NEW ZEALAND CENTRE FOR PUBLIC LAW
Te Wānanga o ngā Kaupapa Ture ā Iwi o Aotearoa

New Zealand Journal of Public and International Law

VOLUME 7 • NUMBER 2 • DECEMBER 2009

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Adriaan Barnard
RP Boast
Kirsty Gover
Carwyn Jones
Geoff McLay
Miron Mushkat and Roda Mushkat

Victoria
UNIVERSITY OF WELLINGTON
Te Whare Wānanga
o te Ūpoko o te Ika a Māui

FACULTY OF LAW
Te Kauhanganui Tātai Ture

Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

December 2009

The mode of citation of this journal is: (2009) 7 NZJPIL (page)

The previous issue of this journal is volume 7 number 1, June 2009

ISSN 1176-3930

Printed by Geon, Brebner Print, Palmerston North

Cover photo: Robert Cross, VUW ITS Image Services

CONTENTS

***

The **New Zealand Journal of Public and International Law** is a fully refereed journal published by the New Zealand Centre for Public Law at the Faculty of Law, Victoria University of Wellington. The Journal was established in 2003 as a forum for public and international legal scholarship. It is available in hard copy by subscription and is also available on the HeinOnline and Westlaw electronic databases.

NZJPIL welcomes the submission of articles, short essays and comments on current issues, and book reviews. Manuscripts and books for review should be sent to the address below. Manuscripts must be typed and accompanied by an electronic version in Microsoft Word or rich text format, and should include an abstract and a short statement of the author's current affiliations and any other relevant personal details. Authors should see earlier issues of NZJPIL for indications as to style; for specific guidance, see the *New Zealand Law Style Guide*, copies of which are available through Thomson Reuters. Submissions whose content has been or will be published elsewhere will not be considered for publication. The Journal cannot return manuscripts.

Regular submissions are subject to a double-blind peer review process. In addition, the Journal occasionally publishes addresses and essays by significant public office holders. These are subject to a less formal review process.

Contributions to NZJPIL express the views of their authors and not the views of the Editorial Committee or the New Zealand Centre for Public Law. All enquiries concerning reproduction of the Journal or its contents should be sent to the Student Editor.

Annual subscription rates are NZ$100 (New Zealand) and NZ$130 (overseas). Back issues are available on request. To order in North America contact:

Gaunt Inc
Gaunt Building
3011 Gulf Drive
Holmes Beach
Florida 34217-2199
United States of America
e-mail info@gaunt.com
ph +1 941 778 5211
fax +1 941 778 5252

Address for all other communications:

The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand
e-mail nzjpil-editor@vuw.ac.nz
fax +64 4 463 6365

TRIBAL CONSTITUTIONALISM AND MEMBERSHIP GOVERNANCE IN AUSTRALIA AND NEW ZEALAND: EMERGING NORMATIVE FRICTIONS

Kirsty Gover*

This article considers the tensions that arise when tribes and states must agree on membership rules for inclusion in written tribal constitutions. It draws on a study of the tribal constitutions of New Zealand Treaty Settlement Entities and Australian Native Title Registered Bodies Corporate and considers these in the context of the law and policy of land claims settlements in both countries. The article considers the importance of the distinction emerging in post-recognition governance between persons legally entitled to benefit from a settlement or determination (beneficiaries or native title holders) and persons entitled, as a matter of tribal law, to be registered members of a recognised tribe. Demands from settler governments for certainty, finality and legibility means descent rules are favoured over other measures of affiliation, as is reflected in tribal constitutions and in changes to those constitutions over time. The article considers the different degrees and types of constraints operating on Australian and New Zealand tribes respectively, and concludes that formal descent rules need not amount to an unreasonable constraint on tribal self-constitution, provided they can be unilaterally supplemented or qualified by tribes, acting in accordance with their constitutive documents. By reference to emerging work on cultural production in theories of political and legal pluralism, the author advances the argument that tribal self-constitution through membership governance is the necessary precursor of meaningful tribal self-governance.

* Kirsty Gover, LLB(Hons) (Cant), LLM (Columbia), JSD (NYU), Senior Lecturer, Melbourne Law School. The author is indebted to Benedict Kingsbury, Daniel Hulsebosch and Sally Merry for their many helpful comments on an earlier draft. Thanks are also due to the many friends and colleagues who read drafts, provided commentary and helped with the location of materials, including Dean Cowie, Andrew Hampton, Angus Frith, Lindsey Te Ata o Tu Macdonald, Juanita Pope, David Williams and an anonymous reviewer. All opinions and errors are the author's own. This research was supported by the New Zealand Tertiary Education Commission Top Achiever Doctoral Scholarship Fund and the New York University School of Law Hauser Global Law School Program.

I INTRODUCTION

Tribes in the western settler States are now required to adopt written constitutions and membership rules as a condition of official recognition.[1] In Australia and New Zealand, recognition occurs as a result of land claims settlement. In both States the membership of claimant groups is legally defined at the point of recognition, but thereafter tribes are accorded a degree of discretion in the design and amendment of prospective membership rules. This article investigates the scope of tribal autonomy in membership governance in the new era of tribal constitutionalism, drawing on a study of the membership provisions contained in the constitutions of 48 New Zealand Treaty Settlement Entities (TSEs) and 38 Australian Registered Native Title Bodies Corporate (RNTBCs).[2] It considers the importance of the distinction emerging in post-settlement governance between persons entitled to benefit from a settlement or determination and persons entitled, as a matter of tribal law and custom, to be recognised as members of the tribe. These categories are imperfectly aligned. In post-settlement governance, beneficiaries may not be members, and members may not be beneficiaries. The resulting friction is one of an emerging set of jurisdictional issues accompanying tribal constitutionalism.

The tribal institutions discussed in this article are designed to give effect to litigated or negotiated settlements and to enhance the certainty and finality of new property arrangements, in part by rendering a tribe more legible to outsiders. Tribes are discouraged from enacting membership rules that are indeterminate or contingent and are encouraged to prioritise descent rules over other modes of affiliation. Formal membership criteria can create legal boundaries that do not match the cultural or customary boundaries of the tribe. This can occur, for example, where rules include descendants who have no cultural connection to the tribe or exclude cultural affiliates who are not descendants. In this article, I consider the degree and type of constraints operating on New Zealand and Australian tribes in the design of their membership rules. I conclude that formalisation of membership governance need not amount to an unreasonable constraint on tribal self-constitution, provided that formal rules can be amended, supplemented or qualified by tribes in accordance with custom. If constitutive documents allow membership rules to be adapted through the political processes of tribal governance, the enactment of formal membership rules can be a continuation of customary cultural production, rather than an impediment to it.

Two sets of tribal institutions are considered in this article. RNTBCs are established under the Native Title Act 1993 (Cth) and its regulations. Native title holding communities are identified and described by the National Native Title Tribunal during the initial registration of the claim, and by

---

1 I have elected to use the word "tribe" for comparative purposes, but acknowledge that the word is not in widespread official or popular usage in Australia.

2 See the appendix for a list of tribes and documents included in the study and a description of the methodology used to identify them and locate their governing documents. The study includes all accessible documents in existence as of 31 May 2008.

the Federal Court when it is making a native title determination. Following a successful determination, the group is obliged to establish a corporate structure (the RNTBC) to represent the title holders and manage matters of internal governance. At the time that the study was concluded, 38 RNTBCs were in existence.[3] In the long term, the Australian government anticipates that there will be 100 to 150 RNTBCs operating across Australia[4] and some commentators have begun to refer to an emerging "RNTBC sector".[5]

The New Zealand tribal governance entities in the study (the TSEs) represent tribes recognised though the Treaty of Waitangi settlements process.[6] Claims are progressed through direct negotiation between the Crown and tribal representatives, sometimes on the basis of reports issued by the Waitangi Tribunal. There are 63 such recognised tribes in New Zealand, of which 48 had completed the claims process and had accessible constitutions at the time the study was completed.

Importantly, claims settlement in Australia and New Zealand typically involves the constitutionalisation of a tribal community for the first time.[7] The tribal constitutions referred to in this article are recently written – that is, within the "settlement" phase of the claims era, roughly beginning in the mid 1990s. Where pre-settlement institutions existed, they were representative bodies that were not empowered by and responsible to a constituency of registered members. A body of critical commentary has emerged in the past 15 years on the problems of coercion in the

---

3 Since the completion of the Australian dataset, an additional 19 Native Title Prescribed Bodies Corporate have been registered, bringing the total at the time of writing to 57.

4 Attorney General's Department Steering Committee *Structures and Processes of Prescribed Bodies Corporate* (ACT, 2006) para 2.5.

5 Jessica Weir "Native Title And Governance: The Emerging Corporate Sector Prescribed For Native Title Holders" (Issues Paper 9) in *Land, Rights, Laws: Issues of Native Title* (Vol 3, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, ACT, 2007).

6 Historic claims are usually tribe-specific, and pertain to breaches of the principles of the Treaty of Waitangi occurring before 21 September 1992. Contemporary claims include the 1992 pan-tribal Māori commercial fisheries settlement (discussed below under Part III A): Deed of Settlement "Her Majesty the Queen and Māori" (1992) (accessible at <www.teohu.maori.nz>) (last accessed 26 April 2010). Some tribes recognised for the purposes of the fisheries settlement have not yet begun or completed a historic claim, such as Ngāti Kahungunu (represented by Ngāti Kahungunu Iwi Incorporated), and some groups have independently pursued a historic claim, but are represented as part of a larger collective for the purposes of the fisheries settlement. See for example the Treaty settlement negotiations underway with Ngāti Whātua o Orakei (represented by the Ngāti Whātua o Orakei Māori Trust Board) and Ngāti Whātua o Kaipara (represented by the Ngāti Whātua o Kaipara Claims Komiti). The two tribes are represented together for fisheries settlement purposes by Te Runanga o Ngāti Whātua, a Mandated Iwi Organisation. See www.teohu.maori.nz/iwiregister (last accessed 5 February 2010). For further commentary on the variegation and overlap of New Zealand tribal institutions and implications for membership governance, see Kirsty Gover *Constitutionalising Tribalism: States, Tribes and Membership Governance in the Western Settler States* (Oxford University Press, forthcoming).

7 Tribal constitutionalism has a longer history in Canada and the United States: Gover, above n 6.

litigation and negotiation of land claims, lack of indigenous control over claimant definitions and inter-indigenous conflict on matters of representation.[8] A newer and less extensive body of work addresses the post-settlement governance arrangements adopted by successful claimants.[9] In both countries, the formalisation of membership has been addressed only obliquely in scholarship on tribal governance. This article is intended to contribute to the ongoing conversation about post-settlement governance, by providing a narrowly focused analysis of questions raised by the formalisation of membership rules in tribal constitutions.[10]

The article proceeds as follows. Part II outlines misgivings expressed about the transformative effects of tribal constitutionalism on tribal communities. It considers models of cultural production emerging from political and legal theories of pluralism and proposes that these could assist to provide a more relational, less positional model of the interaction between custom and legal formality in tribal membership governance. Parts III (New Zealand) and IV (Australia) draw on the study of tribal constitutions to consider the dominance of descent rules in the constitutions of recognised tribes and to explain the tension between tribal and settler states concepts of descent. The article assesses the use made of the concept of descent in claims settlement processes in each country. It examines the disjunction between settler state definitions of the beneficiary class and tribal definitions of their membership, and examines closely the formal capacity of tribes to include non-descendants and to exclude descendants. It concludes that the stringencies of the continuity requirements enacted in Australia native title jurisprudence and legislation significantly constrain

---

8 Scholarship on the New Zealand Treaty settlements process includes the following: Roger CA Maaka and Augie Fleras "Indigeneity at the Edge: Towards a Constructive Engagement" in Roger Maaka and Augie Fleras (eds) *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand* (University of Otago Press, Dunedin, 2005) 337, 341; Ani Mikaere "Settlement of Treaty Claims: Full and Final, or Fatally Flawed?" (1997) 17 NZULR 425, 446-447; Mason Durie "The Treaty Was Always About the Future" in Ken S Coates and PG McHugh (eds) *Living Relationships/Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 189; and Malcolm Birdling "Healing the Past or Harming the Future? Large Natural Groupings and the Waitangi Settlements Process" (2004) 2 NZJPIL 259. Comparable work in Australia includes that by: Jocelyn Grace "Claimant Group Descriptions: Beyond The Strictures Of The Registration Test" (Issues Paper 2) in *Land, Rights, Laws: Issues of Native Title* (Vol 2, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, ACT, 1999); Mary Edmunds "Conflict in Native Title Claims" (Issues Paper 7) in *Land, Rights, Laws: Issues of Native Title* (Vol 1, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, ACT, 1995); and Christos Mantziaris and David Martin *Native Title Corporations: A Legal and Anthropological Analysis* (Federation Press, Sydney, 2000).

9 See for example Robert Joseph "Contemporary Māori Governance: New Era or New Error?" (2007) 22 NZULR 682; New Zealand Law Commission *Summary Of Presentation to Consultation Hui on the Law Commission's* Waka Umanga *Report, October-November 2006* (NZLC, Wellington, 2006) and David Martin "Designing Institutions in the 'Recognition Space' of Native Title" in Sandy Toussaint (ed) *Crossing Boundaries: Cultural, Legal, Historical and Practice Issues in Native Title* (Melbourne University Press, Victoria, 2004) 67 ["Designing Institutions"].

10 For commentary on other aspects of claims settlement and consitutionalisation see Gover, above n 6.

tribal self-constitution, by limiting formal membership rules to those recognised as expressions of "traditional law and custom". New Zealand tribes have a far greater capacity to adapt their constitutions and membership rules in the exercise of post-settlement governance, although the scope of tribal discretions in some areas (especially as regards adopted children) remains to be tested. The difference in the scale and type of these constraints are premised on different conceptions of the function and content of tribal continuity tests in claims settlement, and so also of the relationship between tribal self-constitution and tribal self-governance. These amount to the enactment in settler law and policy of different concepts of tribalism.

II THE NORMATIVE CHALLENGE OF TRIBAL CONSTITUTIONALISM – WHAT ARE THE CONSEQUENCES OF FORMALISING MEMBERSHIP RULES?

The official recognition of tribes through claims settlement includes a heavy emphasis on the historic continuity of tribes and on determinacy and legibility in institutional arrangements. In both Australia and New Zealand, all tribes recognised through the reparations process are obliged to adopt a written constitution, to enact membership rules and to keep a register of members.[11] Membership criteria are formally articulated in Deeds of Settlement (and implementing legislation) and native title determinations, albeit with varying degrees of specificity. State policy goals of securing legibility are advanced by the enactment of formal rules to govern membership. These demands for finality and certainty can conflict with tribal demands for self-constitution, by which they claim the right to manage the evolution and adaptation of tribal law and custom on membership, as they traditionally have done.

The formalisation of membership governance is a particularly significant aspect of tribal constitutionalism. To use Robert Post's phrase, formal membership rules are the mechanisms by which groups "invest their identity in institutional forms".[12] The juridification of membership poses, in a very acute form, risks associated with the institutionalisation of indigenous communities. These risks, however, are often unspecified. In the small body of commentary on the juridification of tribes, two broad, related anxieties can be discerned: the first is that formal rules are inadequate representations of custom; the second is that they distort and displace custom, and so are incommensurable with it.

