(p. 157) 4 Tribal Constitutionalism and Historic Claims: The Impact of Claims Settlement on Tribal Membership Governance in Australia and New Zealand

Introduction

In Australia and New Zealand, the official recognition of tribes occurs as a result of land claims settlement. In both countries, tribal constitutions containing formal membership criteria were first enacted in the early 1990s. The membership of claimant groups is legally defined when recognition is granted, but thereafter tribes are accorded a degree of discretion in the design of prospective membership rules. In this chapter I investigate the scope of tribal autonomy in membership governance in Australia and New Zealand in the new era of tribal constitutionalism. I base my analysis on the membership rules contained in the constitutions of 48 New Zealand Treaty Settlement Entities (TSEs), and 38 Australian Registered Native Title Bodies Corporate (PBCs). In broad terms, claims settlement processes impact on tribal membership governance in two ways: first by requiring a legal definition of the claimant community and the class of beneficiaries, and second by prescribing formal membership criteria. These interventions result in a legal distinction between beneficiaries and members, that is, between the class of people entitled to benefit from a settlement or determination, and persons recognized, as a matter of tribal law and custom, as members of the tribe. The categories are imperfectly aligned. The resulting friction is one of an emerging set of jurisdictional issues accompanying tribal constitutionalism in Australasia. Tribes and States must decide on whether and how the categories are to be made consistent with one another, and, if not, how to protect the
interests of people who are in one class but not the other: (p. 158) specifically, non-member beneficiaries and beneficiaries who are not registered members of tribes.

Claims settlement and tribal constitutionalism generate a new legal pluralism to public law and policy in Australia and New Zealand. A body of critical commentary has emerged in the past 15 years debating the problem of coercion in the litigation and negotiation of land claims. This work has primarily focused on the lack of indigenous control over the timing and structure of the claims process, and inter-indigenous conflict on matters of representation. A newer and less extensive body of work considers the legitimacy of post-settlement governance arrangements adopted by successful claimants. In both countries, the formalization of membership criteria has been addressed only obliquely in scholarship on tribal governance.

Importantly, the current tribal constitutions referred to in this chapter are recently written, (within the ‘settlement’ phase of the claims era, roughly beginning in the early 1990s). Claims settlement in Australia and New Zealand often involves the constitutionalization of a tribal community for the first time. Where pre-settlement institutions exist, they are representative bodies that are not empowered by and responsible to a constituency of registered, voting members. New Zealand has a longer history of formal tribal governance than Australia. The dataset contains older constitutions that help to illustrate transitions in tribal membership governance that are not evident in the Australian material. The longer experience of New Zealand tribes with tribal institutions perhaps explains why debates on tribal governance in that country are not centred on the impact of formalization on the social and cultural life of tribal communities, but rather on how the external boundaries of tribes are to be decided, that is, on how tribes are to be optimally grouped for governance purposes. The Native Title process in Australia is strongly reliant on anthropological evidence and commentary, for the evidentiary reasons explained below, and scholarship accordingly also tends to (p. 159) include a stronger emphasis on the risks posed to indigenous communities by the juridification associated with formal institutions.

In this chapter, I first outline misgivings expressed about the transformative effects of tribal constitutionalism on tribal communities. I consider the models of cultural production emerging from political and legal theories of pluralism, discussed in Chapter One, and propose that these could help to provide a more relational and less positional model of the interaction between custom and legal formality in tribal membership governance. In sections II and III, I draw on the study of tribal constitutions to consider the dominance of descent rules in membership criteria used by recognized tribes, and to explain the tension between tribal and public law concepts of descent. I examine the disjunction between settler State definitions of the beneficiary class, and tribal definitions of their membership, and take a close look at the formal capacity reserved to tribes to include non-descendants, and to exclude descendants. I observe that the stringencies of the continuity requirements in Australian native title jurisprudence and legislation significantly constrain tribal self-constitution, by limiting formal membership rules to those recognized as expressions of ‘traditional law and custom’, substantially uninterrupted since sovereignty was acquired over the claimed territory. New Zealand tribes have a far greater capacity to adapt their 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. I conclude that formal membership rules, including descent, can be designed to provide reasonable certainty and continuity for tribal constitutionalism in post-settlement governance while providing a structure for the evolution of tribal law on membership. This flexibility is secured by provisions allowing tribal constitutional amendment.
I: The Normative Challenge of Tribal Constitutionalism—The Consequences of Formalizing Membership Rules

As outlined in Chapter One, the official recognition of tribes is purpose-driven, and tribal constitutions reflect the telos of recognition exercises. Claims processes of the kind under way in Australia and New Zealand have two pragmatic goals: to finally settle historic claims, and, by so doing, to improve the certainty of property arrangements. Ideologically, claims settlement is part of a range of moves designed to bolster the legitimacy of settler States by establishing consensual formal relationships with indigenous peoples and removing indigenous grievance. The official recognition of tribes through claims settlement consequently includes a heavy emphasis on the historic continuity of tribes and on securing legibility, finality, and certainty by requiring that tribes adopt formal institutions and enact membership rules in tribal constitutions. 

