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Traditional CPRs, new institutions: Native Title Management Committees and the Statewide Native Title Congress in South Australia.

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Abstract

Native title has the characteristics of a common property resource. Its management involves accommodating both Aboriginal customary law and the Australian legal system in securing and maintaining a flow of benefits and allocating these between members of the native title 'community'. Native title governance institutions need to be robust to hold and manage native title in perpetuity. They will face inevitable threats to their stability and authority from community conflicts and complex negotiation processes with globalised actors.

This paper outlines the development of governance institutions for native title in SA, at local and statewide scales. These institutions are critical to delivery of authority and certainty in negotiations about native title, yet they are new and fragile. Ostrom's design principles for effective common property resource management institutions find resonance at various scales in their developing structures and decision making processes and also provide a potential framework for critique of the likely effectiveness of their operations. The question of how Ostrom's design principles might be applied to inform, build awareness and support informed decision making by native title communities about the design of effective institutions for holding and managing native title warrants attention.

Keywords: native title, Aboriginal decision making

Introduction

In October 2000, representatives of native title claimant communities across South Australia said 'yes' to pursuing negotiations with the SA Government, SA Farmers Federation and the SA Chamber of Mines and Energy for the settlement of their native title claims on a statewide basis and to the formation of a statewide organisations for this purpose. The moment of the decision was a powerful example of common property owners achieving strong and informed consensus on a complex and novel decision.

The decision making process that led to this outcome has been fundamentally concerned with the development of robust institutions which can negotiate for, hold and manage native title in SA. In their decision to 'nest' their local level claim management structures within a broader scale organisation, native title claimant groups have unconsciously pursued one of the design principles that Ostrom's (1990) work argues are necessary for effective institutions for common property resource (CPR) management. I make the point that they did this unconsciously because at no time in the extended process of decision making that led in October 2000 to the decision to pursue statewide negotiations through a statewide body were these theoretical principles put before the claimants. My involvement as an adviser to and a facilitator in this decision making process spurred my interest in the question of whether and how more widespread awareness of the theory of common property institutional design principles might influence the development of robust institutions for holding and managing native title. Greater awareness of Ostrom's design principles (see Table 1) and how they operate in management of other CPRs could provide native title groups with a conceptual framework which makes issues of individual and collective benefit, responsibility and accountability in the holding and management of native title more transparent than they are in the voluntary 'not for profit' association model of governance which is prevalent in Aboriginal organisations. The common property institutional framework would seem to have potential to provide a strong tool for native title groups to use in their decisions about design and operation of native title institutions.

Holding and managing native title as common property

While there is much literature which argues that communities can and do hold and manage common property resources successfully and sustainably notwithstanding pressures from market forces, demographic changes and adverse pressures from the state, we are also being cautioned that this optimistic view is not reflected widely in the realities on the ground, a point that Campbell et al (2001) make strongly in the case of forests of Zimbabwe. Nevertheless native title holders do not have any option other than to hold and manage their native title communally. This is because native title is approached by the common law of Australia as a system of collective rights. By negotiated agreement native title holders may conceivably choose, in some circumstances, to relinquish their native title for collectively held property rights under statute law (as a 'land rights' scheme). They might

even conceivably negotiate to relinquish their native title in favour of allocation of individual property rights to group members. But if they continue as native title holders they must operate collectively since native title "takes effect for the community as a whole" and while it also takes effect "for the subgroups and individuals within (that community) who may have particular rights and interests in the community's lands" (Mantziaris and Martin 1999: p6), the title itself is inalienable and indivisible. Developing effective institutions to hold and manage native title is a critical challenge for native title groups if recognition of native title is to make any difference to their marginalised situation.

As McKean (2000) discusses, it is necessary to be clear about the definitions of terms when discussing common property and its management. This is particularly pertinent when considering native title as common property since most investigations of CPR regimes involve exclusive rights that are held privately and collectively by groups of people (such as in villagers) for harvest of forest products, fish or pastures. This kind of resource use is one aspect of native title, but native title is overall a more complex entity. It does not fit neatly into the theoretical frameworks that have been developed to characterise goods (or resources), rights and ownership. The ambiguities are a consequence of native title having being recognised as part of the Australian legal system only recently, after public and private property rights in the goods claimed under native title were already extensively allocated, such that recognition of native title has been squashed in around these rights.

Native title rights are rights over public or common pool goods or resources, that is goods or resources from which potential users can be excluded only with great difficulty, and which are 'subtractable' in consumption, meaning that they can be depleted or disappear from overuse (McKean 2000). Native title rights are owned privately since they are vested in an exclusive group – the native title holders. The question of whether they are *private rights* depends on the extent to which they entitle native title holders to exclude other people from use of a resource (McKean 2000). Native title does confer this entitlement in relation to indigenous people who are not native title holders for an area or resource. It does not confer this entitlement in relation to the holders of other property rights granted by Australian governments (ie existing rights of access and use under pastoral leases, fishing licences, mining tenements etc) prior to certain dates (as specified in the Native Title Act). After these same dates, native title does to a limited extent (as specified in the Native Title Act) confer an entitlement to exclude Australian governments from granting new property rights. Thus native title rights are private rights only in limited circumstances. The characteristics of native title as common property are discussed below.