Most frequently, normative critiques of institutionalisation in the tribal context focus on the difficulties of expressing culture as formal rules. Examples include arguments that are directed at

---

11 In New Zealand, see the Māori Fisheries Act 2004, schedule 7. See also Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua, Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Office of Treaty Settlements, Wellington, 2000) 74-77 [*Healing the Past, Building a Future*]. In Australia, see the Native Title (Prescribed Bodies Corporate) Regulations 10 1999 (Cth) and the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth).

12 Robert Post "Cultural Heterogeneity and Democratic Constitutionalism" 25 (2000) AJLP 185, 194.

the failure of institutions to "capture" cultural phenomena or social facts and the failure of formal membership rules to describe all cultural affiliates at any given time. David Martin, for example, is sceptical about the capacity of any institution to reflect the membership of a native title holding group:[13]

> [A] bounded and prescriptive list of the individuals who have been accepted as corporate members in accordance with procedures set out in the constitution can only ever approximate, at best, the composition of characteristically fluid and permeable Indigenous groupings.

Because this complaint is a recurring one in tribal governance literature, it is worthy of further investigation. A claim of this kind implicitly identifies two risks. The first is that there will be a discrepancy between the class of persons entitled to be enrolled and the class of persons who actually do enrol. This shortfall is, however, inevitable in any subscriptive membership regime. The set of persons entitled to become legal members will always be larger than those who actually subscribe. The second risk, however, is premised on a more far reaching ontological claim, namely that the contingency of indigenous customary forms of membership means that it is impossible to express them as formal rules.[14]

The latter claim is the one most centrally expressed in critiques of formal membership governance. The assertion is that formal membership rules will necessarily distort tribal practices because they are incapable of "keeping up" with the flux of customary membership. Patrick Sullivan has argued that indigenous culture should not be incorporated into tribal institutions, because this can "lead both to bad governance and an inherently oppressive reductive codification of a complex culture."[15] In this approach culture is by definition insusceptible to expression as formal rules because it is "[a] way … of doing things adapted to *other ways of life at another time*."[16] In their influential work on the anthropology of RNTBCs, Martin and Mantziaris begin with this premise.[17] They advise against the codification (defined by them as "attempts to define and record, in writing")[18] of membership rules for native title communities, precisely because this will "inevitably

---

13 Martin "Designing Institutions", above n 9, 71.

14 David Martin, Julie Finalyson et al *Linking Accountability and Self-Determination in Aboriginal Organisations* (Discussion Paper 116, Centre for Aboriginal Economic Policy Research, Australian National University, ACT, 1996).

15 Patrick Sullivan *Indigenous Governance: The Harvard Project on Native American Economic Development and Appropriate Principles of Governance for Aboriginal Australia* (Discussion Paper 17, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, ACT, 2006) 10.

16 Ibid (emphasis added).

17 Mantziaris and Martin, above n 8.

18 Mantziaris and Martin, above n 8, 308.

affect the principles and practices of that body of traditions."[19] In this account, no formal governance of membership, however framed, could adequately accommodate customary membership rules. This argument stands irrespective of tribal agency and choice in the decision to enact formal rules, and without a clear statement of the losses that follow from formalisation. Following this logic, formality cannot be an expression of tribal custom.

Those commentators that identify substantive losses are primarily concerned with the displacement of familial and kinship ties by the creation of binary relationships between individuals and their governors.[20] The institutionalisation of tribal governance is thought to reduce the interdependence of tribal members, by eroding the complex of local negotiations, mutual accommodation and divisions of labour that keep the tribal community intact.[21] In New Zealand, the designation of tribal members as legal "beneficiaries" of a Treaty of Waitangi settlement is seen by many observers (tribal and otherwise) to demean and pacify individuals by increasing their dependence on the expertise and resources of officials.[22] Lyn Waymouth, for example, is uneasy with the idea that a person should be individually entitled to some benefit or protection from the tribal community because of their legal status, whatever the quality of their interpersonal relations. The enumeration of community members as beneficiaries of tribal trusts, she observes, emphasises their entitlement at the expense of responsibility:[23]

> A list of beneficiaries … is quite different from a group of people who had been obligated to and responsible for land, family and resources through whakapapa. The book [the Ngai Tahu base-roll] on its own is a list of names isolated from the stories that explained the kinship connections. It also isolates any knowledge of how the relationships are maintained and sustained. There is no responsibility on a registered beneficiary's part to maintain the practice of the principles of whakapapa. Neither is there any obligation to acquire the knowledge to do so.

---

19 Mantziaris and Martin, above n 8, 309. See also Katie Glaskin "Outstation Incorporation as Precursor to a Prescribed Body Corporate" in James F Weiner and Katie Glaskin (eds) *Customary Land Tenure and Registration in Australia and Papua New Guinea* (ANU E Press, Australian National University, ACT, 2007) 199, 212.

20 Jeffrey Sissons "Tall Trees Need Deep Roots: Biculturalism, Bureaucracy and Tribal Democracy in Aotearoa/New Zealand" (1995) 9 Cultural Studies 61, 71.

21 Edmunds "Conflict in Native Title Claims", above n 8.

22 Lyn Waymouth "The Bureaucratisation of Genealogy" (2003) 6 Ethnologies Comparées 1, 17. See also Jessica Weir and Steven Ross "Beyond Native Title: The Murray Lower Darling Rivers Indigenous Nations" in Benjamin R Smith and Frances Morphy (eds) *The Social Effects of Native Title: Recognition, Translation, Coexistence* (Research Monograph 27, Centre for Aboriginal Economic Policy Research, Australian National University E Press, Canberra, 2007) 185, 198.

23 Waymouth "The Bureaucratisation of Genealogy", above n 22. See also Elizabeth Rata "An Overview of Neotribal Capitalism" (2003) 6 Ethnologies Comparées.

Concerns about the disempowerment of individuals and the weakening of social ties are evident in, and informed by, the generic juridification literature.[24] In the indigenous context, however, I suggest they are overlaid by concerns about assimilation, that is, the loss of characteristics that are thought to make tribes distinctively indigenous. This necessitates a closer look at the competing demands made of tribal membership by settler governments and publics, namely that it be comprehensible, but also traditional. Interpersonal relatedness and mutuality are qualities closely associated with traditional tribalism. Their diminution or suppression is viewed by many as a loss of cultural patrimony. These anxieties extend beyond particular consequences for tribal communities however, because following this logic, formalisation also poses a challenge to the idea of indigenous difference. If membership in a tribe is substantively no different to membership in an association, club or corporation, then the cultural distinctiveness of tribal communities appears to be compromised. In other words, because customary tribal membership is seen to be based on familial and social ties rather than legal ones, formalisation appears as a type of assimilation. Critiques based on juridification have a special meaning where the juridified community is indigenous, because the extension of law into the customary life of a tribe is seen simultaneously to reconstitute that community as a culturally non-indigenous one. Accordingly, the loss of custom is also the loss of cultural pluralism.

Seen in this way, institutionalisation threatens the particular type of pluralism that is embraced as the postcolonial identity of settler societies and which underpins political theory on indigeneity. It possibly also calls into question the fragile settler–public consensus on the necessity of recognising indigenous difference in public law and policy. Importantly, for the purposes of this article, tribal constitutionalism powerfully influences the concept of legal indigeneity which is a cornerstone of settler State public law. It does so by introducing the legal category of tribal membership alongside that of indigeneity, calling into question the idea of non-tribal forms of indigenous collectivity, that is, of indigeneity that is not correlated with tribal membership.[25] The potency of concerns about the institutionalisation of tribes is further evidence that tribal constitutionalism is more than an exercise in institutional design. It is, as Tim Rowse astutely observes, "a practical test for a postcolonial liberalism."[26]

---

24 See for example Jürgen Habermas *The Theory of Communicative Action, Volume 2: Lifeworld and System: A Critique of Functionalist Reason* (translated by Thomas McCarthy, Polity, Cambridge, 1987) and Gunther Teubner "Juridification: Concepts, Aspects, Limits, Solutions" in Gunther Teubner (ed) *Juridification of Social Sphere: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* 4 (Walter de Gruyter and Co, Berlin, 1987).

25 Gover, above n 6.

26 Tim Rowse "Culturally Appropriate Indigenous Accountability" American Behavioral Scientist 43 (2000) 1514, 1518.

While it is important to acknowledge the social significance of formalisation, it is not possible, in the absence of a comprehensive study of the sociology of pre- and post-recognition tribes, to assess the effects of institutionalisation on tribal social life. It is possible, however, to look at the processes by which tribes are institutionalised and the constitutions themselves. Any normative evaluation of tribal institutions must consider the degree of agency afforded to tribes in their design and implementation, that is, whether constitutions and rules can be amended or supplemented by tribes. These are questions about the degree of space left in tribal constitutionalism for tribal self-constitution. They are not advanced by approaches which position law and custom in opposition to one another. In the following section evolving scholarship on the relation between formality and custom is discussed, and it is suggested that this may offer more nuanced ways to understand and frame the interplay of customary and legal tribal membership.

A The Cultural Production of Tribal Law: Strategies for Evaluating Formal Membership Rules

As noted, the tendency has been to map formality and custom on two opposing ideologies of membership. Here I explore the possibility that new approaches to cultural and legal pluralism could offer a more helpful view of the ways in which tradition and adaptation interact in cultural production. I begin with the suggestion that formality, manifested as relatively inflexible principles or rules, is already part of, and produced by, customary orders. Customary legal systems, like other legal systems, contain underlying values or conventions that are constitutive of legal process and guide the production of norms. [27] Recent contributions to debates on cultural production and custom are useful.

Older concepts of culture in political theory and anthropology were presented in objective terms, as a "thing" that a community "has".[28] This approach tends to present cultures as holistic and static. Newer relational approaches, however, understand culture as a process whereby cultural attributes are actively chosen and produced by participants. These emerge from a body of anthropologic research known by the shorthand "new culture". In this model, culture evolves and is elaborated through ongoing political contestation and disagreement. These approaches have the advantage of drawing attention to the politics of indigenous law-making as a cultural process.

The reconceptualisation of culture has lately influenced approaches to indigenous custom and "custom law". Increasingly, scholarship emphasises the law-making capacities of indigenous groups as political entities, rather than understanding custom as an expression of unchanging "tradition". These accounts stress the relationship between tradition and innovation in the production of indigenous law and custom. As in any law-making system, indigenous legal systems are innovative,

---

27 See for example Christine Zorzi "The Irrecognition of Aboriginal Customary Law" (Speech to Brisbane Institute, 18 May 2001, Brisbane).

28 Sally Engle Merry "Law, Culture, and Cultural Appropriation" (1998) 10 Yale JL & Humanities 575, 585.

but constrained by core values.[29] Some norms are deemed to be mutable and others are not. Traditions are embedded and serve to guide and constrain innovation, while other norms emerge in response to new situations and so are adapted to current circumstances.[30] It is this constant reiteration of the connection between old and new that is the engine of indigenous law, propelling indigenous legal systems forward while retaining conformity with their normative underpinnings. These values (or traditions) allow indigenous custom and law to adapt while maintaining the continuity of the society that creates and is governed by it. Such a framing is encompassed in the New Zealand Law Commission's useful exposition of Māori custom law, in which it suggests that "[t]ikanga Mā̄ori should not be seen as fixed from time immemorial, but as based on a continuing review of fundamental principles in a dialogue between the past and the present."[31]

In an approach of this kind, certain elements of a customary system of governance may be susceptible to expression as formal rules, namely those principles that are fundamental or constitutive and so provide a framework for reactive law-making. Prescriptive rules can form the "external constitution" that protects more responsive and flexible forms of custom and facilitates innovation.[32] A useful approach to the institutionalisation of culture is offered by the Harvard Project on Native American Economic Development (the Harvard Project), which elaborates the concept of "cultural match". By this, Harvard Project staff refer to the "fit between the formal institutions of government and indigenous conceptions of how authority should be organized and exercised."[33] It is the quality of this fit, the Harvard Project suggests, that determines the economic success of tribes in the United States, to a greater degree than other factors including the size of the tribal landbase, its population, location and the extent of its natural resources. Importantly, the Harvard Project does not propose that custom should be given effect in or by tribal institutions. In

---

29 Edward F Fischer "Cultural Logic and Maya Identity: Rethinking Constructivism and Essentialism" (1999) 40 Cultural Anthropology 486. See also James Clifford "Traditional Futures" in Mark Salber Philips and Gordon Schochet (eds) *Questions of Tradition* (University of Toronto Press, Toronto, 2004) 152.

30 Bruce Rigsby "Custom And Tradition: Innovation And Invention" (2006) 6 Macquarie LJ 113, 122. See also Francesca Merlan "Beyond Tradition" (2006) 7 The Asia Pacific Journal of Anthropology 85, 92.

31 New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP 9, Wellington, 1998) para 10. See also New Zealand Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP 17, Wellington, 2006) paras 4.31-4.41; Chief Justice ET Durie "Custom Law: Address to the New Zealand Society for Legal and Social Philosophy" (1994) 24 VUWLR 331; and Robert Joseph "Contemporary Māori Governance: New Era or New Error?", above n 9.

32 Habermas, above n 24, 370-371.

33 Stephen Cornell, Miriam Jorgenson Joseph P Kalt *The First Nations Governance Act: Implications Of Research Findings From The United States And Canada: A Report to the Office of the British Columbia Regional Vice-Chief Assembly of First Nations* (Udall Centre for Studies in Public Policy, University of Arizona, July 2002). See also Stephen Cornell "Indigenous Peoples, Poverty and Self-Determination in Australia, New Zealand, Canada and the United States" in Native Nations Institute (ed) *Joint Occasional Papers on Native Affairs* (No 2006-02, Native Nations Institute, University of Arizona, 2006).

fact it emphatically rejects the proposition that cultural match entails traditional governance. "It is not an appeal *to tradition*", they say, "it is an appeal *for legitimacy*."[34] Under this view, formal tribal institutions are not the exhaustive expression of indigenous custom, but the scaffolding around which indigenous cultural production can take place.

For the purposes of this article, one of the most useful ideas contained in the Harvard Project's analysis is that the need for "cultural match" in tribal governance (and for a body of research on the subject) derives from the fact that tribal institutions are more likely than others to suffer from a legitimacy deficit. This is because tribes are more likely than other communities to be governed by an institution and by formal rules that they did not design or that they are unable to amend:[35]

> Historically, outsiders designed and, in effect, imposed the governing institutions through which many contemporary Indian nations attempt to achieve their goals. … [Cultural match] is not necessarily an argument for a return to 'tradition'. The point is to search out and organise a resonance between formal institutions and what people currently view as appropriate *for them*.

Applying the ideas discussed above, I propose that the way forward is not to extirpate custom from institutions, or to reject formal rules altogether, but rather to ensure that tribal communities are able to decide which elements of tribal custom it is necessary or desirable to formalise.

