

Native title corporations achieving capacity in both Aboriginal and Australian legal systems

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My Hypothesis

A corporation that represents a native title group is more effective if the Aboriginal & Torres Strait Islander law governing the group's organisation and decision-making is recognised in corporate structures and operations, and in its dealings with government and resource companies



My Case Study

- Jabalbina Yalanji Aboriginal Corporation RNTBC
 - Eastern Kuku Yalanji People
- Yawoorroong Miriuwung Gajerrong Yirrgeb Noon Dawang Aboriginal Corporation (MG Corp)
 - Miriuwung Gajerrong and Gija Peoples



Two types of law in Australia

1. Traditional Aboriginal & Torres Strait Islander laws
2. Australian law

Recognition of rights and interests arising under traditional law as native title implies recognition in Australian law of traditional law about land



Two types of law in Australia

- After a determination of native title, the Court must also determine a PBC to:
 - hold the native title as trustee, or
 - manage the native title as agent, for the native title holding group
- A PBC is the face in the Australian legal system of a native title group whose identity is determined by traditional law



PBC in Two Legal Systems

Agreements involving PBCs imply an engagement by

- the company or government, and
- the Australian legal system

with

- Aboriginal or Torres Strait Islander people,
- their native title rights and interests, and
- their traditional law



PBC in Two Legal Systems

Under Australian law, a PBC has ordinary corporate attributes including:

- Perpetual succession
- Separate legal personality

Company or government need not deal with an amorphous native title group



PBC in Two Legal Systems

Under Australian law, in the native title context, a PBC's role is to:

- Detail 'internal' issues relating to the native title holders
- Identify which particular group can exercise what particular rights.

Gumana v NT [2005] FCA 50



PBC in Two Legal Systems

In practice

- Traditional law is a fundamental part of PBC operations
 - the native title process prioritises traditional law and custom
 - traditional law is central to the PBC's role in making decisions about land
- PBCs are bound by traditional law



PBC in Two Legal Systems

In practice, Australian law is a fundamental part of PBC operations:

- it must be incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*
- it makes contracts that are enforceable under Australian law



PBC in Two Legal Systems

- A PBC is a meeting place where traditional law interacts and engages with Australian law
- Potentially, traditional law can be expressed in and through a PBC in a way that allows it to operate in the Australian society and economy consistently with that law



Challenges for PBCs

- Different roles and obligations of a PBC in two legal systems
- Relationships with the native title group
- Relationships with government and resource companies
- Limited resources and capacity

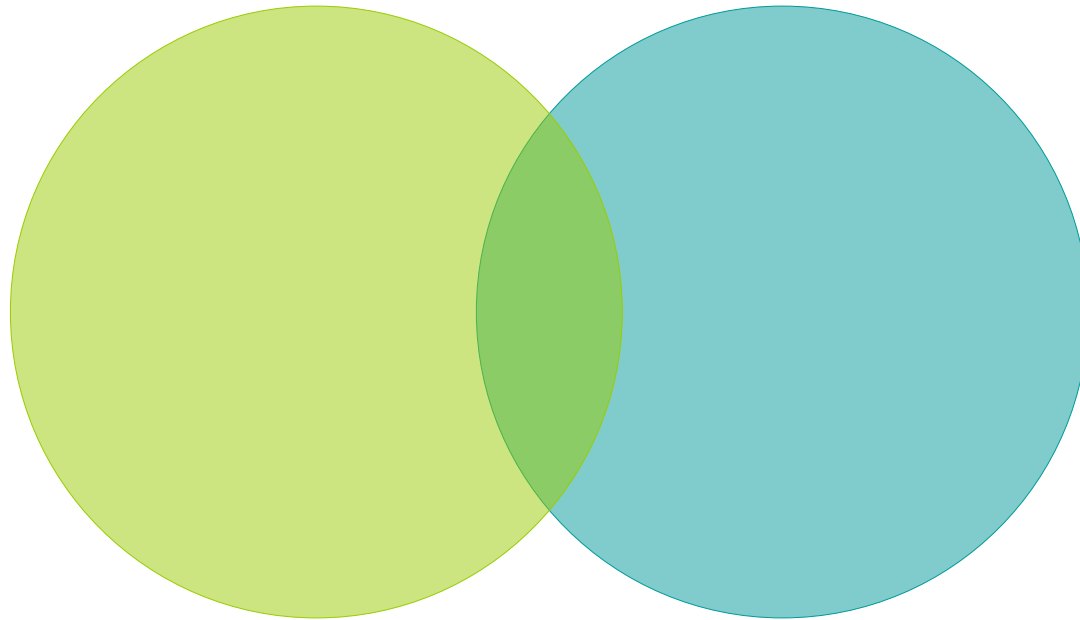


How to address these challenges?