Dimensions of native title common property

Native title refers to the rights and interests of Aboriginal and Torres Strait Islander people in land and waters according to their traditional laws and customs, *that are recognised under Australian law*. This can be quite a small subset of the totality of rights and interests in

land and resources that indigenous people have under their traditional law and customs. While the common law in relation to native title is still evolving, the current legal framework allows for recognition of the rights of individuals who are members of a native title group to access some land and to extract some natural resources for their own non-commercial use and a collective right of the group to negotiate benefits in return for authorisation of some uses of land and natural resources which are proposed by other people. These rights define what resources are included in native title common property and what are excluded. However definition is fuzzy until there has been a determination of native title or some alternative agreement between native title holders and other parties about the content of native title. Under the prevailing legal regime a native title group does not have the right to determine what activities by other people require its authorisation. Where activities do require authorisation or otherwise attract a 'right to negotiate', the group may not only negotiate for a flow of benefits but also to minimise adverse impact on the native title common property and on other natural and cultural resources on which the native title common property depends for its integrity.

Although the precise nature of native title common property will vary between indigenous groups and their territories depending on each group's customs and traditions and the rights that the Australian legal system has granted to other people in those territories, it would seem that native title common property always has two dimensions which I characterise here as 'cultural expression' and 'access to resources'[1]. These dimensions are discussed below in relation to the critical problem in common property - management of 'free-riders', that is individuals who are able to access benefits from the CPRs without contributing to their maintenance (Ostrom 1990: p6).

Cultural expression

The 'cultural expression' dimension of native title accords individual benefit to native title holders in identity and recognition by others as a 'traditional owner'. Collective benefit derives from the respect that may be accorded by others to the integrity of the group and its cultural traditions, with associated social outcomes in group cohesion and self reliance which can help indigenous people redress marginalisation. This 'cultural expression' dimension of native title behaves like a common pool resource in that it is difficult to exclude people from it, and unlimited access by individuals to individual benefit will constrain access by others to that benefit. Indigenous customary law establishes common property management regimes for the cultural expression dimension of native title – embodying the rules for access to and exclusion from 'traditional ownership'. However there can be frequent contest about

[1] I don't find "access to resources" to be a very satisfactory term but can't think of a better alternative. The term attempts to encompass both the limited legal right recognised for native title holders to gatekeep access by mining companies (ie the 'right to negotiate') and access by native title holders to land for cultural and recreational uses (ceremony, hunting, camping etc) as well as their rights to take resources for subsistence & cultural purposes. Although native title holders are seeking recognition of their 'ownership' of resources, in fact the rights that are being recognised by governments are far more limited. For example they rarely allow native title holders to exclude other people from use of the resource.

understandings and application of these regimes today.

Thus if one person claims to be traditional owner for the whole of the group's territory, or to be the sole traditional owner for part of the territory, this claim can be difficult to counter, and it also acts to limit the recognition that may be accorded to other individuals as traditional owners. It will often engender conflict amongst the various people who claim traditional ownership, and this conflict may readily limit the respect that other people have for a group's cultural integrity. Thus outsiders, especially other Aboriginal people, may say about native title groups which are fighting internally over such issues: "They've forgotten their culture, they don't know where their country is, they don't respect their law" etc.

Maintaining the flow of individual and collective benefits from the 'cultural expression' dimension of native title requires inputs by the members of the native title group. These inputs include such things as learning and transmitting cultural beliefs and practices to others in the group; acting to protect significant landscape features from disturbance by outsiders and group members; and maintaining cultural resources, such as language, which are significant in the group's traditions. A significant free-rider problem exists in that individuals may benefit through recognition and respect from outsiders which is gained by their assertion of identity as part of the 'traditional owner' group, without contributing to the maintenance of these cultural traditions.

Access to resources

The existence of the 'cultural expression' dimension of native title is a prerequisite for the other dimension of native title, 'access to resources', to exist and to return benefits. This is because of the construct of native title in Australian law. Native title is held to have survived only where indigenous people have maintained traditional law and custom. Though it has been accepted by the courts that tradition may have evolved, adapted and changed since colonisation started, at least to some extent[2], the Australian legal system requires that continuity in tradition be established in order for native title to be recognised.

Benefits or 'appropriations' that derive from the 'access to resources' dimension of native title include subsistence use of wildlife and plants; access to land for camping or hunting; and opportunities for the expression of cultural tradition through such activities. They also include flow of cash and non-cash economic benefits from negotiated agreements about mining and some other uses of resources by people from outside the native title group. As well as individual group members benefiting from their individual exercise of access and subsistence use rights, they potentially benefit from sharing in the flow of economic benefits as a result of these negotiated agreements. One of the expectations of many native title group members is that recognition of native title will lead to a change in

[2] The Federal Court has established a limit on the extent of change that is acceptable, through its findings to date on the native title claim of the Yorta Yorta people of the central Murray River valley – that the contemporary customs and traditions of Yorta Yorta people do not qualify them for recognition of native title.

their marginalised socio-economic situation. Negotiated agreements over mining offer the most immediate opportunity to secure a flow of money to the native title group, and potentially to individual members of the group.