How might an approach of this kind play out in the particular arena of membership governance? Some consequences of tribal constitutionalism seem inevitable. It is necessarily the case that tribal institutionalisation involves a series of translations and approximations of "real life". The normative effects of such formal reductions, however, are determined by the degree to which they are designed and controlled by the community that is subject to them. It matters whether institutions are imposed from the outside and it matters whether they can be amended by the community that is subject to them. Formal constitutional amendment is also an act of customary self-constitution. The legitimacy of membership rules in tribal institutions depends on the extent to which they are able to keep pace with the shifting cultural boundaries of the tribe.[36] To use Tim Rowse's phrase, under such an approach "formal associations are an adaptive continuation of indigenous tradition, not a symptom of their capitulation and decline."[37]

---

34 Manley A Begay Jr and Stephen Cornell "What Is Cultural Match and Why Is it So Important?" (Presentation to Building Effective Indigenous Governance Conference, Jabiru (Aust), 4-7 November 2003) (emphasis in the original).

35 Stephen Cornell "Nation-Building and the Treaty Process" (2002) 17 Indigenous Law Bulletin 5, 8-9 (emphasis in the original).

36 See for example the conclusion reached by Martin and Mantziaris: "The important issue is not the degree of 'traditionalism' or otherwise of indigenous governance structures. It is the degree of control indigenous people have over the design and operation of their own governance structures." Mantziaris and Martin, above n 8, 239.

37 Rowse "Culturally Appropriate Indigenous Accountability", above n 26.

As a matter of institutional design, this approach would auger against a high degree of prescription and detail in tribal membership regimes, but in favour of the formalisation of fundamental principles that are relatively immutable. This might encompass, for example, the enactment of descent rules as the scaffolding of tribal membership regimes, because these rules are relatively stable and uncontested. This could provide the legibility and accountability considered necessary for the transfer of resources and governance capacities to tribal institutions, while allowing space for those rules to adapt in accordance with the evolving custom of the tribal community. The inclusion of non-descendants as an exercise of tribal discretion is relatively non-controversial in New Zealand, but more problematic in Australia. Tribal efforts to exclude descendants (legally adopted children) have been a source of friction in New Zealand, but not in Australia. In each jurisdiction much turns on the concept of descent in play and its legal meaning. The following section evaluates the efforts of tribes and States to strike an appropriate balance between certainty and malleability in institutional arrangements.

III COMPETING OFFICIAL AND TRIBAL CONCEPTS OF DESCENT: NEW ZEALAND

A major source of friction in reparative negotiations is the tension between the State's emphasis on descent as a stand-alone, constitutive rule and the efforts of tribes to supplement or qualify it with other types of affiliation rules, such as cultural proficiency, familial ties or residency.[38] Descent rules lend themselves to formalisation. Relative to other measures, they are determinate and predictable in their effects, and because they neatly mesh with legal mechanisms for inter-generational transmission of property, they facilitate succession.[39] Tribes and public actors can agree that descent is of central importance in the constitution of tribal communities even if they do not agree on the form of its expression. Consequently, lineal descent rules are often proposed as stand-ins for more complex social arrangements. The formalisation of membership often requires the translation of a variable and contingent set of cultural protocols into the singular, semi-permanent state of descent-based membership.

Descent rules also serve the function of demonstrating a tribe's continuity. Land claims processes require the claimant community to show that it is the successor to a historic group and entitled to inherit its status and property. Descent serves this probative dictate. The relevant ancestor for descent purposes is ordinarily a person who was an occupant of the claimed land at a designated time in the colonial history of the state. New Zealand claimant definitions identify ancestors who

---

38 Gover, above n 6.

39 Weiner and Glaskin, above n 19, 1, 9-10; Nancy M Williams "The Relationship of Genealogical Reckoning and Group Formation: Yolngu Examples" in JD Finlayson, B Rigsby and HJ Bek (eds) *Native Title: Genealogies, Kinship and Groups* (Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 1999) 129-130. See also Dan Jorgensen "Clan-Finding, Clan-Making and the Politics of Identity in a Papua New Guinea Mining Project" in Weiner and Glaskin, above n 19, 57, 63.

exercised customary rights in the tribal "area of interest from 1840" (the date the Treaty of Waitangi was signed).[40] In Australia, the community must show that it "has continued to exist [since sovereignty was asserted] as a body united by its acknowledgment and observance of the laws and customs".[41]

In both countries, the transition from pre- to post-settlement community can involve the "shedding" of non-descendants from the self-description of the tribe. The prioritisation of descent can have the effect of denying affiliations that are derived from non-descendant ancestors, including non-indigenous ancestors[42] or ancestors distinguished by their "recent" (post-contact) migration to the claimed territory.[43] The New Zealand Law Commission has observed, apparently without condemning the change, that "[w]hile traditionally, for Māori, involvement in, and contribution to, society were paramount to issues of entitlement, today's reality is that only whakapapa can be the basis for inclusion in the settlement group."[44] More recently, the Law Commission has explained that even while tribes have the right to determine their own membership (at paragraph 4.61),[45] nonetheless:[46]

> Where Treaty settlement assets are involved, the assets should be held for the benefit of all who *descend* from the tribal members who were affected by the act that gave rise to the claim. No proven descendant can be excluded.

This approach, followed by the New Zealand Crown in its Treaty of Waitangi settlement policy, ensures the legal entitlements of descendants but has nothing to say about the entitlement of non-descendant cultural affiliates including, importantly, spouses and adopted children. Nor does it offer an account of descent that could accommodate persons incorporated into the descent structure of the group in accordance with custom and thereby designated as descendants for tribal purposes.

Some of these changes are evident in the subset of New Zealand tribes for whom multiple constitutional iterations are available. Among this small group of tribes, there is an observable

---

40 Office of Treaty Settlements *Healing the Past, Building a Future*, above n 11, 47.

41 *Members of the Yorta Yorta Aboriginal Community v Victoria and Others* (2002) 194 ALR 538, para 89 (HCA) Gleeson CJ, Gummow and Hayne JJ [*Yorta Yorta v Victoria*].

42 Fiona Powell "Generation and Gender Differences in Genealogical Knowledge: The Central Role of Women in Mapping Connection to Country" in Finlayson, Rigsby and Bek, above n 39, 58, 63.

43 Julie Lahn "Native Title and the Torres Strait: Encompassment and Recognition in the Central Islands" in Smith and Morphy, above n 22, 135, 145.

44 New Zealand Law Commission *Treaty Of Waitangi Claims: Addressing the Post-Settlement Phase* (NZLC SP13, Wellington, 2002) para 53.

45 New Zealand Law Commission *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC R92, Wellington, 2006) para 4.61 [*Waka Umanga*].

46 Ibid, para 4.79 (emphasis added).

reduction over time in the frequency of references to members or beneficiaries who are non-descendants. This manifests within their constitutions as a shift from descriptions of the tribal community as a class of persons, to the specification of criteria used to identify each qualifying individual. Ngapuhi, for example, has amended the membership provisions of the Te Runanga a Iwi o Ngapuhi constitution five times since the tribe was first incorporated in 1989. The changes show a transition from a nominal description of the community, to a description of the class of beneficiaries, to rules in which official membership and voting status is affirmed for each registered member. The original form of the constitution made no explicit reference to either beneficiaries or members: "All persons living in Aotearoa of Ngapuhi descent and affiliated to Ngapuhi Marae who have indicated an intention to support the aims and objectives of the Trust may attend general meetings of the Trust and may vote on matters considered by the Trust at general meetings."[47] In 2002, the tribe introduced the concept of community membership based on descent from the eponymous ancestor.[48] In the most recent version of the constitution, revised in 2005, the membership of the group is defined in accordance with a template clause provided to recipients of fisheries assets under the pan-tribal fisheries settlement:[49]

> "Members of Ngapuhi" means persons who affiliate to Ngapuhi through descent from a primary ancestor and affiliate to Marae/Hapu within Te Whare Tapu o Ngapuhi or persons who are whangai.

Importantly, the transition from community models to membership models involves the shedding of voluntaristic terminology from tribal constitutions. In order to qualify as descendants, members must demonstrate their ancestral ties to the group, rather than show a commitment to the tribe and its purposes. As with Ngapuhi, the Ngāti Koata constitution shows a transition of this kind. In 1987, the constitution recorded that "[m]embership of the Trust shall be open to any person who is sympathetic and actively supportive of the objects of the Trust."[50] This was changed in 1996 to "[a]utomatic Membership is given to those who can prove that they are of Ngāti Koata descent."[51]

---

47 Te Runanga a Iwi Ngapuhi Trust Board Deed of Trust 1989 (Doc No C-NZ-6-A, on file with author). The second iteration of the membership provision, enacted in 1995, established a very broad class of persons entitled to benefit from the operations of Te Runanga, including "all members of the community" and particularly "all tangata whenua resident in Aotearoa (New Zealand) and members of an existing Ward (takiwa) or constituency of Te Runanga A Iwi O Ngapuhi." Te Runanga a Iwi Ngapuhi Trust Board Deed of Trust 1995 (Doc No C-NZ-6-B, on file with author) cl 9.

48 Te Runanga a Iwi o Ngapuhi Constitution 2002 (Doc No C-NZ-6-C, on file with author) cl 4.1. "'Community Members' means the descendants of Ngapuhi who belong to any Constituent Community, also being beneficiaries of the Charitable Trust". "'Constituent community' means any marae that is eligible to elect representatives to a Takiwa and any community that forms a Taurahere."

49 Te Runanga a Iwi o Ngapuhi Charitable Trust Deed 2005 (Doc No C-NZ-6-E, on file with author) cl 1.1.

50 Constitution of Ngāti Koata no Rangitoto ki te Tonga Trust 1989 (Doc No C-NZ-42-A, on file with author).

51 Constitution of Ngāti Koata no Rangitoto ki te Tonga Trust 1996 (Doc No C-NZ-42-D, on file with author) cl 2(a).

Likewise, multiple iterations of tribal constitutions show that residence rules are often removed by tribes in constitutional amendment. Residency rules are typical of "older constitutions" stating that the purpose of the entity is to serve all residents or the local "Māori community" of a particular region. Formulations of this kind have become less common as tribal governance has evolved, particularly as the policy on settlements requires tribes to register beneficiaries "wherever they reside."[52] Only one tribe that has been recognised for Treaty of Waitangi settlement purposes has elected to include a generic reference to non-descendant residents (Ngāti Kahungunu), and then only to accord those persons limited participatory rights.[53] In contrast, of the 11 "oldest" New Zealand tribal constitutions in the data set (those in existence prior to 1990 and unamended since then), three include non-descendant Māori resident in the tribal territory.[54] The provision in the Whanganui River Māori Trust Board Deed of Trust (Te Atihaunui a Paparangi), relating to tribal membership, is illustrative:[55]

> The descendants of the hapu of Tama Upoko, Hinengakau and Tupohi who form the Ati-haunui-a-paparangi iwi together with members of the wider Māori community ("the Beneficiaries") living together within the iwi boundaries of Ati haunui a-Paparangi and/or the area of operation of the Board.

The status of non-residents in tribal politics is a major source of tension in tribal politics and governance. Descent rules "override" residency, by admitting persons to the group who have not lived on the claimed territory and so have no regular interaction with the resident segment of the tribal community. The introduction of descent rules in the claims process can reduce the political authority of the "interactive community" of the tribe, who are responsible for exercising traditional guardianship roles and for maintaining the ahi kaa (home fires) of the iwi. Local residents complain

---

52 Māori Fisheries Act 2004, s 12(1)(a). Tribes seeking to constitute a Mandated Iwi Organisation (MIO), which is the iwi body which receives fisheries assets from the Crown, must comply with the constitutional-design criteria of the Māori Fisheries Act, including the requirement that the MIO "act for the benefit of all the members of the iwi, irrespective of where those members reside."

53 The constitution of the Ngāti Kahungunu MIO includes a generic class of Māori resident members called "Nga Maata Waka" members, who have restricted membership rights. Constitution of Ngāti Kahungunu Iwi Inc 2003 (Doc No C-NZ-7-D, on file with author) cl 6.4.1.

54 Te Runanga o Te Rarawa Deed of Trust 1988 (Doc No C-NZ-25-A, on file with author) cl 2: "Te Iwi o te Rarawa are the people who descend from a tupuna of Te Rarawa and also those Māori people who consider themselves to be of Te Rarawa who are living in the rohe of Te Rarawa." See also Ngāti Kahungunu's "first" constitution: Rules of the Runanganui o Ngāti Kahungunu Inc 1988 (Doc No C-NZ-9-A, on file with author) cl 4.1: "Membership of the Runanganui shall be to those Māori people claiming descent from Kahungunu or any Māori person resident within the traditionally defined boundaries of the iwi named Ngāti Kahungunu." One of the pre 1990 constitutions includes honorary members, and another incorporates spouses. See respectively Te Runanga a Rangitane o Wairau Inc 1988 (Doc No C-NZ-18-A, on file with author) cl 5(a)-(b); and Rules of the Runanga o Toa Rangātira Inc 1988 (Doc No C-NZ-2-A, on file with author) cl 4.1.

55 Whanganui River Māori Trust Board Deed of Trust 1988 (Doc No C-NZ-24-A, on file with author) cl i.

that they are sometimes swamped by non-resident descendants in tribal decision-making processes.[56] Commentators have expressed some sympathy with the position of resident members, noting the association of non-residency with opportunism and cultural inexperience.[57] The New Zealand Law Commission has recently agreed that "tribal descendants who have shown no primary commitment to the tribe may have too great a say in the conduct of its affairs".[58] Emphasising the negative effect that "cultural ignorance or disregard has on the maintenance of traditional hapū values and rules for decision-making and dispute resolution", the Commission observes that "[t]here is little room for traditional mechanisms to operate when nominal members attend at a marae and either do not know the rules or choose to ignore them."[59]

Those few tribal residency statistics that are publicly available give some indication of the demographic import of tribal non-residence. Ngai Tahu, for example, a tribe with a very large rohe (traditional territory), reports that only 38 per cent of registered members live within the rohe and 15 per cent give no address.[60] Ngapuhi, the largest tribe in New Zealand, reports that 80 per cent of its members live outside its territory[61] and for Ngaa Rauru the figure is 82 per cent.[62] Ngāti Mutunga reports that 75 per cent of its registered members live outside the Taranaki region, of which its territory is a small part.[63] If those statistics are typical for most tribes (data of this kind is not officially collected) it means in effect that "full" rights of membership are sometimes claimed by a very small proportion of a tribe's total membership. Correspondingly, resident members are vastly outnumbered in democratic processes that allow absentee voting, as is required by settlement legislation.

As the above discussion indicates, while descent rules are favoured because they establish continuity, they can have transformative impacts on tribal demographics and internal politics. They do so by introducing persons into the formally defined tribal community whose cultural membership

---

56 New Zealand Law Commission *Waka Umanga*, above n 45, para 4.65. See also the discussion of the challenges faced by Ngāti Tama in its management of dissent from more urban members of the tribe during the mandating process, in Crown Forestry Rental Trust *Māori Experiences of the Direct Negotiation Process* (Crown Forestry Rental Trust, Wellington, 2003) 18-20.

