular development negotiation come to assume political authority—to 'stand for' the landowners of that area generally—because the status afforded by incorporation has

distinguished and isolated them from the many other interleaved and overlapping groups which the chance circumstances of the development have rendered invisible.

Why incorporation?

The risk that imposition of corporate forms may undermine the social processes they are intended to preserve (Goldman 1997) begs the question as to why incorporation seems such a desirable end. Contrary to popular belief, it is possible for unincorporated groups to bind themselves in contract, hold property, take legal action and do many other things a corporation might do (Stoljar 1973) (clans in Papua New Guinea regularly take legal action via named individual representatives, for example). The advantages of a formal corporate status emerge almost exclusively from the economic sphere in which most Anglo-Australian organisations operate, the most significant being the protection of office holders and members from personal liability for wrongs committed by the organisation. Ironically, the *Land Groups Incorporation Act* is quite vague on this score, and makes no mention of members' liability except in relation to winding up.

There is little evidence that landowners themselves seek incorporation for reasons internal to the processes within a group, although it may serve some larger culturally-specific purposes. It is sometimes suggested in Papua New Guinea that the primary motivation for landowners to seek incorporation is to secure an advantage over other potential claimants for land—in effect a form of defacto customary land registration. In fact, the process of committing an account of land tenure to paper in the course of incorporation may ultimately be to a group's detriment, when they come at some later stage to argue a case against another group which still enjoys the flexibility of having yet to 'cement' its account (personal communication, Laurence Goldman 1998).

It seems likely that external pressures are the reason why most Indigenous land holding groups incorporate. In Australia where the corporate form is very familiar to Indigenous people, Aboriginal groups argued during debate on the *Native Title Bill* <u>against</u> the requirement that native title holders should be required to be represented by corporations. Not surprisingly, the exigencies of convenience in dealings with other land users won out, although the bodies corporate were also said to provide a 'protective carapace' over native title rights (Fingleton 1994:3). Incorporation gives groups a visible form—in particular through delimiters of membership, a means of identifying who is authorised to speak on the organisation's behalf, and discernible rules by which it makes valid decisions—with which the outside world can more easily engage. In this way incorporation delivers the certainty demanded in order to integrate Indigenous people into Anglo-Australian legal systems for resource management.

In the sense in which an organisation is the only 'legally visible' face of a landowning group, it may be said to 'stand for' them in a symbolic sense, to adopt Pitkin's (1967) classification. The organisation's legitimacy in this respect derives from the extent to which the individuals who are its members acquiesce in the process of another kind of representation—that by which the organisation produces actions on their behalf. If the organisation ceases to reflect its members' wishes, they will no longer own its actions as their own, and it will no longer serve the external purposes for which it was formed. In other words, to maintain their legitimacy in a symbolic sense, organisations need to manifest their representation of their constituencies—act for them—in ways which generate ongoing support and endorsement. The assumption

underpinning most of the emerging theory about Indigenous organisations is that this is most likely to be achieved through organisational forms and modes of operation which most closely match existing customary processes. The construction of constituencies and the establishment of structures for corporate governance are two of the most critical ways in which customary Indigenous processes are undermined in the current mechanisms for formation of incorporated organisations.

Constructing constituencies

Because the boundaries created by the 'electric fence' of incorporation are so permanent, the construction of the corporation's membership in the most culturally sympathetic way is very important for its effective functioning. Two issues emerge. The first is the size of the group around which the corporate cloak will be slung. A view is emerging among practitioners involved in administering the *Native Title Act* that land holding bodies should be constructed from as wide a constituency as possible. This allows the friction between group members to be resolved in the relative privacy of a single organisation (Sutton 1995, Sullivan 1997a), rather than promoting 'factionalism of the parties who under customary law have strong moral and economic obligations to each other' (Goldman 1997:29). In Papua New Guinea, the opposite approach has been adopted. Land groups are encouraged to incorporate at the lowest level of the social order at which decisions about land can be taken independently by a group, so as to most accurately reflect what is considered to be the primary unit of social organisation, and the one at which there is greatest social cohesion. The primary motivation seems to be to avert the risk that within a larger group, one minority might capture control over the financial resources and decision-making processes and use these to disenfranchise other groups, as has been the experience with landowner companies in the forestry industry. The problem is that natural processes of fission and disagreggation create increasingly smaller groups, defeating the purpose of incorporation itself.