There are significant transaction costs in establishing and maintaining these benefits. Individual group members need to provide inputs of time and effort to the group's negotiations for agreements about how use and protection of their native title common property interfaces with government and private property rights (eg on pastoral leases or protected areas) and agreements about other people's access to and impact on the native title common property (eg mining exploration and production). This involves meetings, field inspections and informal consultations within the group. Monitoring the terms of negotiated agreements, and potentially enforcement, is also necessary. In addition securing and maintaining flow of benefits from access to subsistence resources by group members may require provision of maintenance effort by the group on tracks and places they use for camping, hunting, etc. Maintaining access to subsistence resources also overlaps with the 'cultural expression' dimension of native title in that individuals may be required to provide input to 'increase' or 'maintenance' ceremonies for ritual management of populations of particular harvested species.

It is through the flow of benefits from negotiated agreements about mining that the very localised and culturally specific CPRs represented by native title engage most clearly with globalisation processes. Mining companies are often translational. They engage only weakly with particular localities or regions, their interests in these places being determined purely by considerations of project feasibility and market conditions. If the commercial risks or transaction costs associated with a particular prospect or resource are too high, the company will turn its attention elsewhere. There could not be a greater contrast with native title CPRs since these derive from cultural traditions which extend back thousands of years in particular places. Native title CPR management institutions need to be robust if they are to secure an optimal flow of collective benefits from their engagements with these globalised actors.

There are considerable free rider problems associated with the 'access to resources' dimension of native title, particularly when the benefits involve money. Typically relatively few people in the group contribute the effort necessary to produce or maintain the flow of benefits from negotiated agreements such as with mining companies. Yet everyone in the group expects a share. As Altman (1997) has illustrated 'fighting over mining moneys' can perpetuate institutional dysfunction and lead to organisational collapse. This issue again highlights the need for robust institutions to manage native title CPRs.

Design principles for effective CPR institutions

Effectiveness of a CPR management institution is established by its endurance through generations – benefits being extracted from the CPR at a rate that is sustainable, and

beneficiaries continuing to be complaint with the rules, norms or traditions that govern access to benefits.

Much of the concern with developing 'institutions' in relation to native title is with the formalised structures for indigenous organisations. More broadly however, the concept of institutions is less concerned with structures or hierarchies for decision making and more concerned with the norms or traditions that people expect that they themselves and other people will follow in a particular situation. Ostrom (1990: p51) defines institutions as sets of working 'rules' that are used to determine who is eligible to make decisions, what actions are allowable or constrained, what procedures must be followed, what information must or must not be provided, and what payoffs will be assigned to individual people or groups of people according to their actions or their behaviour. Rules may be written down and they may form part of a formal legal system. But often they do not. Indigenous traditional custom and law is founded on 'rules' which are not written down and which prescribe appropriate behaviour between people and with aspects of the environment. Thus rules can be traditions, or protocols. However, they do need to be common knowledge, since they have no power if people do not know about them, and they do need to be monitored and enforced in some way, since otherwise there are no incentives for people to comply with them.

On the basis of empirical research, Ostrom's (1990) classic work tentatively identified seven design principles for effective CPR management institutions, and an eighth design principle for those CPRs that are part of a larger system. These design principles[3], which reflect similarities amongst long enduring CPR management regimes, are summarised in Table 1 based on Ostrom (1990) and McKean (2000).

[3] In considering the application of these design principles to native title, it is important to acknowledge that the language in which they are expressed can readily be a barrier to their acceptance. For example, the concept of 'boundaries' for Aboriginal territories being necessarily fixed (cf design principle #1) has been the subject of much academic critique and controversy. While indigenous custom has varied and complex 'rules' which indigenous people use to know where they can go, and how they should behave, Aboriginal people often stress that this customary law is unchanging, making design principle #3 nonsensical. In addition the word 'rules' (cf design principle #2, 3, 5) is a synonym amongst some Aboriginal groups for male initiation.

Table 1:
Design principles for effective common property resource (CPR) management institutions

1	**Clear boundaries for resources and clear criteria for membership**	Membership of the group (being the individuals or families) is established by clear criteria, and the boundaries of the common property resources (what resources are included and what are not) are also clearly defined.
2	**Congruent rules: Rules which go two ways and fit the local conditions**	The group has operational rules that set out how much benefit individuals and families are entitled to from the CPRs and when, where, and how that benefit may be gained. These rules are matched by other operational rules which require contributions by members (eg in labour, time and/or money) to help maintain the overall flow of benefits. Inputs and benefits do not have to spread around equally but they must be spread around fairly. They must also be appropriate to local environmental conditions (so that the quality of the CPRs does not decline).
3	**Changing rules**	People in the group can change their group's rules over time, when necessary because of changed circumstances.
4	**Enforcement of rules**	Someone in the group, or an official accountable to the group, actively monitors the behaviour of the group, and the condition of the CPRs
5	**Punishment for breaking the rules**	People in the group who break the operational rules are punished by the group, or by an official accountable to the group. The type of punishment matches the seriousness of the offence.
6	**Conflict resolution**	Group members and their officials can quickly access low cost ways to resolve conflicts amongst themselves.
7	**Rights to organise**	The group's right to organise in the way it wants to is not challenged by outsiders (eg by government authorities).
8	**Nested institutions**	For those CPR management institutions that are part of larger systems, activities are nested in a pyramid structure which protects local people's autonomy to make their own rules for their own spheres of benefit and responsibility while providing for coordination over the whole system**.**

