**CORPORATIONS (ABORIGINAL and TORRES STRAIT ISLANDER) ACT 2006 PROPOSED REVIEW**

**RESOLUTION OF INTERNAL DISPUTES WITHIN PBCs**

**INTRODUCTION**

Whilst the Tribunal has views as to many aspects of the proposed review we consider that, in general, the Registrar of Aboriginal and Torres Strait Islander Corporations (the “Registrar”) is in the best position to identify shortcomings and possible remedies. We propose to address only one aspect, namely the resolution of disputes within prescribed bodies corporate (“PBCs”), particularly disputes concerning membership and the election/appointment of directors.

We have chosen to make submissions concerning that matter for two reasons. First, we frequently receive inquiries and requests for advice and assistance concerning it, from PBC members or persons who seek to become members. Secondly, the proposed amendments to the *Native Title Act 1993* (Cth) (the “Native Title Act”) contemplate an expanded mediation role for the Tribunal in connection with disputes within PBCs. Our primary submission is that there may be advantage in combining the Tribunal’s mediation role with an arbitral role, to be engaged where mediation has been unsuccessful.

**ROLE OF THE PBC**

The primary, relevant role of the PBC is to hold native title on trust for the common law holders. It is not necessary, for present purposes, that we deal separately with PBCs which hold native title as agents. The extent of the PBC trustee’s role has not been widely explored. For example, little consideration seems to have been given to the effect upon a pre-determination agreement, of a subsequent native title determination, with the associated appointment of a PBC as trustee for the common law holders. It may be accepted that the role of the PBC is to protect the proprietary and other rights of the common law holders. Presumably, the PBC has the duties and powers which necessarily accompany the appointment as trustee. Its structure should not be inconsistent with the imposition of those duties and the grant of those powers.

We suggest that the structure of a PBC must, in one way or another, entitle all common law holders:

* to membership, directly or indirectly; and
* to participate, directly or indirectly, in the election or appointment of directors, including the entitlement to seek such election or appointment.

Disagreement about such matters occurs from time to time, in many corporations or, for that matter, unincorporated associations. Occasionally, judicial relief is sought in order to resolve those disputes. However such relief is generally expensive and, often involves a drawn out process, leading to longer term damage to the underlying trust which is a necessary aspect of any organization, corporate or incorporate. Obviously enough, the longer a dispute continues, the more damage it will cause.

**CORPORATE GOVERNANCE**

Certainty as to membership, and as to the validity of a director’s appointment or election are critical to the effective functioning of any corporation. Within corporations to which the *CATSI Act* applies, there are frequently disputes in these areas. There are many reasons for such disputes. They are frequently difficult to resolve, even with external assistance.

Section 66-1 (3A) requires that a PBC’s constitution provide for the resolution of internal disputes. However that provision does not seem to have been particularly effective. The oppressive conduct provisions (Division 166) reflect provisions which have been included in corporations legislation for many years. Experience suggests that such process is cumbersome and expensive. Streamlining dispute resolution, at least in the areas of membership and appointment/election of directors, would be a worthwhile first step, perhaps a necessity, in facilitating the efficient operation of PBCs.

**POSSIBLE APPROACHES**

Experience with mediations in the Tribunal suggests that agreements reached at mediation are, on occasions, almost immediately disavowed. Such conduct invites the inference that apparent agreement may sometimes be used as a tactical device, for the purpose of causing delay and/or additional expense, the ultimate goal being the application of pressure in the relevant negotiations.

On some occasions, such repudiation may occur because the negotiator has exceeded his or her authority. In good faith negotiations, such an event should not occur. It is for each party to ensure that its negotiator has appropriate authority and does not act outside of such authority.