It may be possible to more accurately reflect the nature of customary social organisation using corporate group structures (Mantziaris 1997). This is already envisaged in the *Land Groups Incorporation Act*, which provides for a land group comprised entirely of land groups to be recognised. The concept of tiered organisational structures has been further developed in Papua New Guinea through a model of parallel political and commercial organisational structures to represent project area landowners. Within both structures, ILGs form the basic unit of participation in the higher levels of the corporate structure. Within the political structure, ILG's are represented on Village Development Committees, which in turn appoint representatives to a landowner association—the body which represents all the landowners of particular ethnic group who own land in the project area. A corresponding structure for business development comprises a landowner business development company, incorporated under the *Companies Act*, which has ILG shareholders (Power 1995). Proposals to include a category of individual shareholders (perhaps with limited voting rights) to promote a wider interest in the affairs of the company, have also been considered. Arrangements of this kind are presently not possible under the *Aboriginal Councils and Associations Act*, which prohibits membership of Aboriginal corporations by non-natural persons.

The second issue is to consider whether the precise identification of individual members is either necessary or desirable. Under current practice for recognition of ILGs, a list of members is required to be lodged with applications for recognition. Although it is envisaged that the

membership list will be updated each year (PNGFA 1994), it seems unlikely this will occur without outside assistance. Membership lists may be based on genealogies developed as part of the 'awareness process' which precedes the lodgement of applications for recognition, where this occurs in connection with a resource development. The genealogy is intended to ensure that the group is in fact a genuine customary group, and not just part of a group seeking to disenfranchise other members. It is also assumed that genealogies help to distinguish one group from another, although it is not clear how multiple group membership is handled. In practice if genealogies are not undertaken with outside facilitation, the Registrar of Land Groups has no capacity to check their validity[7], and so it seems they serve little purpose.

Similar problems are created by the same requirement under the *Aboriginal Councils and Associations Act*, and the Review of the Aboriginal Councils and Associations Act found that it is 'not culturally appropriate to base membership in all cases on formalities like applications and membership lists' (AIATSIS 1996:49). Those consulted by the Review complained that the current provisions of the Act place great power in the hands of the governing committee to control membership and potentially disenfranchise some people (ibid). The same complaints were a major focus of issues raised in the New South Wales Independent Commission Against Corruption's investigation of corruption in NSW Aboriginal Land Councils. Abuse of the requirement for a Local Aboriginal Land Council Secretary to register members (even though the entitlement to membership is clearly spelt out in the Act and is very broad) was the subject of a number of complaints (ICAC 1997).

The difficulty of detailing membership is one of the reasons why few Aboriginal organisations in South Australia have used the *Aboriginal Councils and Associations Act.* Instead, the state associations incorporation legislation provides a more flexible approach, and most organisations have a membership expressed in very general terms. For example, the Aboriginal Legal Rights Movement of South Australia (which operates a state wide legal aid service) is controlled by a membership comprising 'the Aboriginal community of South Australia'. Arguments about membership are decided by a vote of a general meeting. In practice, the members are those who turn up to the annual general meeting, held sequentially in each of 12 regional 'wards', at which a representative for the region is elected to the Executive. This approach removes any artificial distinction between the association's membership, and its constituency.

The Review of the Aboriginal Councils and Associations Act recommended that membership lists should not be a general requirement (AIATSIS 1996:144). However, as Mantziaris points out in his critique of the Review Report (1997), this may create complications in determining at any point in time who is and is not a member. This has apparently not been an issue for most Aboriginal organisations in South Australia with criterion-based membership definitions, but then virtually none of these organisations has been engaged in a process of distributing cash income to members, as is the case with royalty associations in the Northern Territory and ILGs in Papua New Guinea. Levitus (1991) makes the pertinent observation that when membership carries with it the right to share in the division of an organisation's

[7] The Registrar, located within the Department of Lands, is the only officer with responsibility for all ILGs across PNG.

'profits', there comes a point at which it is necessary to designate people as either being members, and entitled to share in the distribution of profit, or not.

Accountability and equity

If Indigenous groups are to engage in a meaningful and powerful way with the broader land management processes of the State, there is a sense in which they have no choice but to adopt practices which justify the State's recognition of their interests. A state which upholds values of democracy and equity is unlikely to find a public policy good in affording decision-making rights to Indigenous groups, if the result is to benefit a minority at the expense of the majority. Inequities in the operation of Indigenous organisations will be most apparent when they involve the distribution of financial resources. Both for their own effective operation and to ensure their ongoing legitimacy in the wider political arena, these organisations may have no choice but to develop mechanisms which bolster the effectiveness of fiduciary obligations and the enfranchisement of their membership. Martin and Finlayson (1996), in examining the pursuit of both accountability and self-determination within Aboriginal organisations, suggest that externally imposed standards of equity and efficiency are most effectively promoted through mechanisms which enhance internally accountability of organisations to their membership. It is suggested that internal accountability can be achieved through increased representativeness; more equitable decision-making; greater emphasis on constituency rather than membership; and increased cultural appropriateness.