(modified from Ostrom 1990; McKean 2000)

Ostrom established that, in effective CPR management institutions, the 'rules' that govern access to benefits are matched by 'rules' that require beneficiaries to contribute to the maintenance of the CPRs and of the management institution itself. Ostrom comments that it is not possible to derive one set of rules that applies in all CPR institutions. It is possible, however, to establish that such rules do always exist, and that their specifics are tailored to each particular situation, as is reflected in design principle #2 (see Table 1). Other of Ostrom's design principles establish that in effective CPR management regimes:

- both the people authorised to benefit from the CPRs and the boundaries of the resources themselves are clearly defined, establishing unambiguously what resources are included in the management regime and which people are authorised to benefit from those resources;
- there are monitoring and enforcement mechanisms for compliance with the rules that govern access to the CPR;
- low-cost mechanisms exist to resolve disputes amongst the people authorised to benefit from the CPR.

Other analysts have developed and applied Ostrom's framework to particular CPR management problems and identified other factors which influence institutional effectiveness. While it is not possible to review these comprehensively here, some issues raised in this literature are particularly pertinent to the situation of contemporary native title holders. For example, Hobley and Shah (1996), examining local forest management institutions in India and Nepal, suggest that the greater the overlap between the location of the CPRs and the residence of authorised users/beneficiaries the greater the chances of management institutions being effective. Developing effective native title management institutions will certainly be a more complex process than is the case for some other CPRs because of the frequent spatial disparity between a native title group's territory and the residence of native title group members that has resulted from up to 215 years of Aboriginal dispossession, resettlement and urbanisation.

The size of a group is also a consideration in the effectiveness of CPR management regimes. Hobley and Shah (1996) propose that the smaller the number of authorised users/beneficiaries involved in a local forest management institution, the better the chance of it being effective, with group agreement likely to collapse where there are more than 30-40 members. However Agrawal (2000), who has also examined local forest management in India, distinguished between the success of initiating a common property management regime, which is greater for small groups, and the likelihood of successful action by such regimes to protect forest resources, which is greater for larger groups because they have relatively more resources to commit to action. He postulates however that if a group becomes very large, effectiveness will decline because of high costs of coordination. These are also pertinent observations in considering the optimal size of institutions for management of native title CPRs. As Mantsiaris and Martin (1999) warn, small groups of native

title holders may have difficulty coping with the basic organisational processes that are required of them in their interaction with government and industry groups. But larger groupings of native title holders will face considerable challenges in securing and holding agreement amongst themselves. Again this indicates that the design process for effective native title common property management institutions will be more complex than for some other kinds of CPRs.

Current efforts to achieve recognition of native title in SA, including through statewide negotiations, provide an example of the challenges of institutional design and how they are being addressed through a process of informed decision making. This provides the context for considering how greater awareness by native title groups of Ostrom's design principles might promote design of effective native title governance institutions.

Native title governance institutions in South Australia

In South Australia (SA), development of native title governance institutions has been initiated at a local level as part of the processes of native title groups preparing what are commonly known as native title claims[4] and at a statewide level in the context of proposed statewide negotiations about native title. Local scale institution development began in earnest after amendments to the Native Title Act (NT Act) in 1998 introduced a more stringent registration test and a certification process for claim applications. These and other requirements of the NT Act[5] now establish that the applicants for any native title claim application that is entered on the Register of Native Title Claims (and thus attracts procedural rights such as the 'right to negotiate' over mining exploration and mining proposals) are authorised by all the other persons in the native title claim group to make the application and to deal with matters arising in relation to the application. Registration also establishes that:

- the native title claim group is described sufficiently clearly to establish if any particular person is a member of the group or not, and
- the claim application clearly describes the land and waters it applies to.

The 1998 amendments to the NT Act required that most claims filed prior to the amendments be lodged anew in a form that meets these requirements. This re-registration process has not been without conflict since it has involved considerable amalgamation and other redefinition of claims that overlapped spatially.

In meeting the requirements of the amended NTA for claim registration, native title claim groups have gone some way to satisfying the first of Ostrom's design principles for effective CPR management institutions. They have established the external boundaries of the CPR (the territory encompassed by the native title claim) and also the boundaries of the group who are entitled to benefit from this CPR (the native title claimant group or 'community'). Their application also sets out the scope of the property rights in lands and resources

[4] These are 'applications for a determination of native title' in the terminology of the *Native Title Act 1993*.

[5] See Native Title Act, sections 61; 190B; 202(5);

that they claim as their native title, but the precise 'boundaries' of these resources cannot be clearly established until the interface between native title and other people's property rights has been established, through litigation or through negotiation of an agreement.