Numerous remedial procedures have been suggested. There might be a mechanism by which a mediated agreement immediately becomes binding on the parties, and so is legally enforceable. It has also been suggested that it may be possible to confer upon the Tribunal a power to arbitrate in such disputes, particularly where mediation in the Tribunal has failed. Such an arrangement would make it easier to move from the mediation phase of dispute resolution to the arbitration phase, without the need to transfer the relevant records and information to a separate dispute resolution body. All disputes may, in the end, be resolved by the courts. However, such resolution often seems to be both prohibitively expensive, and relatively slow. Further, a distinct advantage of arbitration over judicial proceedings is that it may be conducted in private.

The Tribunal presently provides mediation services in disputes arising under the *Native Title Act*. In connection with future acts, it provides both mediation and compulsory arbitration services. There may be value in seeking to build on that process. I am told that there is some concern that any attempt to confer further arbitral functions upon the Tribunal may offend against the constitutional requirement that the judicial power of the Commonwealth be exercised only by a court, as identified in s 71 of the Constitution. Much of that concern seems to focus upon the decision of the High Court in *Brandy v Human Rights Commission* (1995) 183 CLR 245. Whilst the decision in *Brandy* attracted attention at the time, it does not have much to say for present purposes, largely because of the specific factual situation with which it was concerned. However the observations of the majority, at pp 267-8, are of some assistance. Guidance may also be derived from the decision in *Precision Data Holdings v Wills* (1991) 173 CLR 167, at 188-191. See also *Re Ranger Uranium Mines Pty Ltd; Ex parte* FMUA (1987) 163 CLR 656, at 663-666,cited in *Precision Data Holdings* at 189; *Attorney-General v Alinta Ltd* (2008) 233 CLR 542, where the views of the members of the Court are adequately summarized in the headnotes and per Gleeson CJ at [2], [6] and [7]; Gummow J at [10]-[14]; Kirby J at [35]-[46]; Hayne J at [69]-[71], [95]-[100]; and Crennan and Kiefel JJ at [151]-[159]. The decision in *TLC v Judges of the Federal Court* (2012) 295 ALR 596 at [26]-[29], [75]-[81] is also of considerable relevance*.*

**SOME PROPOSITIONS**

I do not wish to generalize unduly about the propositions which may be drawn from those cases. However it is clear that the decision in *Brandy* is by no means conclusive in so far as it deals with the nature of judicial power. Of particular interest are the passages in *TLC* (cited above) and some of the industrial cases concerning arbitration. Emerging themes are:

* an adjudication, not arising solely from the operation of law on past events or conduct, may not be an exercise of judicial power;
* functions may be classified as either judicial or administrative, according to the ways in which they are to be performed;
* a requirement to take into account, in decision-making, matters of “policy” may lead to the decision-making power being classified as administrative;
* a determination as to appropriate future rights, not involving the resolution of a dispute about existing rights, will be administrative;
* the partial displacement of rights and obligations by a regulatory regime does not necessarily lead to the classification of the function as judicial;
* a significant pointer against a power being characterized as judicial is the entrusting to the decision-maker of authority to alter the law otherwise applying in a particular case, in order to create new rights and obligations.

For present purposes, I stress the proposition that arbitration by consent will not constitute the exercise of judicial power. Further, a statutory dispute resolution process, conferred upon a body other than a court, but requiring consideration of matters of policy, may not involve the exercise of judicial power, particularly if the arbitral body includes non-legal “members”.

**DESIGN**

It would not be rational to design a dispute resolution process prior to identification, with some degree of specificity, of the kinds of dispute to which that process will apply. It is also not rational to assume that whatever the dispute may be, any resolution process, involving a non-judicial body, will be unconstitutional. The Parliament regularly confers power to resolve disputes upon non-judicial bodies. The plethora of cases concerning the judicial power highlights that fact. Once the relevant, anticipated disputes have been identified, the next step may be to decide whether there is a preference for judicial or non-judicial resolution. There will be various factors for consideration, including long term political attitudes and public perceptions. Only when those decisions have been made, can the dispute resolution system be designed. For that reason, the following proposed models are described in broad outline. More detailed design would depend upon the various forms of dispute to be addressed**.** It may be necessary that there be a statutory definition of the term “dispute”, possibly a difficult question. For present purposes, it has been assumed that it is possible to formulate such a definition.