57 Crown Forestry Rental Trust *Māori Experiences of the Direct Negotiation Process,* ibid, 9-10.

58 New Zealand Law Commission *Waka Umanga*, above n 45, para 4.65.

59 Ibid.

60 Te Runanga o Ngāi Tahu *Annual Report 2007* (Christchurch, 2007) 26.

61 Te Puni Kokiri *Case Study: Te Runanga a Iwi o Ngapuhi* <www.governance.tpk.govt.nz>(last accessed 17 April 2010).

62 Hayden Potaka, Tumu Whakarae, Te Kaahui o Rauru, to the author (19 February 2008) Email (on file with author).

63 Ngāti Mutunga website <www.ngatimutunga.iwi.nz> (last accessed 17 April 2010).

may be in question (including members of resistant "sub-groups", non-residents and adopted children). They also seem to encourage the exclusion of cultural affiliates who cannot show descent. While there is considerable agreement between New Zealand tribes and the Crown on the importance of descent as an ordering principle of tribalism, they often disagree on its implementation and its consequences. The following section examines the various concepts of descent operating in settlements policy.

A Māori-ness and Membership in New Zealand: Debates about Descent in the Treaty Settlements Arena

This section examines more closely the relationship between the concept of "beneficiary" and "member". This distinction is likely to become of increasing importance as tribal governance evolves away from its link with Treaty of Waitangi settlements. The constitutions of New Zealand TSEs contain a definition of the beneficiaries of the settlement. This gives effect to the claimant definition that is agreed to in negotiations with the Crown and included in the Deed of Settlement and implementing legislation. The Crown's position is, however, that the claimant definition does not bind the community in post-settlement membership governance, provided all those persons identified in the definition are able to vote in the initial ratification of the constitution:[64]

> Settlement legislation does not prevent the group [from] amending the beneficiary definition at some time after settlement. Such a change would have to occur in accordance with the constitutional documents of the governance entity. The Crown does not have a role in the internal affairs of the governance entity (including any proposal to amend the definition of the beneficiary group).

Andrew Hampton, former Chief Executive Officer of the Office of Treaty Settlements, concedes that there is some ambiguity on this point, since a tribe cannot unilaterally alter the definition of the beneficiary included in settlement legislation or the deed, even if it is free to amend its constitution. Further, those groups constituted under private legislation (Ngāti Awa and Ng$^{\bar{a}}$i Tahu for example), whose constitutions are set out in the TSE legislation, cannot unilaterally amend their constitutions at all. It is more accurate to say, then, that tribes can alter the consequences of beneficiary status by amending their tribal constitution, but they cannot assign or revoke beneficiary status, since this is a product of the legal settlement of the claim. A tribe cannot "unsettle" a person or group's claim, and cannot cause the "settlement" of any person's claims, for instance by including them within the

64 Paul James, Director, Office of Treaty Settlements, New Zealand, to the author (2 May 2006) Letter (on file with the author).

beneficiary definition in their constitution.[65] Those matters are legislatively determined. The consequence of constitutional amendment, then, could be the creation of a class of legal beneficiaries who have no way to "benefit" from the settlement of their claims. They would be beneficiaries in law, but not in fact.

The flexibility accorded to tribes to enrol non-descendants and exclude descendants depends on the distinction made in public law and policy between tribal members and "beneficiaries". Membership is determined by tribes, but beneficiary status is conferred by legislation. The uneasy relationship between the two categories can be illustrated by reference the indeterminacy of law giving effect to the 1992 pan-tribal settlement of Māori claims to commercial fisheries.[66]

As in individual Treaty of Waitangi settlements, the documents giving effect to the fisheries settlement show some ambiguity about the relationship between beneficiaries of the settlement and members of tribes. The Deed of Settlement identifies the beneficiaries as "all Māori".[67] The identification of the Māori collectives who were entitled to represent "all Māori" was the subject of protracted litigation prior to the passage of the implementing legislation, and involved a series of challenges from non-tribal Māori groups claiming the right to receive assets or otherwise benefit from the settlement.[68] Te Ohu Kaimoana (the body tasked with distribution of fisheries assets after settlements have been reached) eventually succeeded in its efforts to have "iwi" designated as the proper recipients of fisheries assets, while making some provision for the funding of non-tribal participation in the fishing industry. The Māori Fisheries Act 2004, implementing the settlement, accordingly defines the beneficiary as "iwi and, through iwi, ultimately all Māori".[69] By

---

65 Interview with Andrew Hampton, former CEO of the Office of Treaty Settlements (Kirsty Gover, in Wellington, New Zealand, 14 March 2006): "It's quite conceivable that the tribe can, post-settlement in accordance with the rules of the charter, change or amend their governance entity … including the definition, they could make it a wider definition but those other people wouldn't under the legislation be beneficiaries of the settlement or have their claims settled, but there's no reason why the tribe couldn't distribute benefits to them. The Crown is completely okay with what they do post-settlement as long as it's in accordance with the charter."

66 Deed of Settlement "Her Majesty the Queen and Māori" (1992), above n 6.

67 Deed of Settlement "Her Majesty the Queen and Māori" (1992), above n 6, cl 4.5.1: "Māori agrees [sic] that the settlement evidenced by this Settlement Deed of all the commercial fishing rights and interests of Māori ultimately for the benefit of all Māori [sic]."

68 See, inter alia, *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA); *Te Runanga o Muriwhenua and others v Treaty of Waitangi Fisheries Commission* [1996] 3 NZLR 10 (CA); *Te Runanga o Muriwhenua Inc and others v Attorney-General* [1990] 2 NZLR 641 (CA); and *Thompson v Treaty of Waitangi Fisheries Commission* [2005] 2 NZLR 9 (CA).

69 Māori Fisheries Act 2004, s 5. The Act does however, make express reference to the capacity of MIOs to confer benefits on third parties, specifically, on "(a) Māori who are not members of the iwi (b) the community generally." As a practical matter, a tribe could make provision for non-members as third parties. Those persons would not, however be legal beneficiaries of the settlement. Māori Fisheries Act 2004, s 5, Kaupapa 26.

implication, "all Māori" are to be represented for the purposes of the settlement by Mandated Iwi Organisations (MIOs), the representative institutions of recognised tribes which receive the assets. These institutional arrangements assume the coincidence of the two constituencies identified in the settlement instruments: "Māori" and "tribal members". They do not easily accommodate persons who are in one category but not the other, for instance non-Māori beneficiaries who are iwi members (such as legally adopted children) and Māori who are not iwi members. The two constituencies are created by the slippage between official and tribal concepts of descent, and by the use of the concept of "descent", notwithstanding its indeterminacy, as the mechanism for the identification of settlement beneficiaries. The categories of excluded persons are discussed in turn below.

While it has generated a significant body of analysis directed at the question of what constitutes an iwi, discourse on the fisheries settlement has not engaged with the way in which individual Māori come to be beneficiaries of that settlement. It seems clear at least that a non-Māori person (a person who is not a "member of the Māori race of New Zealand" or a "descendant of such a person", including the adopted child of a Māori person)[70] could not be a legal beneficiary of the settlement, even if they are enrolled as a member of an iwi. However, the extent to which tribes are obliged to enrol beneficiaries is uncertain.

The Crown's stance on this point is ambiguous. According to government policy, "individual Māori do not belong to the MIO as members, but are members of an iwi that the MIO represents for the purposes of the management of the Fisheries Settlement interests."[71] The MIO is not "the iwi", but the mandated representative of that iwi, and "[i]t is a matter for the iwi, not the MIO (or the Government), as to who is a member of the iwi."[72] However, as discussed above, membership is defined in the Fisheries Act 1996. A tribal member is "a person who affiliates to the iwi through descent from a primary ancestor of the iwi or a person granted that status in accordance with [the Act]." On its face, then, the Fisheries Act obliges MIOs to register all descendants as beneficiaries, because all descendants are legislative "members" for settlements purposes. In any case, MIOs are required by the Act to "make ongoing efforts to register all iwi members".[73] As it currently stands, the fisheries settlement apparently prevents an MIO from narrowing the membership class by refusing to register a descendant. They can, however, elect to exercise a degree of tribal discretion in deciding whether non-descendants should be members. Much turns, then, on the meaning of "descent".

---

70 Māori Fisheries Act 2004, s 5.

71 Hon Jim Anderton, Minister of Fisheries, New Zealand, to the author (25 January 2006) Letter (on file with author).

72 Ibid.

73 Māori Fisheries Act 2004, schedule 7, Kaupapa 5(c).

This indeterminacy has real-world consequences. First, one in five persons identifying as Māori in the national census reported that they did not know from which iwi they were descended. The "all-Māori" category is established through self-identification, but the "iwi member" category is established by tribal law and policy. There is an immediate shortfall between the larger class of Māori and the smaller class of iwi members. Secondly, some self-identifying Māori can be expected not to register, even if they are aware of their iwi genealogy. If too few Māori register as iwi members, then the legitimacy of the settlement is compromised. The logic of the "through iwi, all Māori" framing, itself a compromise reflecting years of debate and litigation, is unconvincing if only a small minority of Māori had any prospect of benefiting from the settlement. What then would be a reasonable proportion for settlements purposes? Te Ohu Kaimoana ultimately decided that in order to receive assets, an iwi organisation must register a named minimum proportion of the "notional iwi population".[74] The minimum proportion required is based on the number of persons identifying as iwi affiliates in the national census and the size of the group relative to other iwi. The minimum total number of persons who would have to be registered in order for all entities to receive assets is approximately 22 per cent of the total notional iwi population.[75] This suggests that for public policy purposes, if one in five self-identifying Māori were registered as iwi members, the settlement would benefit "all Māori".

In addition to the friction between the classes of "all Māori" and "iwi members" that determines the scope and effect of the settlement, principles of whakapapa, legal descent and legal adoption also collide in the settlement instruments. These tensions are evident in disputes about the tribal membership and beneficiary status of legally adopted children. The issue of legal adoption, while it has very local and discrete consequences, is also among those issues that act as a touchstone in debates about the purpose and structure of Treaty settlements and the reach of tribal self-governance. Politically, the matter implicates the authority of the tribes to assert and enforce custom in their internal governance.

This question has arisen as a major point of contention in the negotiation of individual historic Treaty settlements and in parliamentary debates on Treaty settlement legislation. The Crown's position is that Treaty settlement legislation must be subordinated to the Adoption Act 1955, the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990 and cannot be used to allow

---

74 Te Ohu Kaimoana uses a measure called "the total notional iwi population", which it calculates to be 679, 154 persons. This figure is 12.4 per cent greater than the total number of persons recording Māori ancestry in the 2001 census (526, 281) because of prevalence of multiple membership: some people affiliate to more than one iwi and are eligible to register with both. Te Ohu Kai Moana *He Kawai Amokura: A Model for Allocation of the Fisheries Settlement Assets: Report to the Minister of Fisheries* (Te Ohu Kai Moana, Wellington, 2003) 38.

75 If the minimum required registered population for each iwi is added together, the total figure is 148, 310. This is approximately 22 per cent of the total notional iwi population of 679, 154 persons.

tribes to make distinctions between biological descendants and adopted persons.[76] The Crown Law Office has advised that the inclusion of a provision in settlement legislation that allowed the exclusion of legal adoptees from beneficiary rolls could be contrary to the Bill of Rights Act.[77] Tribes are generally very resistant to any intervention touching on whakapapa, which lies at the core of the tribal customary legal order.[78] As a result, the status of legal adoptees was a central issue in the discussion of four of the most recently concluded settlements, involving the claims of Ngāti Mutunga,[79] Ngāti Tuwharetoa,[80] Ngāti Awa[81] and Ngaa Rauru.[82] Māori and non-Māori members of Parliament debated the ethics of including in the settlement legislation measures designed to override whakapapa by including legal adoption in the definition of descent. Outcomes have varied. The legislation enacting the Ngāti Mutunga, Taranaki Whānui ki Te Upoko o Te Ika and Ngāti Awa

---

76 Office of Treaty Settlements "Report to Minister on Ngaa Rauru Deed of Settlement: Revised Timeframes" (20 June 2003) Brief to Minister in Charge of Treaty of Waitangi Negotiations (on file with author); Office of Treaty Settlements "Report to Minister Ngaa Rauru Claimant Definition: Overriding Adoption Act 1955" (25 June 2003) Brief to Minister in Charge of Treaty of Waitangi Negotiations; Minister in Charge of Treaty of Waitangi Negotiations, to Kaiwhakahaere, Ngaa Rauru Iwi Authority (1 July 2003) Letter (on file with author); Minister in Charge of Treaty of Waitangi Negotiations, to Kaiwhakahaere, Ngaa Rauru Iwi Authority (17 September 2003) Letter (on file with author); Director, Office of Treaty Settlement, to Ministry of Fisheries (22 June 2004) Letter (on file with author).

77 Office of Treaty Settlements "Consistency of Proposed Adoption Act 1955 Provisions of the Māori Fisheries Bill with Treaty Settlements" (19 July 2004) Brief to Minister in Charge of Treaty of Waitangi Negotiations (on file with author) para 8.

78 Office of Treaty Settlements "Report to Minister on Ngaa Rauru Deed of Settlement: Revised Timeframes", above n 76; Office of Treaty Settlements "Report to Minister Ngaa Rauru Claimant Definition: Overriding Adoption Act 1955", above n 76; Interview with Mike Neho, Chairman, Ngaa Rauru (Kirsty Gover, 12 March 2006) (on file with author); Interview with Anake Goodall, Chief Executive, Te Runanga o Ngāi Tahu (Kirsty Gover, 23 March 2006) (on file with author).

79 "The Office of Treaty Settlements, the Crown, requires that Ngāti Mutunga tikanga be overridden by a number of Acts, including the Adoption Act. … We have come to accept that this will become part of settlements, but it does not mean to say that we all like it." Hon Georgina Te Heu Heu, Ngāti Mutunga Claims Settlement Bill (6 November 2006) 635 NZPD 6369. See also Māori Affairs Select Committee "Ngāti Mutunga Claims Settlement Bill Commentary" (26 October 2006) 24: "Some of us are increasingly frustrated at the insistence that Government policy, on issues such as the definition of iwi, takes precedence over the tikanga of iwi. Some of us consider that tikanga should take preference in such matters, enabling iwi to define themselves in their own terms."

80 Nanaia Mahuta, Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Bill (5 April 2005) 624 NZPD 19598; Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Bill (3 May 2005) 625 NZPD 20188.