Native Title Management Committees (NTMCs)

While working through the re-registration process for their existing claims, or preparing new claims under the provisions of the amended NT Act, native title claimant groups in SA have also established Native Title Management Committees (NTMCs) to manage their claim. Formation of such committees is not a statutory requirement though they may be considered as a forerunner of the Prescribed Bodies Corporate (PBCs) which native title holders must form to manage and/or hold their native title after a determination that native title exists is made.

The formation of NTMCs represents an endogenous effort by SA native title claimant groups to start to develop effective governance for their native title CPRs. In this, native title claimant groups are adapting and modifying customary management processes under the influence of the practical requirements for effective contemporary decision making about native title. As well as including the people who the group has authorised as applicants for the claim (the applicants), NTMCs may include other native title claimant group members. Typically each main family with ties to country in the claim area will be represented on the NTMC. The native title claimant group may also choose to nominate some of its members who have particular skills and experience in how native title and other issues are managed within the 'whitefella' sphere, and/or it may choose to nominate respected elders who hold the group's authority in terms of Aboriginal custom and law.

The authorisation of claim applications and the formation of NTMCs has taken place in SA through large meetings of each native title claimant group convened and facilitated by the Native Title Unit of Aboriginal Legal Rights Movement. In this work, ALRM is exercising its functions as a representative body under the NT Act, functions which include assisting indigenous people to research and make applications for native title claims and compensation claims, resolving disagreements among indigenous people about these applications, and assisting indigenous people in negotiations and legal proceedings.

The NTMCs are intercultural organisations formed for native title governance. There are now 21 NTMCs and interim NTMCs in SA with between four and 30 members each. The claims they are responsible for managing cover most of the state except the Pitjantjatjara and Maralinga lands where ownership was handed back to traditional owners under special Acts of SA Parliament in the 1980s. Across the state, the various NTMCs present a diverse landscape in terms of their management capacity and negotiating experience. What they have in common is that each has been delegated authority by its whole native title claimant group to manage the claim process and the exercise of 'procedural rights' that come into operation on registration of the claim. Because the boundaries of the groups and their external boundaries

of their territories are becoming very clearly established, outside parties negotiating and making agreements with the NTMCs can be certain that these agreements will not be challenged by other people claiming to hold native title over the area. This promise of certainty was critical to ALRM being able to interest the SA government in negotiating for the settlement of native title claims.

Development of statewide native title negotiations process

In the second half of 1999, the SA Solicitor General suggested to ALRM that the SA government was willing to settle native title claims by negotiation. He indicated that the government expected negotiated agreements would involve recognition, rather than extinguishment of native title, that 'everything is on the table' for potential negotiation, and that one of the primary goals for the government from negotiated agreements would be to establish how native title rights are to be understood for the purposes of practical co-existence (see Morrison 2001) or, in other words, where and how the boundaries of native title CPRs and other property rights interface. The introduction of Indigenous Land Use Agreement (ILUA) provisions in the 1998 amendments to the NT Act had provided a mechanism whereby such negotiated agreements could be made legally binding, at least on native title holders. The SA Farmers Federation and SA Chamber of Mines and Energy also supported a negotiated approach to native title claims and as a result a 'main table' representing SAFF, SACOME, the SA Government and ALRM, with the NNTT as observer, was established in late 1999.

While the government, farmers and mining peak bodies were prepared to negotiate with ALRM itself about mechanisms and procedures for settling native title claims, ALRM was not able to take on this role. Although ALRM's functions as a representative body under the NT Act gives it considerable statutory power to conduct such negotiations, ALRM is also conscious, as an Aboriginal organisation, that its authority in terms of Aboriginal custom and law is much more limited. A 'rule' from Aboriginal customary law is that only traditional owners – or in other terms native title holders/claimant groups – can talk for their country. This authority to talk for country in order to advance the recognition and collective benefit from native title, is now embodied in the NTMCs in SA in accordance with their delegations from their native title communities to manage the claim process. ALRM thus established early in discussions with other parties about prospective statewide negotiations that the claim groups themselves, represented through their NTMC members, would have a direct role in any negotiations.

ALRM envisaged that it would be able to coalesce the localised authority of NTMCs in a larger representative organisation that would enable NTMCs to take a unified statewide approach to negotiations. This was particularly attractive to the government and to farming and mining peak bodies since it would allow framework, or procedural, agreements to be negotiated for issues that affect more than one native title claim area. By mid 2000, SAG, SAFF, SACOME and ALRM had developed a protocol for 'without

prejudice' talks about future directions for native title in SA, had scoped some of the issues for prospective statewide negotiations, and had explored the diversity of meanings that the various different parties attach to some terms that would likely be encountered in the negotiations process. From mid to late 2000 the SA government funded NTU to facilitate a decision making process by NTMCs about the statewide negotaitions proposal.

Formation of the SA Congress[6] of Native Title Management Committees

In the second half of 2000 a series of meetings of all SA NTMCs and interim NTMCs was held. At the third of these 'Congress' meetings the NTMCs said 'yes' very tentatively to the prospect of moving into negotiations for a statewide ILUA, and more assuredly to negotiating a statewide settlement of native title claims whose scope would extend beyond the legal parameters established for ILUAs. They said 'yes' most categorically to the formation of a new statewide organisation to represent their collective interests.