**POSSIBLE MODELS**

Below, are three possible, non-judicial models which might suit presently perceived needs. Our purpose is to demonstrate the forms which dispute resolution processes might take, not to urge the adoption of any of them. All three examples would probably involve legislative change.

**Example 1**

This approach is based on the assumption that the parties in dispute have reached agreement, the terms of which have been reduced to writing and signed by the parties. Such an agreement may produce new rights and obligations, which rights and obligations may be enforceable by the courts as a contract.

It may be possible to provide that the Registrar be notified of such agreement, and that he be authorized to act upon it by altering the relevant register and/or directing the relevant corporation to amend its records. It seems probable that neither the mediation, nor the notification, nor the Registrar’s acting upon that notification would constitute an exercise of judicial power. The process simply gives effect to an agreement, freely made.

**Example 2**

This approach focusses upon arbitration. As I have observed, consensual arbitration, per se, does not involve exercise of the judicial power of the Commonwealth. The arbitrator’s jurisdiction is derived from the consent of the parties. It may be that a mediating body, such as the Tribunal, could indicate that it will only mediate upon condition that if agreement is not reached within a fixed period, a party may seek arbitration, consent to which will have effectively been given as a condition of the original agreement to mediate. Provision might again be made for notification of the arbitration outcome to the Registrar, and action by him in accordance with that outcome.

There would probably have to be legislation to allow NNTT to offer mediation services on such a condition but that, alone, probably would not involve the exercise of judicial power.

**Example 3**

This approach involves a rather more formal approach to arbitral dispute resolution and would probably require legislation. The legislation might provide that where mediation has failed, a party might seek arbitration by a body set up for that purpose. The body might comprise, say, the President of the NNTT and/or the Registrar (or, in each case, a nominee), together with a small number of senior Aboriginal people appointed from a panel authorized by the Minister. In resolving the dispute, the body would be obliged to take into account:

* the interests of the native title holders;
* the effective administration of the PBC;
* the interests of Aboriginal people generally; and
* the public interest.

The composition of the body, and the matters to be taken into account could be tailored so as to exclude the possibility that the process might involve any exercise of judicial power.

This process would be a little clumsy and possibly, expensive. Feasibility may depend upon there not being too many referrals. There are probably many possible variations on this approach.

An alternative approach might be to allow a mediator or arbitrator to make recommendations to the Registrar as to the exercise of his powers. The making of such recommendations would certainly not involve the exercise of any judicial power. I stress that these are only working examples. Some care and good advice would be necessary in adopting any of them.

**SOME PRACTICAL CONSIDERATIONS**

A matter of real concern is the amount of time and money which may be invested in non-arbitral dispute resolution, which resources are in the end, thrown away, either because the problem is not susceptible of mediated resolution, or because one party has chosen mediation for tactical reasons, with no desire to reach agreement, or, perhaps, because a negotiator has exceeded his or her authority.

I note that the National Native Title Council has suggested that it will probably oppose any proposal of the kind suggested above. It suggests that, “an arbitral role for the Tribunal would appear to be inconsistent with those assistance and facilitation functions envisaged in the Explanatory Memorandum.” This proposition is difficult to understand. There is no reason to believe that an ultimate arbitral role would detract from the flexibility of a mediation role. No such problem has been experienced to date in connection with the Tribunal’s combined mediation/arbitration role concerning future acts. Nor is there any merit in the unexplained assertion that the proposal may, “seriously undermine the self-determination rights of native title holders in RNTBCs to make their own decisions …”.

Experience demonstrates that extended disputes within organisations cost money but, more importantly, lead to extended periods of disharmony, with the real possibility of permanent damage to the underlying trust upon which such organizations should be built.