The existence of formal rules to enforce internal accountability becomes more important in larger organisations which are less likely to be effectively regulated by traditional authority structures (Smith 1995). Mechanisms such as the 'informed consent' provisions in the *Aboriginal Land Rights (Northern Territory) Act* impose statutory obligations on Land Councils to obtain formal instructions from traditional owners are a 'powerful and legally enforceable weapon' in ensuring accountability (Martin and Finlayson 1996:11). (*prescribed bodies corporate consultation provisions?*)

In addition to consultation mechanisms, statutory duties of financial accountability (such as requirements for financial reporting to members and audit of accounts) are another important weapon against misuse of a corporation's financial resources by its officers. The *Aboriginal Councils and Associations Act* and the *Land Groups Incorporation Act* contain few specific references to mechanisms of this kind, perhaps because they are derived from Anglo-Australian models in which fiduciary obligations are imposed through the common law, rather than in statutory provisions. Incorporated associations traditionally require far less external regulation of financial dealings, precisely because they are non-profit organisations which are prohibited from distributing dividends to their members.

Neither the *Land Groups Incorporation Act* nor the *Aboriginal Councils and Associations Act* prohibits payments to members, yet there is considerable variance between them as to the nature of the formal fiduciary obligations imposed on their representative and management structures. The *Aboriginal Councils and Associations Act* has moved progressively toward a regime closely resembling that applying to commercial corporations. On the other hand, the *Land Groups Incorporation Act* lacks even the most basic financial disclosure and supervisory provisions, and so there are few avenues through which financial malfeasance might come to light. The difference between the two may be at least partly explained by the visibility of

Aboriginal associations which have failed to account properly for government grants they receive, whereas ILGs receive no publicly accountable money, and those members who are disenfranchised lack the political access or legal means to complain effectively about the failings of their representatives.

In considering the potential effectiveness of externally imposed standards for financial management it is sobering, however, to reflect on the fact that the model constitution used by most of the forestry and petroleum project ILGs contains provisions requiring the committee to consult the whole membership on every decision (PNGFA 1994). Notwithstanding the impracticality of these provisions, it is clear that even major decisions are not always made in this way. The ineffectiveness of these provisions in some cases (as evidenced by fraud or misuse of cash income be committee members) may suggest that problems are deeper than can be rectified structurally. It may also suggest that accountability mechanisms imposed through association rules are not as effective as those imposed under the parent legislation, at least without intensive capacity building to reinforce the new rules of decision-making. The ineffectiveness is further compounded by provisions in the Act which prevent a member of the ILG from using a court as a forum for resolving disputes, unless the ILG as a whole agrees.

An alternative approach may be to express accountability mechanisms in terms of limitations on the power of representatives, rather than as positive but vaguely expressed duties. Petroleum companies working with landowner business development corporations in Papua New Guinea have assisted these corporations to explore variations on the standard form of company articles in order to close off the 'weak points' in the corporate governance structure. These include prohibiting the company making loans to directors, abolishing the position of managing director, providing that directors cannot also be employees of the company and general managers cannot be directors, and requiring that the Board appoints an independent director who has experience in operating a large business or practices a profession. Directors' remuneration is fixed by the company's auditors, instead of by the board (personal communication, Richard Robinson 1998). Clear and unambiguous statements about the behaviour of officers make it easier for members and shareholders with little education to judge the behaviour of their organisation's officers.

Corporate governance

The vulnerability of Aboriginal organisations to capture by particular factions (thus impeding their 'representativeness') has been the focus of proposals to design committee structures which contain in-built safeguards against this possibility. The suggestion that executive committees should operate on a family 'ward' basis rather than being selected at open elections has been periodically suggested (ICAC 1997) and may even have been attempted (Memmott 1995). An variation proposed by Sutton is the use of a 'bicameral' structure in which a council of elders would have power to veto decisions of a democratically elected committee where they affect land or matters of religious significance (Sutton, cited in Rowse 1992:58). The proposed Rubibi Land Heritage and Development Corporation, formed to represent three ethnic groups with interests in land around the township of Broome in Western Australia, would be established on a similar basis, with the intention of providing a structure more in keeping with Aboriginal customary law. The membership will be comprised of all common law native title claimants, and it has a Governing Committee and a Council of Elders which is not elected. The Council of Elders are those people recognised by the membership as having the

right to speak about the law and tradition. The Governing Committee is nominated by the membership but appointed by the Council of Elders, who may only refuse to make an appointment if it is considered contrary to Aboriginal law. The Council of Elders can make decisions about a range of land and customary issues which are binding on the members, and the Governing Committee has the normal responsibilities of an Aboriginal corporation (Sullivan 1997b).