Decisions taken by the NTMCs during the Congress meetings were taken by an 'opt in' process. Each NTMC would meet, discuss and report back to the main meeting on its decision about the matters at hand. The mode of decision making allowed informed consent to be built. It allowed the NTMCs to come to their decision, rather than simply accept advice given to them by 'experts'. It also allowed each NTMC to use its own decision making protocols. This is particularly important given the wide range of cultural backgrounds and management styles amongst SA NTMCs, a diversity which reflects the diversity of Aboriginal cultural groups in the state and their varied experiences of interaction with non-Aboriginal governance structures. Agius and Davies (2001) and Morrison (2001) discuss these decision making processes in more detail.

The proposed statewide organisation of native title claim groups in SA has not yet adopted a name or a constitution. At the fourth Congress meeting, in December 2000., the NTMCs gave extensive consideration to the matter of membership of the statewide organisation, a process critical to defining its institutional 'boundaries'. The meeting debated tensions and potential conflict between the aims of inclusivity (including all Aboriginal people who want to contribute to and benefit from this new organisation) and maintaining authority (which requires that only those delegates who are authorised to represent their native title claimant groups are party to Congress decisions). They determined that the members of the Congress would be restricted to NTMCs and interim NTMCs, in order to retain clear authority structures, and that each NTMC would be a 'corporate' member of Congress, rather than the individual members of each NTMC being Congress members. This is appropriate to a nested institution such as Ostrom's design principles envisage.

Membership of Congress is a voluntary process – NTMCs may decide to 'opt in' and be part of the

[6] The term 'Congress' was used for the statewide meetings of NTMCs in 2000 and is also used for convenience to refer to the statewide organisation that the NTMCs decided to form at these meetings. The organisation does not have an official name at this time.

Congress structure, or they can decide to 'opt out'. The effectiveness of the Congress in negotiating on statewide issues will depend on the Congress retaining the support of all or at least most NTMCs. If a number of NTMCs either become dysfunctional and unable to represent their claim groups at the Congress, or opt out of the Congress because of disagreements with other members, the authority of the Congress to speak on statewide issues will be threatened. There is thus something of an inbuilt accountability mechanism in the consensus approaches to informed decision making that have featured in the development of the Congress to date. If the Congress as a whole is seen by any of its NTMC members to be overstepping its authority, leading to them resigning their membership, then other parties will be increasingly less willing to negotiate with the Congress about statewide issues.

Application of CPR institutional design principles

A critical factor in the development of the SA Statewide negotiation process, is that the SA government has accepted the authority and governance structure established through the NTMCs. It is not requiring native title claimant groups in SA to prove their connection to country through assembling anthropological evidence in a connection report. This contrasts with government requirements in Queensland (1999) and WA (2001). The SA government has also not required that the statewide organisation of NTMCs conform to any particular structural model. By not challenging the rights of native title claim groups to devise their own institutional structures, government and industry parties in SA have supported achievement of Ostrom's design principle #7 (minimal recognition of rights to organise).

In moving to form a statewide organisation SA native title claimant groups took the first steps to nest the institutions through which they manage their individual claims – the NTMCs - into a larger scale organisation, giving effect to Ostrom's design principle #8. This is a nested institution because it operates to manage only those issues which are appropriate to manage at a statewide scale. Recognition by NTMCs that their local actions could not change the 'big, hard issues' where their aspirations encounter the structures and processes that operate through State legislation was an important factor in their decision to work towards the formation of this statewide organisation, and to participate in the proposed statewide native title negotiation process. The NTMCs adopted as a key 'rule' that the autonomy of local NTMCs will be respected by the statewide organisation – in accordance with the principle from Aboriginal customary law that nobody can speak for someone else's country.

At Congress meetings, NTMCs and their members also began to take steps to establish and build understanding about other 'rules' for the operation of their governance institutions. There was considerable attention and debate at Congress meetings about protocols for the conduct of meetings and for decision making. While the process of defining and agreeing on operational rules, norms or protocols has really only just commenced, it marks the start of native title claimants overt

engagement with Ostrom's design principles #2 to #6. Discussions about Congress membership at Congress #4 (see above) also mark the engagement by NTMCs with Ostrom's design principle #1, the definition of clear boundaries for the higher order nested CPR management institution represented by the Congress.

In addition to events and processes that happen within the Congress itself, the effectiveness of Congress in the proposed statewide negotiations depends critically on the NTMCs maintaining the authority that has been vested in them by their native title claimant groups. The authority of the NTMCs themselves in local negotiations depends on this same factor. Like the Congress itself, the NTMCs are new and many are institutionally fragile. Their membership, and that of the claimant groups they represent, is spatially dispersed; they typically have few resources to support communication between members; and their members have a variety of understandings and experiences of how Aboriginal custom and law and corporate management procedures should apply in their decisions. Ostrom's design principles suggest that the long term effectiveness of both the NTMCs and the Congress will depend on the extent to which their members can agree on, establish and enforce clear rules about how benefits from their native title CPRs are distributed and congruent rules about how contributions by members to the maintenance of the native title CPR management institutions are to be made. This challenge is very difficult for NTMCs to address without start up resources.