81 Ngāti Awa Claims Settlement Bill (1 March 2005) 623 NZPD 18805.

82 Rauru Kiitahi Claims Settlement Bill (21 June 2005) 627 NZPD 21779. See also the Māori Affairs Select Committee "Ngaa Rauru Kiitahi Claims Settlement Bill" (10 May 2005) 8-9.

settlements define descent to include legal and customary adoptees, while the acts for Ngaa Rauru, Ngāti Tuwharetoa, Ngāti Ruanui, Ngāti Tama and Te Roroa make no such reference.[83]

Outside of the legislative regime, several tribes have vehemently asserted their right to determine tribal membership by reference to whakapapa independently of non-discrimination law or Crown policy. Ng$^{\bar{a}}$i Tahu, for example, explains its policy on adoption as follows: "[t]he policy remains that enrolments are only accepted from direct bloodline descendants of the Kaumatua in the 1848 Ngāi Tahu Census. Adopted persons are therefore not eligible to enrol as Ngāi Tahu beneficiaries unless they are of Ngāi Tahu descent."[84] Ngaa Rauru and Te Roroa have succeeded in having statements asserting the dominance of whakapapa over adoption law included in their Deeds of Settlement.[85] Importantly, at the insistence of the Crown, these statements about whakapapa are not reflected in the definition of beneficiary included in the relevant settlement legislation, which refers only to descendants. The view of the Crown Law Office is that the statement included in the Ngaa Rauru Deed of Settlement has no legal effect.[86]

According to the Crown then, whatever the meaning ascribed to whakapapa by tribes, it does not impact on the legal definition of beneficiary included in the settlement legislation. The constitutions of TSEs are subject to approval by the Crown and must also be consistent with settlement legislation. During the drafting and approval of the Ngaa Rauru constitution, claimant representatives sought to designate legally adopted persons as members of a class of persons known as taurima, who would have only limited rights as members of the tribe.[87] The Crown refused to

---

83 Ngāti Awa Claims Settlement Act 2005, s 13(4): "For the purposes of the definitions of Ngāti Awa and Ngāti Awa tipuna, a person is descended from another person if the person is descended from the other person by— (a) birth; or (b) legal adoption; or (c) Māori customary adoption in accordance with the custom of Ngāti Awa"; and Ngāti Mutunga Claims Settlement Act 2006, s 13(2). Compare the Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, Ngāti Ruanui Claims Settlement Act 2003, Ngāti Tama Claims Settlement Act 2003; and Te Roroa Claims Settlement Act 2008.

84 Ngāi Tahu refers readers of its website to the membership provisions in its settlement entity Act, Te Runanga o Ngāi Tahu Act 1996: www.ngaitahu.iwi.nz/Whakapapa-Registration/Registration-Information.php (last accessed 26 April 2010).

85 See also Deed of Settlement of the Historical Claims of Te Roroa 2005 (Doc No DS-NZ-55-A, on file with author) cl 1.5.1: "Te Roroa wish to place on record that they consider that adoption does not confer whakapapa." See also Deed of Settlement of the Historic Claims of Ngaa Rauru Kiitahi 2003 (Doc No DS-NZ-4-A, on file with author) cl 1.11: "Ngaa Rauru Kiitahi wishes to place on the record that it considers it is for Ngaa Rauru Kiitahi, in accordance with Ngaa Raurutanga, to determine who is a member of Ngaa Rauru Kiitahi. Ngaa Rauru Kiitahi considers that: … Ngaa Uki o Ngaa Rauru Kiitahi is determined by whakapapa; and … adoption does not confer whakapapa on an individual."

86 Office of Treaty Settlements "Te Roroa and the Adoption Act" (30 June 2005) File note (on file with author).

87 Office of Treaty Settlements, to Ngaa Rauru "Comment on Te Kawa o te Kaahui o Rauru – 20 questions" (27 September 2003) Letter (on file with author); Office of Treaty Settlements, to Ngaa Rauru "Comment on Draft 6 of Te Kawa o Te Kaahui o Rauru" (11 October 2004) Letter; Office of Treaty Settlements, to Ngaa

approve the constitution, insisting instead that its terms reflect the settlement legislation by including legally adopted persons in the category of uri (descendants) and therefore as beneficiaries of the settlement. The class of taurima now identified in the Ngaa Rauru constitution refers to whangai (customarily adopted children), who are not descendants in the terms of the Act and so can be excluded in accordance with tribal policy.[88]

The status of adopted children was likewise a major source of contention between officials of the Crown and Te Ohu Kaimoana during the drafting of the Māori Fisheries Act 2004.[89] As it has done since in individual Treaty settlements, the Crown argued strongly that legally adopted persons should be beneficiaries of the settlement in the same way as blood descendants, while Te Ohu Kaimoana argued, as tribes have done in settlement negotiations, that the "settlement was a tribal one and therefore someone who did not descend from the iwi shouldn't be able to receive a benefit."[90] During the passage of the Bill, the relevant Select Committee requested that the Bill be amended to allow iwi to exclude legally adopted persons from the register.[91] Such an amendment could have resulted in a discrepancy between the status of adoptees in tribe-specific historic settlements and the status of adoptees in the pan-tribal fisheries settlement, perhaps prompting other tribes to argue for amendments to their settlement legislation.[92] Provisions for whangai were made in the Act as a compromise, but the uncertainty continues. Not all whangai are legally adopted, and not all legal adoptees are regarded by the tribe as whangai, as a matter of custom. Whangai who are not legally adopted and who are not descendants of tribal ancestors cannot be legal beneficiaries of the settlement unless provision is made in the relevant legislation for their inclusion in accordance with tikanga. Some tribe-specific settlement Acts make reference to the inclusion of whangai within the beneficiary class (for example the Ngāti Awa Claims Settlement Act 2005) and others do not.

The status of whangai and the content of the customary law concept itself is a matter squarely at the intersection of public and tribal law on membership. In the end, the Māori Fisheries Act 2004 makes allowance for the inclusion of whangai as iwi members. For the purposes of the Act, a member of an iwi is "a person who affiliates to the iwi through descent from a primary ancestor of

---

Rauru "Comment on Draft 8 of Te Kawa o Te Kaahui o Rauru" (21 October 2004) Letter; Office of Treaty Settlements "Ratification of Ngaa Rauru Governance Entity" (3 November 2004) Brief to Minister in Charge of Treaty of Waitangi Negotiations (on file with author).

88 Constitution of Ngaa Rauru 2006 "Te Kawa o te Kaahui o Rauru" (Doc No C-NZ-4-E, on file with author) cl 1.1.

89 Tamapara Lloyd, General Counsel, Te Ohu Kaimoana, to the author (4 March 2008) Email (on file with author).

90 Ibid.

91 Office of Treaty Settlements "Consistency of Proposed Adoption Act 1955 Provisions of the Māori Fisheries Bill with Treaty Settlements", above n 77, para 7.

92 Ibid.

the iwi, or a person granted that status [in accordance with the Act]."[93] Iwi are also obliged by the Act to set out in their constitutional documents rules specifying the "rights of whangai or other persons who do not descend from a primary ancestor of the iwi."[94] "Whangai" is defined as "as a person *adopted by a member of an iwi* in accordance with the tikanga of that iwi, but who does not descend from a primary ancestor of the iwi."[95] This provision was inserted by the select committee late in the passage of the Bill, replacing an earlier definition of whangai as simply a "person adopted into an iwi" (with no mention of adoption by a tribal member).[96] The question remains as to whether persons who are not descendants by law or custom (such as a spouse) can be regarded as beneficiaries of the settlement. If they are, the implication is also that they are included in the class of "all Māori" for whose claims have been settled.

Notwithstanding its opacity, the language used suggests that the Crown's intent is to capture in the beneficiary definition all descendants including legally adopted persons and whangai, but to prevent the conferral of beneficiary status on non-descendants associated with the tribe. Tribes may in any case confer benefits on members who do not fall within the legally defined beneficiary class, in the same way that they may confer benefits on any person. In turn, tribes are concerned to maintain as much discretion in the operation of membership governance as possible, including the unconstrained right to accept or reject non-descendants as members and to define whakapapa and its consequences as they historically have done.

In summary, in New Zealand, recognised tribes are able to include as members persons who would not qualify as beneficiaries, although they must include all legally qualified beneficiaries (including legally adopted persons), at least until such time as the tribal constitution has been validly amended. There is some acknowledgment that persons can become legal beneficiaries by virtue of customary adoption, provided, it seems, they are Māori. Australian native title groups have far less discretion. The following section discusses the constraining role played by descent in the

---

93 Māori Fisheries Act 2004, s 5.

94 Māori Fisheries Act 2004, schedule 7, Kaupapa 6(2).

95 Māori Fisheries Act 2004, s 6(2) (emphasis added).

96 Fisheries and Other Sea-related Legislation Committee Report "Māori Fisheries Bill" (9 August 2004) 249. An earlier version of the Kaupapa rules proposed by Te Ohu Kaimoana restricted participation rights to descendants by whakapapa, and specified that "[a]ll issues relating to whangai should be entirely determined according to the tikanga of each Iwi", omitting any reference to non-whangai, non-descendant tribal members. Compare section 13(2) of the Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, which defines whangai as "a Māori who is recognised as Ngāti Tuwharetoa (Bay of Plenty) in accordance with Ngāti Tuwharetoa (Bay of Plenty) tikanga (customary values and practices)." In addition, the relevant provision in the template Constitution provided by Te Ohu Kaimoana to iwi to assist their constitutional design invites tribes to specify whether whangai are included as members, but makes no reference to any "other persons" mentioned in the Act: Te Ohu Kaimoana *Draft Deed of Trust Template for Mandate Iwi Organisations* (2006) cl 3.1.

constitution of native title holding communities in Australia and the constraints under which RNTBCs operate in giving effect to membership governance.

IV COMPETING OFFICIAL AND TRIBAL CONCEPTS OF DESCENT: AUSTRALIA

The pressure on Australian native title claimants to define themselves as descent groups begins when they register their claim with the National Native Title Tribunal. In order to register a native title claim under the Native Title Act 1993 (the Act), the Registrar must be satisfied that the persons in the claim group are either named in the application (on a membership list) or are "described sufficiently clearly so that it can be ascertained whether any particular person is in that group."[97] Guidelines issued by the National Native Title Tribunal include examples of how a group might illustrate an "objective way of verifying" the members of the claim group.[98] Three examples are offered: naming ancestors; describing families by reference to apical ancestors (including reference to the status of spouses and adoptees); or including a family tree or genealogical chart in the application.[99] The guidelines also stress that the applicant group should explain, though anthropological reports or affidavits, how adoptions are carried out and also whether criteria other than descent, or in addition to descent, are used to determine membership.[100]

The registration test has proved controversial. Groups that opt to describe a set of membership rules rather than provide an "exhaustive list" of members are required to explain those rules in sufficient detail to meet the Registrar's requirement for "objectivity".[101] In practice, this has entailed an explanation of the methodology used by the groups for allocating membership, in essence a statement of customary law:[102]

> In the early stage of the registration test process, some claimant groups sought to include those who had married into the group. This was deemed by some Delegates not to meet the criteria of 'objectivity'. A second category, adoption, was also not sufficient alone, and a description of the rules for adoption was required as well. A third category, that of people who have historical and cultural connection to country

---

97 Native Title Act 1993, s 190B(3) (Cth). See also Federal Court Of Australia, District Registry, Form 1: Native Title Determination Application (undated, on file with author): "Schedule A: The names (including Aboriginal names) of the persons (the native title claim group) on whose behalf the application is made or a sufficiently clear description of the persons so that it can be ascertained whether any particular person is 1 of those persons."

98 National Native Title Tribunal "Preparing Your Application for the Registration Test" (2004) 6.

99 Ibid, 6-7.

100 Ibid, 8. If some descendants are to be excluded (for instance if they are properly assigned to another relative's country), applicants are advised to specify how the exclusion is managed.

101 Grace "Claimant Group Descriptions: Beyond The Strictures Of The Registration Test", above n 8, 1.

102 Ibid.

included in the claim area, was also an option. Some groups chose to include the second and/or third categories in their claimant group descriptions while others did not.

The stringency of the test is explained in part by the rules introduced by the 1998 amendments to the Act which govern cross-claims. These prevent the registration of a claim to the "same area under traditional law and custom"[103] if the group refers to a person already included in a prior registered claim.[104] Claimants faced with the possibility of membership overlap must either redraw the boundaries of claimant group to emphatically include or exclude the person(s) in question, or act quickly to be the first claimant group to register the claim, thereby excluding contenders.[105] At least one Federal Court judge has pointed out that the necessity of redrawing claimant boundaries in this way is an element of the Act that may be in tension with the operation of traditional law and custom.[106] Faced with such stringent registration rules, groups are more likely to opt for self-description based on descent because these criteria are relatively "self-explanatory" and "self-executing", and so are more likely to pass the Registrar's standard of objectivity.

The objectivity of descent rules also assists the groups that use them to comply with the continuity tests they must meet in order to show requisite connection to territory for a successful determination. According to the Australian High Court, "[n]ative title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law."[107] Australian jurisprudence has limited the content of "recognisable" native title rights to those held in accordance with "traditional laws and customs".[108] The continuity test, then, requires that only those rights and interests that are "*possessed* under traditional laws acknowledged and traditional customs observed by the peoples concerned"[109] are susceptible to recognition.[110] Significantly for

---

103 Stephen Sparkes, Manager Legal Services, National Native Title Tribunal, to the author (19 October 2007) Email (on file with author).

104 Native Title Act 1993, s 190C(3) (Cth). See also the discussion in *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31, para 31 (FCA) Lindgren J [*Harrington-Smith*].

105 Ibid.

106 *Harrington-Smith*, ibid, para 280 (FCA) Lindgren J: "There was some evidence about choice as to which parent to follow for country, but forcing people to be in one or the other Claim group is something different, and arises out of s 190C(3) of the NTA."

107 *Fejo and Mills v Northern Territory* (1998) 195 CLR 96, cited in *Yorta Yorta v Victoria*, above n 41, para 31 (HCA) Gleeson CJ, Gummow and Hayne JJ.

108 Kent McNeil "Legal Rights and Legislative Wrongs: Māori Claims to the Foreshore and Seabed" in Claire Charters and Andrew Erueti (eds) *Māori Property Rights and the Foreshore and Seabed: The Last Frontier* (Victoria University Press, Wellington, 2007) 85, 87 ["Legal Rights"].

109 *Yorta Yorta v Victoria*, above n 41, para 47 (HCA) Gleeson CJ, Gummow and Hayne JJ (emphasis in the original).

110 McNeil "Legal Rights", above n 108, 87.

membership governance, in order to be recognised as a native title right, each practice must independently meet the continuity test. This includes the traditional laws and customs governing membership.

According to the High Court's controversial 2002 decision in *Yorta Yorta Aboriginal Community v Victoria*, in order to be "traditional", practices must have remained "substantially uninterrupted since sovereignty".[111] A degree of change is permissible, but "the key question is whether the law and custom can still be seen to be traditional law and traditional custom", in the sense of "at sovereignty".[112] The application of continuity tests to membership governance raises very difficult questions. What sort of evidence is required to demonstrate that the law and custom of membership has been continuously observed since sovereignty? These questions are faced by the Federal Court, tasked with defining (or confirming the agreed definition) of a native title community and articulating the rights and interests which it is entitled to exercise.

One of the first questions to be addressed by a court, then, is whether a native title determination should include the "right to determine the identity of the native title holders" as a native title right, alongside the other rights set out in the determination. This is a question about the degree of precision with which the group should be described, and how best to balance the group's right to recruit members and alter its membership criteria against the needs of third parties for reasonable certainty. Judicial approaches to group definition have varied. 10 of the 38 native title determinations in the study contain a provision which names, in effect, a native title right to define the native title community. Standard phrasing is as follows:[113]

> The nature and extent of the native title rights and interests in relation to the determination area are the rights and interests of the common law holders to possess, occupy, use and enjoy the determination area … but always subject to and in accordance with their traditional laws and customs and in particular to: … (c) maintain, use and manage the determination area for the benefit of the common law holders, that is to: … (iii) decide who are the native title holders provided that such persons must be Torres Strait Islanders within the meaning of that term in the [Native Title Act].