Demands for finality may be in tension with tribal efforts to manage the evolution and adaptation of tribal law and custom on membership. The question faced by tribes and States in institutional design is whether and how State interests should condition membership governance.

In both Australia and New Zealand, all tribes recognized through claims settlement are obliged to adopt a written constitution, to enact membership rules, and to keep a register of members. In their first formal iteration, membership rules used in a tribal constitution must accord with the definition of the claimant community that was decided during the claims process and appears in the native title determination (Australia), or in the Deed of Settlement (New Zealand). State actors have an interest in knowing the population of the claimant community, and in ensuring that the community itself is identifiable, with legible human boundaries. In both countries, membership criteria must be clear enough to permit public officials to identify a person as a member, or non-member, at any given time. Tribal constitutionalism, then, requires that a formal member–non-member boundary be extracted from the cultural practices of tribal communities. Membership rules that appear to be indeterminate, inchoate, or otherwise inaccessible to outsiders are unlikely to survive the claims process. They include rules permitting a high degree of discretion in the selection of members, and those that allow the modification of a person’s status over the course of their lifetime, due to changes in residency, marriage, or their observance of laws and customs. The exigencies of the claims process accordingly tend to favour descent rules over other forms of affiliation. The preference for descent rules in formal membership governance therefore seems to displace tribal custom and constrain tribal self-constitution.

In order to assess the degree to which the public law and policy of claims settlement restrains tribal self-constitution, it is helpful first to consider the small but important body of critical commentary debating the sociological impact of tribal institutions. These analyses are animated by the claim that the formalization of tribal governance amounts to the juridification of tribal communities, that is, that institutionalization results in the encroachment of law into realms of tribal life that should remain within the domain of custom and culture.

(p. 161) The underpinning assumption is that institutionalization necessarily displaces custom, because custom and formality are incommensurable. New work on legal pluralism assists in modelling a less oppositional approach that can acknowledge the existence and function of formal rules in indigenous customary legal systems. I build on this work to suggest that formal rules and institutions can be an expression of customary tribal self-constitution, rather than an impediment to it. Tribal constitutions can set out values or principles that constrain and guide the evolution of custom without displacing it, and so form the ‘external constitution’ that protects more responsive and flexible forms of custom
and facilitates innovation. These can include the principle of descent, which can provide the ‘scaffolding’ for the exercise of tribal discretions in membership governance.

**Formalization of tribal membership: anxieties and assumptions**

‘Juridification’ is generally understood as the advance of law into arenas that were previously not subject to legal regulation. The process is usually framed as a threatening one that places something of value at risk. I observe that where juridification is discussed in relation to tribal communities, normative debates are complicated by the particular political significance accorded to indigenous culture in settler societies. Juridification impliedly poses a risk not just to the cultures of tribal communities, but to cultural pluralism itself, because the formalization of indigenous governance appears as a type of assimilation. Concerns about assimilation are particularly evident in commentary and scholarship lamenting the impact of tribal incorporation on the relationship between community members.

The formalization 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’. The juridification of membership poses, in a very acute form, the risks thought to attend the formalization of indigenous governance. These risks, however, are usually not precisely articulated. In the small body of commentary on the juridification of tribes, two broad, related anxieties are evident: first, that formal rules are inadequate representations of custom (whether or not they affect it); and second, that they distort and displace custom. Most commonly, critics point to the failure of institutions to ‘capture’ cultural practices or social facts, and the consequent failure of formal membership rules to describe all cultural affiliates at any given time. David Martin, (p. 162) for example, is sceptical about the capacity of any institution to reflect the membership of a native title holding group:

> ...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 commentary on 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 as formal members, and that comprised of persons who actually do enrol. This shortfall is inevitable, however, in any subscriptive (voluntary) 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.

The latter claim is the one most centrally expressed in critiques of formal tribal membership rules. The assertion is that formal rules will necessarily distort tribal practices because they are incapable of ‘keeping up’ with the flux of customary membership. In their influential work on the anthropology of PBCs, Martin and Mantziaris begin with this premise. They advise against the codification (by which they mean ‘attempts to define and record, in writing’) of membership rules for native title communities, precisely because this will ‘inevitably affect the principles and practices of that body of traditions’. In this account, no formal governance of membership, however framed, could adequately accommodate
customary membership rules. Following this logic, formality cannot be an expression of tribal culture or custom.

Those commentators that identify substantive losses associated with juridification are primarily concerned with the displacement of familial and kinship ties. The institutionalization 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. In New Zealand, commentators have argued that the designation of tribal members as legal ‘beneficiaries’ of a Treaty settlement demeans and pacifies individuals by increasing their dependence on the expertise and resources of tribal officials. Lyn Waymouth, for example, is uneasy with the assumption 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 settlements, she observes, emphasizes entitlement at the expense of responsibility:

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.