As the process of negotiating agreements about native title develops it can be expected that institutional development will encompass farmers, miners and government – there will be negotiation about and articulation of operational 'rules' to govern the future relationships between the negotiating parties and their respective access to land and natural resources. However gaining minimal resources to support the development of effective NTMC governance, the continued development of the Congress structure and the integral involvement of these institutions in negotiations about native title continues to present critical challenges[7] . Resource constraints mean that the development of effective native title governance and the negotiation process will be slow. This gives some breathing space to plan how it can be effectively supported, while also highlighting the need to use available resources efficiently to build awareness amongst NTMC members about models for design of effective institutions. It is in this context that I have been considering what contribution CPRs management theory might make.

Using CPR management theory in practice

CPR management theory appears to have had limited impact in practice in Australia, and certainly not on design considerations for Aboriginal organisations, not withstanding the fact

[7] No action on developing the statewide Congress of NTMCs has taken place since December 2000, due to lack of funds to initiate the 'statewide' negotiations at a scale that involves all claimant groups. Current action is taking place through preparations for negotiations involving 3 'pilot' claim groups about issues in specific industry sectors – pastoralism, mining, parks, fishing and local government. The framework for the statewide negotiations established by NTMCs in the second part of 2000 nevertheless provides a robust foundation to advance the development of the statewide organisation and pursue statewide negotiations as resource constraints are overcome. Meanwhile the pilot negotiations are expected to scope the specific issues that need to be the subject of negotiations at this broader scale.

that, even outside the native title sphere, these organisations are often holding common property, such as through statutory land rights mechanisms. The structure or operational mechanisms of existing Aboriginal organisations have been widely found to be inappropriate for effective governance due to the straitjackets imposed by legislation or lack of understanding of accountabilities or other limitations (see for example AIATSIS 1996; Reeves 1998; The Australia Institute 2000). There is clearly value in looking beyond the models that are familiar in Australia in the design of contemporary native title institutions.

Inadequacies of 'not for profit' models of governance

The institutional model on which most Aboriginal organisations are based is that of a voluntary 'not for profit' or charitable association in which members freely give of their time and energy to meet the organisation's objectives. However native title management institutions are not 'not for profit' organisations. Their aim, often unstated but nevertheless important, is to achieve a flow of benefits to members of the native title group, including money and other material benefits. Further, membership of a native title group and participation in its governance is not, fundamentally, a voluntary process. Aboriginal custom and law establishes both the rights of individuals to membership and puts responsibilities on particular people to participate in governance. Thus, NTMC members will frequently say that they have been 'put in place' by their elders or by their people to carry the responsibility of protecting and managing native title, and will suggest that they have very little or no choice in the matter.

The advantages of using theory from CPR management as an alternative framework for native title governance began to be apparent in relation to a question that arose frequently at Congress meetings – recognition for the time and effort contributed by NTMC members to these meetings and to other aspects of the statewide negotiations process. There were no mechanisms in place to recognise the value of these contributions. This is typical in a 'not for profit' organisational model. Members are expected to give of their time and effort voluntarily and their reward is in advancing the organisation's goals and the self actualisation that accrues from helping others who benefit from this advancement.

During the Congress meetings, allocation of responsibility for recognising the contributions of time and effort by NTMC members was confused, with an assumption by many NTMC members that the government should be recognising their efforts, by paying NTMC members for the work associated with the process. However a CPR management model of governance makes it clear that the locus of responsibility for recognising NTMC members' contributions lies not with government, but with each native title community. This is because NTMC members are working on behalf of their communities to secure recognition of native title and a flow of benefits from that recognition. Thus, in an ideal world, each native title community would establish operational rules for how its members are expected to contribute to maintenance of their native title CPRs and of their CPR management institution – for some people this might be through membership of the NTMC and attendance at meetings, while others might make different kinds of contribution. A CPR management model of native title

governance would seem to have value as a framework for making explicit the need for congruence between the benefit that may be gained from being a native title community member and the contributions required to secure that benefit.

The problem of designing corporations which will hold and manage native title effectively has been the subject of a recent report by Mantziaris and Martin (1999) commissioned by the National Native Title Tribunal. It summarises legal and anthropological considerations relevant to the design of Prescribed Bodies Corporate (PBCs) which the Native Title Act (NT Act) requires be established by native title claimant groups to manage and/or hold native title following a determination of native title. What is apparent, as the authors themselves comment, is the complexity of the issues involved, and the rigidity of the applicable legal frameworks. These frameworks give little scope for recognition of native title group's rights to devise their own institutions, as Ostrom's design principle #7 found is necessary for effective CPR governance.

The organisational design required by the legal framework is based on a voluntary association model of governance. The NT Act requires that PCBs be established as corporations under the Commonwealth *Aboriginal Councils and Associations Act* 1976 (ACA Act). Mantziaris and Martin conclude that little thought has gone into the interface between these two acts and they are mismatched at several points. The outcome is that native title groups will be unable to implement their rules from Aboriginal custom and law in design of their PCBs. For example, the ACA Act is premised on the equality of the members of a corporation in voting rights and in entitlement to benefits. It does not permit classes of membership. However in traditional law and custom neither representation in decision making, nor the distribution of benefits amongst members of the group, are likely to be based on equality between individuals. Instead the internal structure of the group and its subgroups (families, clans etc) and the authority structure embodied in traditional law (elders, gender, law-men, law-women etc) will determine the distribution of authority in decisions and of benefit. As Pearson (1999) and Mantziaris and Martin (1999: p22) argue, and as CPR management theory supports, the distribution of benefits of native title amongst the members of the native title group is a matter for traditional law and custom, not external regulation.