---

111 *Yorta Yorta v Victoria*, above n 41, para 87 (HCA) Gleeson CJ, Gummow and Hayne JJ. The laws and customs must also have "normative content" rather than simply comprise "observable patterns of behaviour": ibid, para 42 (HCA) Gleeson CJ, Gummow and Hayne JJ. See also Lisa Corbellini "Ethnographic Evidence, Rights and Interests, and Native Title Claims Research" (Issues Paper 3) in *Lands, Rights, Laws: Issues of Native Title* (Vol 3, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, ACT, 2007).

112 *Yorta Yorta v Victoria*, above n 41, para 83 (HCA) Gleeson CJ, Gummow and Hayne JJ.

113 See for example *Dauan People v State of Queensland* [2000] FCA 1064, para 7.

An indication of the complexity of framing a native title right to determine membership is shown in *Northern Territory of Australia v Alyawarr et al*.[114] In this case, the Federal Court removed a provision in the determination that affirmed the group's "right to determine and regulate the membership of and recruitment to a landholding group."[115] The claimants accepted that that the right was "more appropriately recognised as part of their laws and customs rather than as a right or interest in relation to the claim area."[116] The right was held to be subsumed by the description of the native title holding community, because traditional laws and customs define the community itself. In such an approach, because members are precisely those persons recognised by the community, there is no need to reiterate the group's capacity to determine membership. Parties opposed to the claim or concerned about its scope accordingly direct their efforts to increasing the specificity of the description, in order to reduce the discretion exercised by the group in recruitment. In *Northern Territory v Alyawarr et al*, the description included persons "recognised by the [the group] as members … by virtue of non-descent based connections, being adoption or birthplace affiliation."[117] The court rejected the Northern Territory's opposing claim that the recognition portion of the description was too indeterminate (but allowed the replacement of "including" with "being") and noted that further specification would compromise the group's privacy:[118]

> The form of the determination … involves an acceptance that the community of native title holders is a living society. It is not consistent with the purposes of the [Native Title] Act, nor productive of any practical benefit to require that the laws and customs of indigenous society and the rights and interests arising under them be presented as some kind of organism in amber whose microanatomy is available for convenient inspection by non-indigenous authorities.

This discussion gives some insight into the difficulty of deciding the degree of specificity appropriate in a native title determination, and how much discretion should be afforded to the group to admit non-descendants. Too much detail could unreasonably constrain a group in the exercise of its laws and customs and invite undue scrutiny from third parties, while too little precision would

---

114 *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 [*Northern Territory v Alyawarr*].

115 *Northern Territory v Alyawarr*, ibid, para 165 (FCA) Wilcox, French and Weinberg JJ.

116 Ibid.

117 *Northern Territory v Alyawarr*, ibid, para 94 (FCA) Wilcox, French and Weinberg JJ.

118 *Northern Territory v Alyawarr*, ibid, para 165 (FCA) Wilcox, French and Weinberg JJ.

fail to provide the certainty that is a primary goal of the native title process, and one of the core functions of RNTBCs.[119]

The continuity test also defines the scope of post-settlement governance. Strikingly, while much has been written about the difficulty of meeting the native title "societal continuity" test in the claims process, far less attention has been given to the continuing operation of "tradition" in the prospective membership governance of the community. It is often assumed that the native title holding group, via its RNTBC, is entitled at common law to determine its own membership, by giving formal effect to the will of the common law native title holders, in accordance with its constitution. However, the definition of the native title holding community is fixed at common law by the determination (including the scope of any discretion conferred on the group to decide the identity of native title holders). An RNTBC cannot admit as a legal member a person who is not a native title holder at common law. Just as the group cannot (via the RNTBC) exercise a native title right that is not identified in the determination, it cannot admit as a member a person who does not fit the definition included in the determination. Applying the continuity test, then, the group cannot enrol persons who would not have been members in accordance with law and customs operating "at sovereignty". As is the case for other native title rights and interests, the continuity requirement for membership rules pertains notwithstanding the huge demographic changes occurring since colonisation.

Not least among these demographic changes is the historic arrival in indigenous territories of potential group members who are not indigenous. Native title legislation prevents an RNTBC from conferring membership on a person who is not a native title holder[120] and, as per recent common

---

119 Native Title Act 1993 (Cth), preamble: "The needs of the broader Australian community require certainty and the enforceability of acts potentially made invalid because of the existence of native title. It is important to provide for the validation of those acts." See also Department of Families, Housing, Community Services and Indigenous Affairs *Guidelines for Support of Prescribed Bodies Corporate* (Department of Families, Housing, Community Services and Indigenous Affairs, Indigenous Programs Branch, Canberra, 2009) 3.

120 An RNTBC does not, however, have to enrol all native title holders: *James on behalf of the Martu People v State of Western Australia (No 2)* [2003] FCA 731, 3rd schedule, para 16.

law jurisprudence, a non-indigenous person cannot be a native title holder.[121] This common law principle is sometimes reinforced in the text of the determinations themselves. Of the 10 native title determinations in the study that expressly refer to the group's native title right to determine its membership, seven include language confining that right to Aboriginal persons[122] or Torres Strait Islanders.[123] Indeed, in such determinations the two categories of indigenous Australians are distinct, so the groups are required in their membership decision-making to exclude indigenous persons who fall into the unspecified category. In addition, while other Aboriginal and Torres Strait Island Corporations may, in accordance with the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth), enrol non-indigenous members (provided they are a numeric minority),[124] native title legislation apparently prevents RNTBCs from registering any person who is not indigenous.

Much depends then, on the definition of the native title holding community included in the determination. A court determining that native title exists must make a determination of "who the persons, or each group of persons, holding the common or group rights comprising the native title are",[125] but in doing so, it need not name the members of the group.[126] According to a recent judgment in the Federal Court, "[o]ften a statement of the group name will identify the group of

---

121 *Harrington-Smith*, above n 104, para 3738 (FCA) Lindgren J: "A determination of native title cannot be made in favour of non-Aboriginal people: see the definitions in the NTA of 'determination of native title' (s 225), 'native title' (s 223) and 'Aboriginal people' (s 223)." Native Title (Prescribed Bodies Corporate) Regulations 4(b) 1999 (Cth). The regulations apparently import indigeneity from the definition of native title included in section 223 of the Native Title Act, although the Act's definition of native title holder (contained in section 224) does not refer to indigeneity. Felicity Mason, Legislation and Policy Officer, Office of the Registrar of Aboriginal and Torres Strait Islander Corporations, to the author (26 February 2008) Email (on file with author). Of the 10 native title determinations in the study that expressly refer to the group's native title right to determine its membership, seven include language confining that right to the identification of indigenous persons. The determinations made in *Saibai People v State of Queensland* [1999] FCA 158 and *Congoo v State of Queensland* [2001] FCA 868 confine the right to "Aboriginal" persons. The determinations made in *Dauan People v State of Queensland* [2000] FCA 1064; *Masig People v State of Queensland* [2000] FCA 1067; *Warraber People v State of Queensland* QG 6073 OF 1998 (7 July 2000); *Poruma People v State of Queensland* [2000] FCA 1066 and *Andrew Passi on behalf of the Meriam People v State of Queensland* (includes corrigendum dated 23 July 2001) [2001] FCA 697 confine the right to persons who are Torres Strait Islanders.

122 *Saibai People v State of Queensland*, above n 121; and *Congoo v State of Queensland*, above n 121.

123 *Dauan People v State of Queensland*, above n 113; *Masig People v State of Queensland*, above n 121; *Warraber People v State of Queensland*, above n 121; *Poruma People v State of Queensland*, above n 121 and *Andrew Passi on behalf of the Meriam People v State of Queensland*, above n 121.

124 Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth), s 295.

125 Native Title Act 1993 (Cth), s 225(a).

126 *Western Australia v Ward* [2000] FCA 191, para 189, Beaumont, Von Doussa and North JJ.

persons sufficiently for the purposes of [the Act]".[127] Unless the court considers that there is some uncertainty as to the group's membership, it need not supply further detail in the determination. More recently, in *Western Australia v Ward*, the Federal Court was of the view that:[128]

> [I]t was not necessary for his Honour to make findings about the ancestry of each of the representative applicants, about the membership of particular estate groups, or about their continuing connection with particular parts of the determination area. It is sufficient that the determination declare the existence of native title rights and interests in the determination area which are held by the Miriuwung and Gajerrong community. Matters of detail as to the identity and rights of particular members of that community are matters to be determined with the registered native title body corporate.

In general, community definitions have become more complex in the last decade. Earlier determinations were more likely to include only a nominal description of the community, leaving the substance of membership to be determined as a matter of traditional law and custom.[129] The tendency is now for the court to include a more detailed description of the native title holders in a schedule to the determination, incorporating a base roll, a list of family groups or ancestors and occasionally a statement of the descent rules to be applied. The reason for this increased specificity is difficult to pinpoint. In part it reflects the impact of the 1998 amendments to the Act, requiring the decision-maker to specify the "nature and extent of native title rights and interests",[130] rather than simply to determine "those native title rights and interests that the maker of the determination considers to be of importance".[131] The shift appears to be understood by some public officials as a positive development, showing the increasing confidence and expertise of judges deciding native

---

127 *Moses v State of Western Australia* [2007] FCAFC 78, para 370, Moore, North and Mansfield JJ. The Court goes on to say: "This explains the many determinations which have adopted that formulation. In other cases, for instance, where the constitution of the membership of the group is unclear, the determination will need to clarify by supplying some definition of the way membership of the group is attained so that s 225(a) can be satisfied." This precedent dates to Brennan J's observation in *Mabo and Others v Queensland (No 2)* that even when there are difficulties establishing proof of boundaries or membership of the relevant community, "those difficulties afford no reason for denying the existence of native title rights and interests." *Mabo and Others v Queensland (No 2)* (1992) 175 CLR 1, 51-52 (HCA) Brennan J.

128 *Western Australia v Ward*, above n 126, para 280 (FCA) Beaumont, Von Doussa and North JJ. See also *Hayes v Northern Territory* (1999) 97 FCR 32, 51 Olney J: "I do not regard [section 225] as requiring each individual member of a group of persons found to hold native title to be identified by name. Such a requirement would be impossible to fulfill and even if it were possible to name each individual comprising the group at the time the determination is made, to do so would be meaningless as the composition of such a group will inevitably be in a state of flux as senior members pass on and as new generations emerge."

129 Stephen Sparkes, Manager Legal Services, National Native Title Tribunal, Email, above n 100.

130 Native Title Act 1993 (Cth), s 225(b).

131 See the discussion in *Myra Hayes v Northern Territory DG* No 6002 of 1996 (23 May 2000) para 3, concerning the Mparntwe, Antulye and Irlpme native title holders, represented by the Lhere Artepe Aboriginal Corporation.

title claims.[132] However, without a close examination of the anthropological and historical evidence presented on behalf of claimant groups in particular cases, it is not clear that this new level of detail serves the interests of claimants. As is indicated above, the greater the degree of specificity in the determination, the less discretion afforded to indigenous communities in their efforts to supply the substance of native title, including the identification of the native title holders themselves. The more detail included in the definition, the closer the court comes to determining and incorporating the content of traditional law and custom of membership. Paradoxically however, determinations that lack substantive detail may provide more scope for the post-determination contestation of traditional laws and customs.

Within the overarching requirement that the identity of the native title holding community be governed by traditional laws and customs, substantially uninterrupted since sovereignty, the legislative regime provides at least two mechanisms by which the membership jurisdiction of an RNTBC can be varied by a court order. First, the determination itself can be varied or revoked. Secondly, the membership decisions of an RNTBC can be challenged by members of the native title holding community it represents. A variation to the determination can amount to a modification of the common law definition of the native title holding group itself (by reference to traditional laws and customs), while a claim brought against an RNTBC by a native title holder is a challenge to the RNTBC's interpretation of the traditional laws and customs that constitute the group. Both provide ways that native title holders can modify, via litigation, the constitutive legal framework that empowers and constrains them in their membership decision-making.

The Act provides for the possibility of revising a native title determination if an application is successfully made by the appropriate state or Commonwealth minister, the RNTBC itself or the Native Title Registrar.[133] The provision has never been successfully used. A determination may be varied or revoked, if "required by the interests of justice" or if "events have taken place since the determination was made that have caused the determination no longer to be correct".[134] This means that the formal identification of the native title holding community can be altered, in the circumstances described, by the named class of applicants. Such changes could include modification of the scope and discretion exercised by the RNTBC in membership governance, by changing the membership definition in the determination. These provisions raise the possibility of a change to the membership components of a determination on the request of an RNTBC. It also provides an avenue for a post-determination challenge from a party opposed to a successful determination.

---

132 "The early determinations in particular had poor group descriptions. Some leave it up to the traditional law and custom of the groups etc…" Stephen Sparkes, Manager Legal Services, National Native Title Tribunal, Email, above n 100.

133 Native Title Act 1993 (Cth), ss 13(1), 61.

134 Native Title Act 1993 (Cth), s 13(1).

Importantly, however, while a person "who holds a non-native title interest" in the area in question can apply for a native title determination, they are ineligible to apply for the variation or revocation of an existing determination.[135] This provides a degree of permanence and stability to determinations, while allowing some scope for their alteration in changed circumstances. The revision provision has never been successfully used.[136] From time to time, however, disaffected indigenous groups have petitioned state or Commonwealth governments to seek a variation of a disputed determination on their behalf. In the same way, non-indigenous disputants could also petition a government to apply on their behalf for the variation or revocation of a determination. It is significant that the possibility remains that the definition of a native title holding community can be revised to accommodate demographic change and better reflect self-description, provided of course that such change is in accordance with traditional laws and customs and meets the common law continuity tests.

The second mechanism for adaptation or correction of membership provisions is provided by the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (CATSI Act), which allows native title holding members to challenge an RNTBC's interpretation of traditional laws and customs. RNTBCs are obliged by their regulations to consult with and obtain the consent of the common law native title holders before making a decision that affects native title.[137] From time to time, disputes arise between members and directors on matters implicating traditional laws and custom, including membership decisions. If disputants are unable to resolve their disagreement, they may avail themselves of the dispute resolution services provided by Office of the Registrar of Indigenous Corporations (ORIC) and ultimately may have recourse to the Federal Court for a remedy provided for in the CATSI Act. The ORIC is empowered to offer non-binding advisory opinions interpreting the corporation's governing documents in the event of a dispute and also to manage mediation services.[138]

Although the point has never been litigated, the available materials suggest that if the membership determinations of an RNTBC are questioned, the dispute would be ultimately susceptible to review in the Federal Court under the auspices of the CATSI Act. They further indicate that in considering whether the RNTBC's decisions accord with native title legislation and

---

135 Native Title Act 1993 (Cth), s 61.

136 The statutory provision was at issue in *Re Yoren* [2004] FCA 916, in which the Walmbaar Aboriginal Corporation, one of three RNTBCs established under the Hopevale determination, brought a claim for revision of the determination in accordance with section 13(1)(b). Interpreting section 61(1)(b), the court found that where multiple RNTBCs hold the native title, one RNTBC could not proceed independently to apply to revise the joint determination: *Re Yoren* [2004] FCA 916 Beaumont J.