Interest group representation or local governance?

Organisations structured like Rubibi in many respects bear a closer resemblance to local-level government than they do to the private non-profit associations on which their structure is based. In Papua New Guinea landowner associations, formed to negotiate project benefit agreements, perform similar functions to local government, partly because in many areas there is no effective local government to undertake that task. However, they could not be replaced by the establishment of local government, which are generally seen as inappropriate bodies to make decisions on issues related to land. This may reflect the unsuitability of how local governments have been constituted—they are usually too large and do not reflect ethnic boundaries. There are examples of landowner associations and local governments overlapping. On the island of Lihir in New Ireland province, for example, the smaller community government played an integral role in negotiating the benefits agreement for the Lihir gold mine.

There are some efforts to develop forms of local government which better reflect customary decision-making processes. As part of an effort to resolve the eight year conflict on Bougainville (which began as a landowner strike against the Panguna copper mine), the Bougainville Transitional Provincial Government passed the *Council of Elders Act*, which bases a new system of local-level government on traditional authority structures. The Act formalises the establishment of Village Assemblies, to which all residents and persons with traditional links to the village belong. The residents within each Council of Elders area select the method by which representatives to the Council of Elders will be chosen, which may include clan representation, appointment of hereditary chiefs or their nominees, representation of particular interest groups within the village, direct election, and a mixture of all of these. Women, youth and churches are interest groups which must have representation (personal communication, Tony Regan, 1998). Similar ideas, though perhaps not quite as radical, were expressed by the Queensland Parliamentary Public Accounts Committee (1993) when it sought solutions to the malfunctioning of self-governing Aboriginal Councils which are the local government structures for the Deed of Grant in Trust Communities in the Cape York Peninsula.

Such approaches are not without their pitfalls. As Mantziaris (1997) suggests, the concept of incorporating custom into organisational rules of behaviour is problematic, not least of all because what constitutes custom is often contested. In Papua New Guinea this seems to be less of an issue, perhaps because there is a longer history than in Australia of formal attempts to reconcile custom and common law. The Papua New Guinea Constitution incorporates custom as part of the common law and directs the judicial system to develop custom as part of the underlying law. Papua New Guinean judges who are themselves Indigenous landowners may feel in a stronger position to adjudicate on custom than do their non-Aboriginal

counterparts in Australia[8]. Despite these complexities, models such as those in Bougainville and Broome point the way to the potential for lateral thinking approaches which step outside traditional Anglo-Australian legal models.

Sullivan's study of Aboriginal organisations in the Kimberley (1986; 1996) identifies the 'dual reality' in which Indigenous organisations operate. While their legal forms render them visible from an Anglo-Australian perspective, they retain a cultural ambiguity as 'intermediate systems acting as a conduit between cultures' (Sullivan 1996:123), and recognition of this ambiguity is necessary if they are to retain legitimacy within both systems. Finding forms for organisations which both recognise the introduced legal system's need for certainty and 'representative decision-making, but do not undermine Indigenous social processes, is not an easy task, since it is precisely those attributes which are in tension.

Indigenous organisations which represent landowners increasingly perform unique functions which have no parallel in mainstream Anglo-European societies. The nature of customary or native title land tenure is fundamentally different from that of rights over alienated land. The legal force of Western property rights relies on the authority of the state from whom they are obtained. What is owned is not the land itself, but a bundle of rights over it which rest on the underlying radical title of the state. Customary or native title land carries with it no such psychological ceding of sovereignty. In this sense, the articulation of native title rights expresses a form of sovereignty (albeit one limited by the imposition of state laws). No longer 'special interest' groups like the service and sporting clubs their corporate structures are modelled on, Indigenous landowner organisations serve a much broader role of articulating between these sovereign interests and the systems of the state. A fundamental philosophical shift may be required in the kinds of organisational structures which are offered to support them, away from the model of private and interest-specific non-profit associations and towards a more *sui generis* form of organisation—one which bridges the gulf between self-government structures and private corporations and allows Indigenous people to articulate their views and exercise their rights without being completely subsumed by the larger systems with which they interact.

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[8] See, for example, the decision of Amet, J Land Titles Commissioner (now Chief Justice) in the Land Titles Commission decision in relation to Hides Gas Field, in which ownership of land is decided on the basis of principles enunciated by Professor Robert Cooter in an analysis of customary land law. These included the concept of adverse possession as defeating claims based on genealogical and other historical evidence. Re Hides Gas Project Land Case [1993] PNGLR 309. Although no specific anthropological evidence was presented to the Commission, the Commissioner felt no difficulty on ruling as to the custom which properly governs land inheritance when conflicting claims of two different language groups are concerned, on the basis of 'first principles' enunciated by a visiting researcher.

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