With the degree of external regulation of organisational design that the NT Act establishes, native title groups could readily be disempowered by the very legal framework that are supposedly established to support their authority. There is a clear risk that native title groups will settle on a corporate structure for their PCB on the basis of legal advice about the options that Australian law currently presents them with, without fully understanding the implications for conflict between these structures and their customary modes of representation and decision making. The resultant corporations are unlikely to be stable or truly authoritative. Mantziaris and Martin's analysis indicates the need for more effective frameworks and models to be developed for corporations to hold

and manage native title than are now available.

Using CPR management theory to promote good practice

Can the CPR institutional design principles identified by Ostrom, and subsequently tested and applied by various others in a variety of situations, be used to inform, build awareness and support informed decision making by native title groups about the design of effective institutions for holding and managing native title?

I think Ostrom's design principles could be usefully applied in this way. CPR management theory provides a framework that is appropriate to the collective nature of native title ownership and decision making. It could play a useful role in building awareness amongst native title group members of the interface between individual and collective benefits from and contributions to the group's efforts to hold and manage native title.

The application of CPR management theory to problems of institutional design is likely to have considerable appeal to native title groups because the theory draws from indigenous and other local people's experience and practice internationally. In other situations in Australia, such as the development of the Indigenous Protected Area concept (Smyth and Sutherland 1996; Environment Australia 1997), international principles have found resonance amongst indigenous groups because they provide a reference point that lies outside the limited conceptual frameworks which Australian governments typically offer for recognition of indigenous rights and realisation of indigenous peoples' aspirations for the future. In the Congress meeting process SA NTMC members were keen to learn about international experience in negotiations and settlements and they drew inspiration from international examples.

Awareness of CPR institutional design principles could be promoted with native title groups by presenting international case studies where the operation of these principles is apparent. Experience at the SA Congress meetings in 2000 does however indicate how difficult it can be to present complex information of this nature in big meetings. One problem is that time is a limited resource, and one that is readily appropriated by some individuals to the exclusion of others. Indeed meeting time has all the characteristics of a CPR, requiring agreement amongst meeting participants on rules about its allocation. Congress meetings did however show that complex information can be conveyed effectively, understood and acted on by participants at large meetings if time is available and if appropriate communication techniques are used. Videos and diagrams certainly help. Congress meetings also successfully used 'break out' discussion groups and report back sessions. These were valuable in encouraging meeting participants to apply new concepts to their own situation and to comment on how well they fit.

In presenting international examples of CPR management to native title groups, it will be important to find case studies which are somewhat analogous to native title. Many examples of CPR institutions available from the international

literature are not directly applicable because their primary focus is local people's collective management of forest, water or fisheries resources for livelihood benefits, rather than the multifaceted processes of managing CPRs for cultural, subsistence and monetary benefits that characterises native title. It will also be important to find ways of expressing key concepts from CPR theory in language that native title groups are comfortable with, and to encourage claimants to discuss and share their understandings of terminology in order to establish a 'common language'.

Material about effective CPR governance could be very usefully incorporated into training for Aboriginal community development facilitators, Boards of Management for Aboriginal organisations, community leadership programs, and natural resource management education. This would help to break down the conceptual monopoly that the voluntary 'not for profit' organisational model has in material about Aboriginal governance. I would welcome discussion about these ideas and how they might be developed and advanced.

Conclusion

Native title governance institutions need to be robust to hold and manage native title in perpetuity. They will face inevitable threats to their stability and authority from community conflicts and complex negotiation processes with globalised actors. The legal framework for the incorporation of Prescribed Bodies Corporate that is established by the *Native Title Act* 1993 and the *Aboriginal Councils and Associations Act* 1976 has been identified as having a number of structural weaknesses. Ostrom's design principles for CPR management institutions provide a flexible framework for developing governance organisations for resources such as native title which are 'owned' collectively. These design principles appear to be far more appropriate to the task of native title governance that the voluntary 'not for profit' association model on which the Australian legal framework for holding and managing native title is based.

Native title groups in SA have begun to develop governance institutions which exhibit some of the features of effective CPR management institutions that Ostrom identifies in her design principles. To date, their rights to design their own governance institutions for native title have been recognised by the SA government with whom they have agreed to negotiate for settlement of their native title claims. This holds some promise that they might ultimately be able to negotiate a legal framework for organisations to hold and manage native title which is better at meeting their needs to interface their own customary law and the Australian legal system than what is currently available to them. Greater awareness of Ostrom's design principles and how they operate in management of other comparable CPRs could provide native title groups with a conceptual framework which makes issues of individual and collective benefit, responsibility and accountability in the holding and management of native title more transparent than they are at present. Such a framework has potential to support native title holders decisions about design of their own governance institutions for native title and to help them ensure these are effective.

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