137 Native Title (Prescribed Bodies Corporate) Regulations (Cth), cl 8(2).

138 Office of the Registrar of Indigenous Corporations *Policy Statement 22: Disputes Involving Corporations* (2009) 5.

with the determination, the Court is obliged to assess whether a practice is properly one described in common law as an expression of traditional laws and customs, since these empower and constrain the governance powers of the RNTBC. The Federal Court's explanation in *Western Australia v Ward* gives an indication of what may be in store for an entity whose membership determinations are contested:[139]

> [O]nce the determination is made, and a registered native title body corporate has been appointed … the ascertainment of who is a common law holder is a matter to be determined, if necessary, in a court of competent jurisdiction, by reference to the traditionally based laws and customs of the common law holders named in the determination, as those laws and customs are at the time currently acknowledged and observed: see *Mabo (No 2)* at CLR 59. The occasion for a dispute requiring curial determination should be rare. The need should not arise in dealings between third parties and the registered native title body corporate as that body has the capacity and standing to represent the common law holders from time to time. Such a dispute is more likely to arise between the registered native title body corporate and people claiming to be entitled to be recognised as common law holders. That would be a dispute between people with a close knowledge of the relevant traditional laws and customs.

Leaving aside the court's optimistic expectations of community consensus on traditional law and customs, this passage illustrates the significance of the description of the native title group in the native title determination, since this determines the criteria for subsequent judicial review.

In sum, then, an RNTBC is constrained in the selection of its members by native title legislation and regulations, indigenous incorporation legislation, the native title determination and the common law of indigeneity. An RNTBC that is thought to have acted ultra vires these constraints may be challenged by its own members under the CATSI Act or by specified official actors (ministers and the Native Title registrar) under the Act, acting in the public interest or on behalf of a petitioning, affected individual or community. In each case, the RNTBC may be required to demonstrate that it has exercised its jurisdiction through the continued observance of traditional laws and customs, as articulated in its native title determination.

To further discuss the scope and flexibility of native title determinations on membership, it is necessary to recall the purposes of constitutionalisation in the native title process. The object is not (as it arguably is in the New Zealand Treaty settlements process) to give effect, so far as is possible, to current membership boundaries and to legitimate these by reference to a historic antecedent. The object is rather to confine current organisational practice to that which existed at sovereignty. In native title jurisprudence, traditional laws and customs constitute the society in question, and the society in turn constitutes those laws and customs through its observance of them.[140] If the

---

139 *Western Australia v Ward*, above n 126, para 213 (FCA) Beaumont, Von Doussa and North JJ.

140 In this way, the "laws and customs and the society which acknowledges and observes them are inextricably interlinked." *Yorta Yorta v Victoria*, above n 41, para 55 (HCA) Gleeson CJ, Gummow and Hayne JJ.

observance lapses, the society ceases to exist as a native title holding community. Despite the formal legal avenues for review of native title determinations, there is very little room in this test for the legal reconstitution of a native title community in a way that accords with current cultural boundaries.[141]

Accordingly, unless a claimant group can demonstrate that adoptions and incorporations were part of the pre-sovereign traditional laws and customs of the group or a reasonable adaptation of such laws and customs, they will not be able to incorporate a non-descendant as a native title holder and remain within the jurisdiction allowed by the determination. Consequently, the description of the community for claims purposes is one in which post-contact innovations have been sheared off. This streamlining process involves the removal of those practices that require the most detailed explanation, are most contentious within the community and are least likely to pass the common law test as an allowable post-determination adaptation.[142] For the reasons discussed above, descent rules are the criteria most likely to survive the legal reconstitution of the group that occurs during the claims process. The following section considers the ways in which descent rules have been used to define native holding groups in native title jurisprudence.

A Competing Constructions of Descent in Native Title Determinations

One of the tensions that must be resolved in native title determinations is whether "descent" should operate as a biological measure, a legal assignment (which would include legal adoptees) or as a construct of "traditional law and custom". This debate has parallels with discussions of the customary and legal meaning of descent in the New Zealand context, where persons may enter the beneficiary class as biological descendants, adopted (legal) descendants and adopted (customary) descendants. Significantly, in *Mabo and others v Queensland (No 2)*, Brennan J referred to biological descent as a requirement for native title holders.[143] However, biological descent was not included as a provision of the Act and has not been imposed as a criterion in subsequent Federal Court determinations. In fact, as federal judge O'Loughlin J concluded in *The Ngalakan People v Northern Territory*:[144]

---

141 *Yorta Yorta v Victoria,* above n 41.

142 Peter Sutton *Aboriginal Country Groups and the "Community of Native Title Holders"* (National Native Title Tribunal, Occasional Paper Series 01/2001, Perth, 2001) 17.

143 He states that "[m]embership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people." *Mabo and Others v Queensland (No 2)*, above n 127, 70 (HCA) Brennan J.

144 *The Ngalakan People v Northern Territory of Australia* [2001] FCA 654, para 51 O'Loughlin J.

> Lack of biological or adoptive descent does not therefore create a problem in an application for a determination of native title if a particular person can show that he or she is a member of the claimant group by virtue of the traditional laws acknowledged and traditional customs observed by that group.

However, the biological test may nonetheless surface in the native title context where a person's indigeneity is in question, as for instance in the scope of a native title group's discretion to incorporate or adopt non-descendants. A non-indigenous person cannot be a native title holder at common law (and in any case, an RNTBC is legislatively prohibited from registering a non-indigenous member). Some degree of biological descent is necessary to establish that a person is "a member of the Aboriginal race of Australia".[145] A three-part definition is used to define indigeneity in Australian common law and policy, in which an Aboriginal or Torres Strait Islander "is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he (she) lives."[146] Accordingly, whatever the scope allowed for the incorporation and adoption of non-descendants in traditional law and custom, all native title holders must be biologically indigenous at law, since biology is required to establish legal indigeneity.

Since so much rests on the terms of the native title determination, how is descent used to define native title groups? Some determinations make explicit reference to descent in the group definition. There are 18 such determinations in the study, representing 58 per cent of the total. Unless they make provision for adoption or incorporation, descent determinations prevent the incorporation of persons who are not descendants of the ancestors or family groups named in the description.[147] 11 descent determinations in the study make reference to adoption or incorporation in accordance with the traditional laws and customs of the group.[148] Occasionally, where adoption or incorporation is not mentioned, descent is sometimes combined with criteria requiring community recognition or acceptance. These mirror the tripartite definition of indigeneity used in Australian public policy, wherein recognition serves as evidence of descent.[149] For an example of the most frequently used

---

145 Native Title Act 1993 (Cth), s 253: "'Aboriginal peoples' means peoples of the Aboriginal race of Australia."

146 *Shaw and Anor v Wolf and Ors* (1998) 163 ALR 205.

147 See for example *Rubibi Community v State of Western Australia* [2001] FCA 1553 (Re the Yawuru People, represented by the Rules of the Kunin (Native Title) Aboriginal Corporation.) "Second Schedule: The common law holders of native title, comprising the Yawuru Community, are the descendants of [names]."

148 See appendix, dataset four.

149 See for example the membership provision used in the rules of Dunghutti Elders Council (Aboriginal Corporation), specifying that "[m]embership of the Association shall be open to all adult Aboriginal persons who are of Dunghutti descent, who identify as Dunghutti people and who are accepted by the Committee as being Dunghutti people." Rules of Dunghutti Elders Council (Aboriginal Corporation) 1996, cl 8.1 (Doc No C-AU-2-A, on file with author). For an identical formulation see Rules of Western Yalanji Aboriginal Corporation 1998, cl 10(a) (Doc No C-AU-4-A, on file with author); and Rules of Mualgal Torres Strait Islanders Corporation 1999, cls 10(a), 2 (Doc No C-AU-6-A, on file with author).

formulation allowing adoption and or incorporation, see the description of the Kulkalgal People:[150]

> The Kulkalgal People, being: (a) the members of the Warraberalgal, Porumalgal and Masigalgal groups who are the descendants of one or more of the following apical ancestors [names] and (b) Torres Strait Islanders who have been adopted by the above people in accordance with the traditional laws acknowledged and traditional customs observed by those people.

As the native title process matures, the distinctions between such concepts as "recognition", "incorporation" and "adoption" may become the subject of dispute and possibly litigation. For the time being, the interpretation of these terms remain within the purview of an RNTBC's application of traditional law and custom – constrained, however, by the operation of common law and legislation, and by the terms of the determination itself.

V CONCLUSION

In New Zealand, there is a legal distinction between the class of settlement beneficiaries, defined by the Crown, and tribal members, defined by tribes. While this legal pluralism is controversial, it allows for the continued operation of tribal custom in the self-constitution of the tribe. To comply with public law and with the negotiated agreements giving effect to a settlement, tribes must include all descendants of the relevant ancestor as members and may not exclude legally adopted children, but may include any other person as a tribal member and confer benefits on them. Furthermore, a tribe may subsequently alter the scope of the legal beneficiary class by constitutional amendment, provided all beneficiaries have the opportunity to vote on such an amendment in accordance with constitutional rules (arguably this flexibility does not apply to Mandated Iwi Organisations in the registration of beneficiaries for purposes of the Māori Fisheries Act 2004.) These arrangements allow tribes and the Crown to agree on descent rules for the purposes of claims settlement, while allowing tribes the capacity to revise and supplement legal descent rules in accordance with evolving custom.

As the law and policy of Treaty settlements now stands in New Zealand, tribal institutions and the descent rules they contain provide the legal scaffolding for tribal self-constitution but do not limit it. In contrast, the continuity tests applied to native title holding communities in Australia define the legal operation of traditional laws and customs on membership and do not allow a person who does not meet the legal test set out in the determination to exercise any of the rights held by that community. RNTBCs are constrained in the performance of membership governance by native title legislation and regulations, indigenous incorporation legislation, the native title determination and the common law of indigeneity. Amendments to membership rules must be consistent with the determination, which is construed to give effect to only those rights held under traditional laws and customs that have been continuously exercised since sovereignty. Native title holding communities

---

150 See for example *Warria on behalf of the Kulkalgal v State of Queensland* [2004] FCA 1572.

cannot include adopted or incorporated persons unless those persons would have qualified under traditional laws and customs as articulated in the determination. They cannot enrol a non-indigenous person. These are significant constraints on the capacity of groups to supplement descent rules with recruitment criteria based on other forms of affiliation. Juridification of native title communities in Australia leaves comparatively little room for the continued evolution of customary law, or for adaptations to formal legal membership rules. The degree of agency enjoyed by native title communities over their institutions and the formal rules they contain is very limited. Consequently, native title holding communities have little or no scope for self-constitution within the confines of the legal regimes they are subject to.

In both countries, descent rules provide a useful "middle ground", providing the minimum certainty required of representative organisations established to receive and manage property allocated in the settlement of land claims. The extent to which these rules displace customary membership rules depends on whether they can be modified, supplemented or qualified by the tribal communities governed by them. The negative consequences of juridification, eventuating from the entry of law into a field of tribal life previously governed by custom, are mitigated where their legal rules can be designed and controlled by the tribe itself. In this way, tribes decide which aspects of the custom of membership should be expressed as formal rules. In both countries, tribes must enact constitutions that record the identity of persons covered by the relevant settlement or determination, and must include all persons who meet the legal definition. In New Zealand, but not in Australia, groups may alter and supplement the legal criteria: in effect, they may adapt them to match evolving custom on membership. In such circumstances the constitutions and rules they contain can be expressions of evolving cultural production of customary norms, and so also expressions of tribal self-constitution.

APPENDIX: TRIBES IN THE STUDY

Listings in dataset three: New Zealand iwi and hapū – constitutions		
Reference	**Tribe name**	**Document date**
C-NZ-1-A	Muaupoko	13/07/2001
C-NZ-1-B	Muaupoko	17/07/2001
C-NZ-1-C	Muaupoko	10/09/2002
C-NZ-1-D	Muaupoko	28/11/2005
C-NZ-4-A	Ngaa Rauru	27/07/1995
C-NZ-2-A	Ngāti Toa Rangatira	3/11/1988
C-NZ-2-B	Ngāti Toa Rangatira	1/07/1993
C-NZ-2-C	Ngāti Toa Rangatira	2/10/1994
C-NZ-2-D	Ngāti Toa Rangatira	5/03/1994
C-NZ-2-E	Ngāti Toa Rangatira	28/05/1997
C-NZ-4-B	Ngaa Rauru	7/07/2000
C-NZ-3-A	Nga Hauiti	7/03/2006
C-NZ-4-C	Ngaa Rauru	10/03/2004
C-NZ-4-D	Ngaa Rauru	24/08/2004
C-NZ-4-E	Ngaa Rauru	1/?/2005
C-NZ-6-A	Ngapuhi	28/04/1989
C-NZ-5-A	Ngaiterangi	13/12/1990
C-NZ-6-B	Ngapuhi	4/07/1995
C-NZ-6-C	Ngapuhi	24/10/2002
C-NZ-6-D	Ngapuhi	12/07/2004
C-NZ-6-E	Ngapuhi	1/11/2005
C-NZ-7-A	Ngapuhi/Ngāti Kahu ki Whaingaroa	8/08/1991
C-NZ-7-B	Ngapuhi/Ngāti Kahu ki Whaingaroa	22/09/1994
C-NZ-7-C	Ngapuhi/Ngāti Kahu ki Whaingaroa	22/03/2000
C-NZ-7-D	Ngapuhi/Ngāti Kahu ki Whaingaroa	1/11/2005
C-NZ-8-A	Ngāti Apa	3/10/1992
C-NZ-8-B	Ngāti Apa	15/04/1995
C-NZ-8-C	Ngāti Apa	3/04/2003
C-NZ-8-D	Ngāti Apa	27/01/2004
C-NZ-8-E	Ngāti Apa	8/02/2006
C-NZ-9-A	Ngāti Kahungunu	8/12/1988
C-NZ-9-B	Ngāti Kahungunu	21/03/2001
C-NZ-9-C	Ngāti Kahungunu	10/05/2002
C-NZ-9-D	Ngāti Kahungunu	10/03/2003
C-NZ-9-E	Ngāti Kahungunu	2/10/2003
C-NZ-10-A	Ngāti Pukenga	3/08/1992