- Pearson – recognition space
- Legal pluralism – co-existence
- Harvard project – cultural match



Recognition space



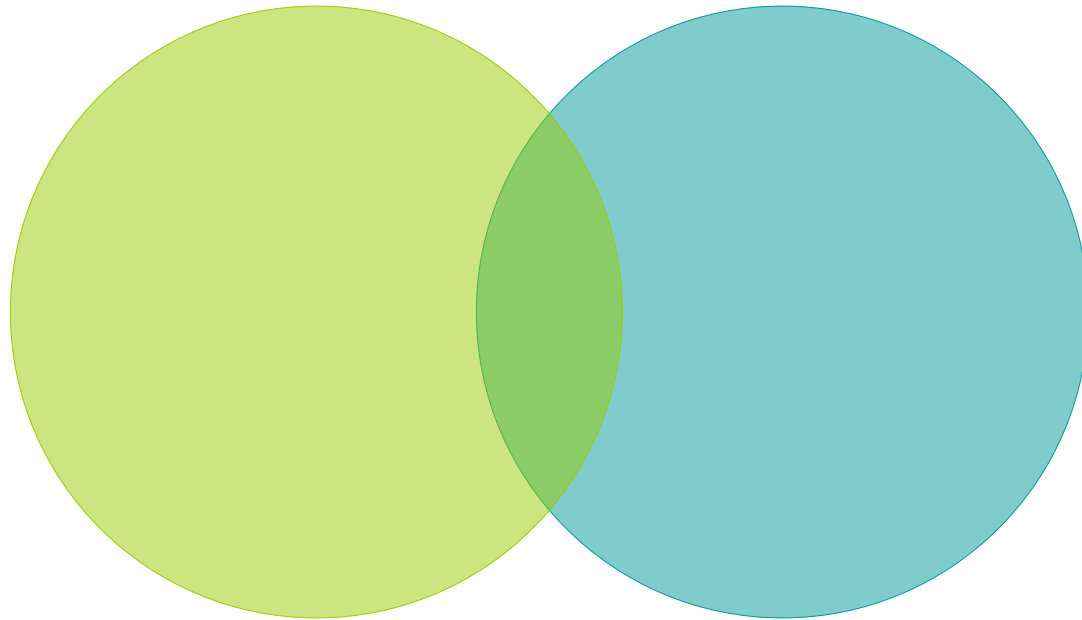


Third space

- The colonial structures that support the colonisers' activities are weakened, leaving room for a hybrid third space
- In this third space, between the spheres of authority of the coloniser and the colonised can be constructed 'a political object that is new, *neither the one nor the other*'
Homi Bhabha



Third space





Third space

The idea of a PBC existing in a third space between traditional and Australian legal systems potentially:

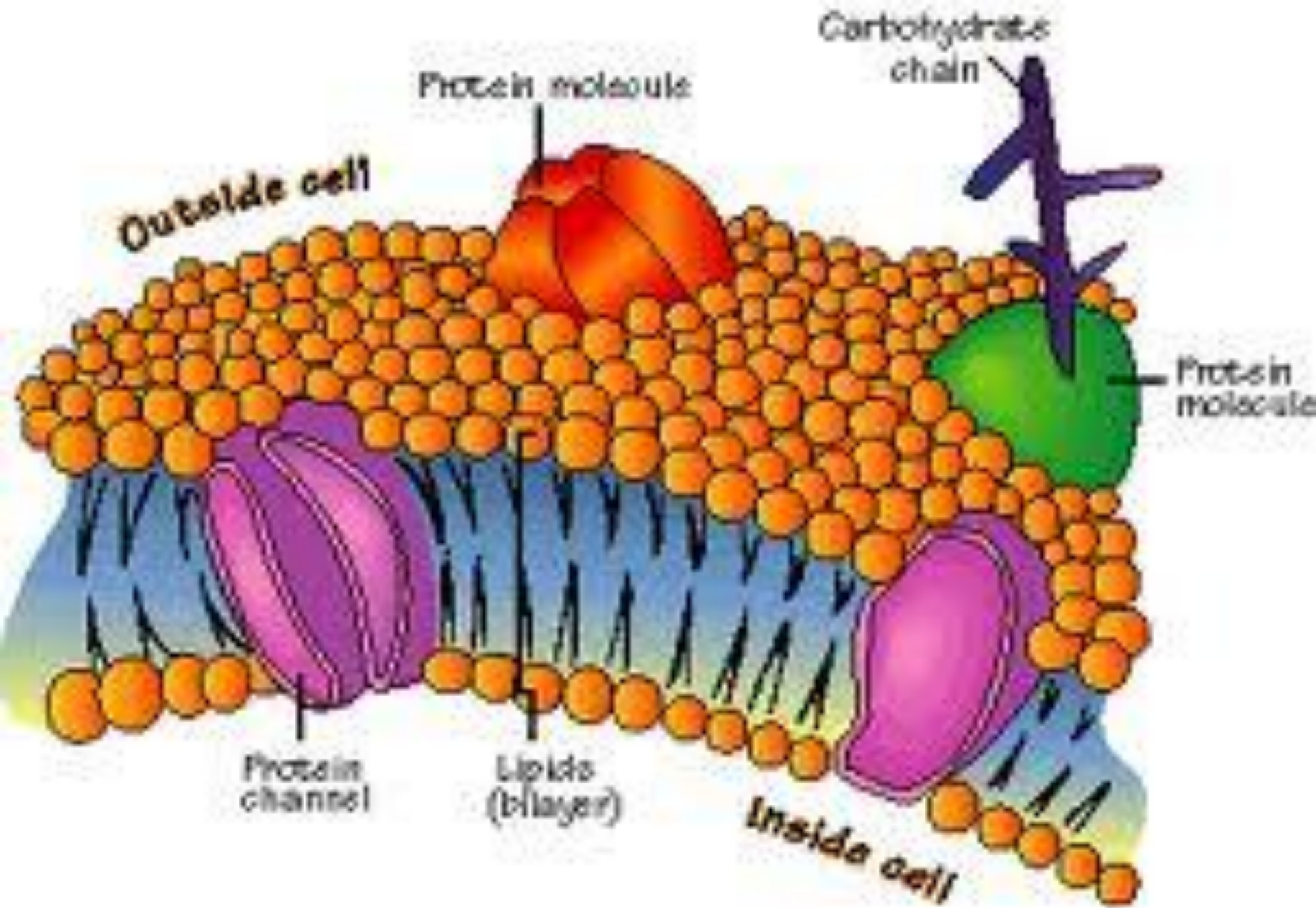
- Enables better engagement with Australian law
- Gives the native title group more control over that engagement
- Helps the PBC to achieve the group's aspirations



Boundary of Third Space

Nature of boundary

- Hard shell (carapace)
 - Protects traditional law
 - Mechanisms allow interaction across it
- Semi-permeable membrane (skin)
 - Active engagement between laws
 - Selective and flexible interaction both ways
 - Controlled by native title group





Boundary of Third Space

- Location of boundary
 - Enclosing PBC only, or
 - Including those who deal with PBC
- Mechanisms for crossing the boundary
 - Exercising native title rights
 - Differential engagement with Australian law
 - Conduit between group and outsiders
- Control by group



Inside the Third Space

- A political object that is new, neither the one nor the other
- Selection and invention from tools available in Australian law
 - Elders' committees
 - Whole of country planning
 - Subgroup membership
- Active engagement between laws
- Control by native title group



Creating PBC in Third Space

- The corporate form is contingent:
 - has developed in response to social, political, economic and legal conditions
 - can change if something new arises
- If Aboriginal and Torres Strait Islander people are to benefit from the corporate form, it can and should be changed to meet their needs



Creating PBC in Third Space

- Active creation of something new
- Australian law and institutions must:
 - listen and actively engage
 - understand how traditional law operates in PBCs
 - acknowledge that, sometimes, they are subject to traditional law
 - vacate legal space
 - fund PBCs properly for them to be effective



Case study & traditional law

- PBCs are trying to meld:
 - traditional decision making
 - imposed corporate governance requirements
- PBCs are setting up different ways of engaging with:
 - Traditional law
 - Commercial opportunities



Practical outcomes of research

- Support for PBCs:
 - Confirm that traditional law should have a place in PBCs
 - Tell government about how PBCs work and problems they face
 - Arguments for more resources and support from government
 - Suggestions for improvements in running organisations
- Suggestions for changing Australian law