C-NZ-11-A	Ngāti Ranginui	4/09/1990
C-NZ-11-B	Ngāti Ranginui	19/08/1996
C-NZ-11-C	Ngāti Ranginui	13/08/1999
C-NZ-11-D	Ngāti Ranginui	7/05/2000
C-NZ-11-E	Ngāti Ranginui	24/02/2003
C-NZ-11-F	Ngāti Ranginui	12/09/2003
C-NZ-11-G	Ngāti Ranginui	18/05/2005
C-NZ-12-A	Ngāti Raukawa (ki te Tonga)	2/9/1088
C-NZ-12-B	Ngāti Raukawa (ki te Tonga)	29/07/1991
C-NZ-12-C	Ngāti Raukawa (ki te Tonga)	23/12/2004
C-NZ-13-A	Ngāti Raukawa (ki Waikato)	24/03/1987
C-NZ-14-A	Ngāti Tama	4/02/1993
C-NZ-15-A	Ngāti Tuwharetoa	18/04/2005
C-NZ-15-B	Ngāti Tuwharetoa	
C-NZ-16-A	Ngatikuri	11/10/1993
C-NZ-17-A	Rangitane (North Island)	19/09/1989
C-NZ-17-B	Rangitane (North Island)	15/05/2003
C-NZ-18-A	Rangitane (Te Tau Ihu)	1/06/1988
C-NZ-18-B	Rangitane (Te Tau Ihu)	19/06/1995
C-NZ-18-C	Rangitane (Te Tau Ihu)	5/18/19999
C-NZ-19-A	Rongowhakaata	28/04/1998
C-NZ-19-B	Rongowhakaata	16/11/1998
C-NZ-20-A	Taranaki	21/04/1998
C-NZ-20-B	Taranaki	24/09/2000
C-NZ-21-A	Te Arawa	19/12/1995
C-NZ-21-B	Te Arawa	7/07/2000
C-NZ-21-C	Te Arawa	30/09/2002
C-NZ-21-D	Te Arawa	26/08/2003
C-NZ-21-E	Te Arawa	29/04/2004
C-NZ-21-F	Te Arawa	17/02/2005
C-NZ-22-A	Te Atiawa (Taranaki)	18/11/1995
C-NZ-22-B	Te Atiawa (Taranaki)	9/07/1996
C-NZ-22-C	Te Atiawa (Taranaki)	29/04/1999
C-NZ-22-D	Te Atiawa (Taranaki)	26/06/2000
C-NZ-22-E	Te Atiawa (Taranaki)	2/02/2001
C-NZ-22-F	Te Atiawa (Taranaki)	8/03/2002
C-NZ-23-A	Te Atiawa (Te Tau Ihu)	17/05/1993
C-NZ-23-B	Te Atiawa (Te Tau Ihu)	9/11/1997
C-NZ-23-D	Te Atiawa (Te Tau Ihu)	2/06/1999

C-NZ-23-E	Te Atiawa (Te Tau Ihu)	18/05/2000
C-NZ-24-A	Te Atihaunui a Paparangi	8/12/1988
C-NZ-25-A	Te Rarawa	14/12/1988
C-NZ-26-A	Te Whanau a Apanui	4/10/1988
C-NZ-26-B	Te Whanau a Apanui	19/04/1999
C-NZ-26-C	Te Whanau a Apanui	21/01/2004
C-NZ-26-D	Te Whanau a Apanui	8/10/2005
C-NZ-27-A	Ngāi Tai	3/10/1988
C-NZ-28-A	Ngāti Mutunga	6/08/1991
C-NZ-28-B	Ngāti Mutunga	22/05/1998
C-NZ-29-A	Ngāti Kahu	24/01/1996
C-NZ-29-B	Ngāti Kahu	19/10/2000
C-NZ-29-C	Ngāti Kahu	20/03/2003
C-NZ-30-A	Te Aitanga a Mahaki	15/01/1996
C-NZ-30-B	Te Aitanga a Mahaki	1/08/1998
C-NZ-30-C	Te Aitanga a Mahaki	8/06/1999
C-NZ-30-D	Te Aitanga a Mahaki	29/01/2004
C-NZ-31-A	Ngāi Tamanuhiri	22/08/1994
C-NZ-32-A	Ngāti Apa (North Island)	16/07/1991
C-NZ-32-B	Ngāti Apa (North Island)	1/04/2004
C-NZ-32-B	Ngāti Apa (North Island)	26/02/2006
C-NZ-33-A	Atiawa ki Whakarongotai	4/07/1990
C-NZ-33-B	Atiawa ki Whakarongotai	7/09/1994
C-NZ-33-C	Atiawa ki Whakarongotai	10/11/2003
C-NZ-35-A	Ngāti Kuia	14/07/1994
C-NZ-35-B	Ngāti Kuia	2/06/1998
C-NZ-35-C	Ngāti Kuia	10/05/2000
C-NZ-35-D	Ngāti Kuia	28/07/2000
C-NZ-35-E	Ngāti Kuia	27/05/2002
C-NZ-35-F	Ngāti Kuia	17/10/2003
C-NZ-35-G	Ngāti Kuia	24/03/2004
C-NZ-36-A	Ngāti Mutunga ki Wharekauri	No document
C-NZ-37-A	Moriori	3/06/2003
C-NZ-38-A	Ngāi Takoto	No document
C-NZ-39-A	Ngāti Rarua	15/10/1992
C-NZ-39-B	Ngāti Rarua	28/05/1997
C-NZ-39-C	Ngāti Rarua	20/05/1998
C-NZ-39-D	Ngāti Rarua	13/06/2005
C-NZ-39-E	Ngāti Rarua	29/09/2005

C-NZ-40-A	Ngāti Whatua	1/01/1995
C-NZ-41-A	Ngāti Ruanui	No document
C-NZ-42-A	Ngāti Koata	No document
C-NZ-42-B	Ngāti Koata	No document
C-NZ-42-C	Ngāti Koata	24/01/1996
C-NZ-42-D	Ngāti Koata	25/01/1996
C-NZ-43-A	Ngāti Porou	No document
C-NZ-44-A	Ngāti Maru	No document
C-NZ-45-A	Ngāti Wai	No document
C-NZ-47-A	Waikato	No document
C-NZ-48-A	Ngāti Maniapoto	No document
C-NZ-49-A	Iwi of Hauraki	No document
C-NZ-50-A	Tuhoe	No document
C-NZ-51-A	Ngāti Awa	25/06/2004
C-NZ-51-B	Ngāti Awa	23/11/2005
C-NZ-52-A	Whakatohea	No document
C-NZ-53-A	Ngāti Manawa	No document
C-NZ-54-A	Ngāi Tahu	22/11/2000
C-NZ-55-A	Te Roroa	No document
C-NZ-56-A	Ngāti Tama	No document
C-NZ-57-A	Te Uri o Hau	No document
C-NZ-58-A	Ngāti Turangitukua	No document
C-NZ-60-A	Ngāti Rangiteaorere	No document
C-NZ-63-A	Waimakuku	No document

Listings in dataset four: Australian Native Title Holding Communities – constitutions

Reference	Document name	Document date
C-AU-1-A	Constitution of the Mer Gedken Le (Torres Strait Islanders) Corporation	18/01/1999
C-AU-2-A	The Rules of Dunghutti Elders Council (Aboriginal Corporation)	16/10/2002
C-AU-3-A	The Rules of the Walmbaar Aboriginal Corporation	24/10/2000
C-AU-4-A	The Rules of Western Yalanji Aboriginal Corporation	7/01/2002
C-AU-5-A	The Rules of Saibai Mura Buway (Torres Strait Islanders) Corporation	7/01/2002
C-AU-6-A	The Rules of Mualgal Torres Strait Islanders Corporation	13/03/2003
C-AU-7-A	Rules of Lhere Artepe Aboriginal Corporation	13/03/2003
C-AU-8-A	The Rules of Dauanalgaw (Torres Strait Islanders) Corporation	20/03/2004

C-AU-9-A	The Rules of Masigalgal (Torres Strait Islanders) Corporation	20/03/2004
C-AU-10-A	The Rules of the Warraberalgal (Torres Strait Islanders) Corporation	17/11/2005
C-AU-11-A	The Rules of the Porumalgal (Torres Strait Islander) Corporation	11/11/1996
C-AU-12-A	Rules of Ngan Aak Kunch Aboriginal Corporation	11/11/1996
C-AU-13-A	The Consitution of Pila Nguru (Aboriginal Corporation)	28/08/1998
C-AU-14-A	Rules of Kaiwalagal Aboriginal Corporation	28/08/1998
C-AU-15-A	The Rules of the Bar-Barrum Aboriginal Corporation	30/12/1998
C-AU-16-A	The Rules of the Jidi Jidi Aboriginal Corporation	30/12/1998
C-AU-17-A	The Rules and Objects of the Tjurabalan Aboriginal Corporation	17/12/1998
C-AU-18-A	The Rules of Tjamu Tjamu	17/12/1998
C-AU-19-A	Rules of the Kunin (Native Title) Aboriginal Corporation.	18/01/1999
C-AU-20-A	Rules of The Karajarri Traditional Lands Association (Aboriginal Corporation)	8/04/2002
C-AU-21-A	Rules of the Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu)	8/04/2002
C-AU-22-A	The Rules of Kulkalgal (Torres Strait Islanders) Corporation	19/08/2004
C-AU-23-A	The Rules of the Yindjibarndi Aboriginal Corporation	19/08/2004
C-AU-24-A	Rules of Erubam Le Traditional Land and Sea Owners (Torres Strait Islanders) Corporation.	15/05/2000
C-AU-25-A	The Rules of Magani Lagaugal (Torres Strait Islanders) Corporation	15/05/2000
C-AU-26-A	The Rules of Ugar Kem Le Ged Zeuber Er Kep Le (Torres Strait Islander) Corporation	2/06/2000
C-AU-27-A	The Rules of the Mura Badulgal (Torres Strait Islanders) Corporation	2/06/2000
C-AU-28-A	The Rules of Malu Ki'ai (Torres Strait Islanders) Corporation	2/06/2000
C-AU-29-A	The Rules and Objects of the Yarnangu Ngaanyatjarraku Parna (Aboriginal Corporation).	2/06/2000
C-AU-30-A	Rules of the Djabugay Native Title Association	16/10/2002
C-AU-31-A	Rules of the Miriuwung and Gajerrong #1 (Native Title Prescribed Body Corporate) Aboriginal Corporation.	30/08/2005
C-AU-32-A	The Rules of the Maluilgal (Torres Strait Islanders) Corporation	30/08/2005

C-AU-33-A	Rules of the Garboi (Torres Strait Islanders) Corporation	13/11/2001
C-AU-34-A	The Rules of the Porumgalgal (Torres Strait Islanders) Corporation	13/11/2001
C-AU-35-A	The Rules of the Wakeyama (Torres Strait Islanders) Corporation	29/03/2000
C-AU-36-A	Rules of the Hopevale Congress Aboriginal Corporation	29/03/2000
C-AU-37-A	The Rules of the Gebaralgal (Torres Strait Islanders) Corporation	24/10/2000

Methodological Note

The following outlines the methodological challenges faced by the author in compiling the collection of tribal documents listed above. The content of the dataset is determined by the availability of documents, which itself is governed by settler state and tribal policies on publicity and publication.

The first determinant of accessibility for tribal constitutions is whether tribes are obliged to write one at all. In Australia, RNTBCs are obliged by native title legislation to draft a constitution. New Zealand tribes are required to have a written constitution to comply with Treaty of Waitangi settlement policy and cannot receive assets until such a document has been ratified by the tribal community.

The second determinant of accessibility is the prescription of publicity requirements. In New Zealand, there is no general requirement that constitutions be made accessible to the public. Publicity depends on the form of incorporation used by the tribe and the requirements of the applicable legislation. As Treaty claims settlement progresses, there is a trend towards the tribal use of private trust documents which are not kept by the public registrars. In contrast, Australian RNTBCs are required by law to publish their constitutions in an online database.

The mechanics of state-specific collections

In New Zealand, official recognition of tribes occurs in an ad hoc manner through the Treaty of Waitangi claims settlements process, rather than as part of an established administrative policy. The 63 tribes that qualified for the study have all have been recognised either by the New Zealand government (the Crown) or by Te Ohu Kaimoana. The institutions created through this process are known as Treaty Settlement Entities.[151] In total, the constitutions of 48 tribes were obtained.

151 At the time of writing in 2008, the representative bodies of 44 tribes and tribal groupings had been approved by Te Ohu Kaimoana as Mandated Iwi Organisations for the purposes of receiving fisheries assets, and 13 Recognised Iwi Organisations remained to be finally mandated. 24 constitutions of Mandated Iwi Organisations were available for use in the database. The remainder were either not publicly available, or were published too recently to be included in the study. 11 groups confirmed that they had not drafted a constitution at the time of writing. Te Ohu Kaimoana "Te Ohu Kaimoana Approves 44th Iwi to receive Fisheries Assets" (17 August 2007) Press Release.

Twenty-seven of these tribes had published earlier iterations of their constitutions, showing as many as four sets of amendments to the text of the document.[152]

In New Zealand, there is no general legislative provision that compels tribes to publish constitutions, nor is this made a condition of Treaty settlements. The documents are held by the Crown but are not made available as official information. According to the government's Office of Treaty Settlements, while the trust deeds of Treaty Settlement Entities are technically available under the Official Information Act, they remain "the property of the governance entities themselves"[153] and are "supplied to the Crown under an obligation of confidence."[154] The policy of the Office of Treaty Settlements is to consult with the governance entities before releasing the documents to members of the public.[155] Similarly, it is the policy of Te Ohu Kaimoana not to unilaterally circulate or publish the constitutional documents of the tribal entities it deals with, and advises that these must be obtained directly from the tribal entities themselves.[156] Only the governing documents of tribes incorporated as charitable trusts, companies and incorporated societies are available on the public "voluntary organisations" register.[157]

There are 38 tribal governing documents in the Australian dataset. All are constitutions of RNTBCs established pursuant to native title determinations and incorporated under the Corporations (Aboriginal and Torres Strait Islander) Act 2006, a Commonwealth statute designed to facilitate the incorporation of indigenous organisations. All of the groups in the study are obliged by the Act to submit their constitutions to the Office of the Registrar of Aboriginal Corporations for approval, and

---

152 Older iterations were only available for those tribes incorporated as societies, companies and charitable trusts, because these documents are included in a public register. Older documents for other tribes were not available.

153 Bonnie Jones, Analyst: Communications, Office of Treaty Settlements, New Zealand to author (18 May 2006) Email (on file with the author).

154 Paul James, Director, Office of Treaty Settlements, New Zealand, to author (16 June 2006) Letter (on file with author).

155 Bonnie Jones to author (18 May 2006), above n 153; and Paul James to author (16 June 2006), above n 154. On the basis of such consultation, the Office of Treaty Settlements decided to withhold the tribal constitutions in its possession. Of the six tribes in this category, two subsequently voluntarily shared their constitution with the author.

156 Interview with Simon Karipa, Te Ohu Kaimoana (Kirsty Gover, 3 March 2006). The Commission is not a Crown entity and is not obliged to provide public access to materials in its custody under the Official Information Act.

157 The register is managed by the Ministry of Economic Development. Accessible at the Ministry of Economic Development website, Societies And Trusts Online <www.societies.govt.nz> (last accessed 17 May 2010).

for publication in the public register administered by that Office.[158] All those RNTBCs incorporated at the time of writing had publicly accessible constitutions in the register.[159]

158 The Registrar is administered by The Registrar of Aboriginal and Torres Strait Islander Corporations. See The Public Register of Aboriginal and Torres Strait Islander Corporations website <www.orac.gov.au> (last accessed 17 May 2010) and Native Title (Prescribed Bodies Corporate) Regulations (1999) of the Native Title Act 1993. Tribes are obliged to make their membership registers available to members without charge, and to non-members who pay a fee (to be capped by the terms of the Act). Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth), ss 180-25. See the discussion in Office of the Registrar of Indigenous Corporations *A Guide to Writing Good Governance Rules: For Prescribed Bodes Corporate and Registered Native Title Bodies Corporate* (2008) 11.

159 Because the settlement of native title claims did not begin in earnest until the mid 1990s, the dataset spans a period of less than a decade. The earliest documents in the Australian dataset were concluded in 1998. Alterations to the constitutions are consequently rare.