The juridification of tribal governance is also thought to threaten the political cohesiveness of tribal communities by exacerbating discord and encouraging strategic behaviour and fragmentation. It is seen to do so by formally separating decision makers from those governed, and so ‘entifying’ leadership. Tribal resources are vested in the tribe’s governing board, and the task of managing and distributing those assets falls to tribal officials. By providing a focal point for jurisdictional struggles, it has been argued, institutions displace relational practices of diplomacy and negotiation, because conflict about the terms of relations between members are reframed as struggles over control of a governing board or council. I suggest that the causality proposed in these claims should be challenged. Formalization makes internal boundaries and contestation more legible but whether it increases the frequency and intensity of conflict within a tribe is not self-evident. In fact, continuing debates about membership criteria can be seen as evidence of the continuing investment of indigenous peoples in the (p. 164) governance of their communities, rather than as a type of organizational failure. Many of the disputes that arise over leadership, property, and boundaries in post-settlement entities can be seen as ‘traditional’ concerns that have long been debated as matters of custom.

Concerns about the disempowerment of individuals and the weakening of social ties are evident in, and informed by, the generic juridification literature. In the indigenous context, however, it is apparent that they are overlaid by concerns about cultural assimilation, that is, the loss of characteristics that are thought to make tribes distinctively indigenous. Interpersonal relatedness and mutuality are qualities closely associated with traditional tribalism, and part of the appeal of these qualities is that they are so starkly contrasted with the individualism associated with Western modernity. Their diminishment appears as a loss of cultural patrimony for both indigenous and non-indigenous communities. These anxieties extend beyond the consequences for particular tribal communities, however; because, following this logic, formalization 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 some of 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, the extension of law into the customary life of a tribe is seen simultaneously to
reconstitute that community as a culturally non-indigenous one. The displacement of
custom also results in the loss of cultural pluralism that sustains settle nationalism.

Seen in this way, the formalization of tribal membership could threaten the particular type
of pluralism that is embraced as the postcolonial identity of settler societies, and that
underpins most political theory on indigeneity. It possibly also calls into question the fragile
public consensus on the necessity of recognizing indigenous difference in public law and
policy of settler States. (p. 165) As discussed in Chapters One and Two, tribal
constitutionalism invites re-examination of the essential basis on which tribes are
recognized, by requiring the enumeration and evaluation of their cultural attributes. It also
invites attention to the relationships between tribal and non-tribal indigenous communities.
Debates about the impact of formal institutions on tribes are part of this re-evaluation of
indigenous-State relations. The potency of these concerns 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’.22

While it is important to acknowledge the social significance of formalization, it is not
possible, in the absence of a comprehensive study of the sociology of pre- and post-
recognition tribes, to authoritatively describe the discrete effects of institutionalization on
tribal social life and intra-tribal relationships. It is possible, however, to look at the
recognition processes by which tribes come to adopt written constitutions, and the terms of
those constitutions. Any normative evaluation of tribal institutions must consider the degree
of agency and control afforded to tribes in the design and implementation of formal rules,
and specifically whether those rules can be amended or supplemented by tribes. This
invites attention to the politics of indigenous subjectivity and choice, that is often missing in
critical commentary. For tribes, the balance between formality and flexibility that must be
addressed in the design of any legal institution is complicated by the constraints imposed
on them by the public law and policy of claims settlement. This raises important questions
about whether tribal constitutionalism facilitates or encroaches on tribal self-constitution.
They are not advanced by approaches that position law and custom in opposition to one
another.

In the following section I outline the possibility that models emerging from scholarship on
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.23 Recent contributions to debates on cultural production, discussed in
Chapter 1, have resulted in more fine-grained scholarly accounts of the process of
indigenous law making. These add to older concepts used in political theory and
anthropology, which presented culture in objective terms, as a holistic and static attribute
of a community.24 Newer relational approaches understand culture as a process (p. 166)
where attributes and symbols are actively chosen by participants in cultural production. In
this model, indigenous law making is a cultural process.

The reconceptualization of culture has lately influenced approaches to indigenous custom
and ‘custom law’, stressing 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, but constrained by core values.25 Traditions are embedded and
serve to guide innovation, while other norms emerge in response to new situations and so
are adapted to current circumstances.26 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 ensuring their conformity with normative underpinnings. Such a
framing is encompassed in the New Zealand Law Commission’s useful exposition of Maori
custom law, in which it suggests that: ‘[t]ikanga Māori should not be seen as fixed from time

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immemorial, but as based on a continuing review of fundamental principles in a dialogue between the past and the present'.

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. If formality is accepted as an element of indigenous custom, then incommensurability cannot be assumed, and critical focus should shift to the question of indigenous agency in the enactment of formal rules and institutions. Descent rules, for example, can form 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 public transfer of resources and governance capacities to tribal institutions, while allowing space for adaptation of those rules in accordance with the evolving custom of the tribal community, for instance by enacting rules admitting non-descendants. The inclusion of non-descendants as members is relatively uncontroversial 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 (p. 167) concept of descent in play in State–tribal relations, and its legal meaning in public and tribal law.

The human boundaries of tribes are formalized during claims settlement in two ways, first when the community is named and described, and second when membership rules are specified. While the two mechanisms overlap, in the first the policy goal is to define a group of optimal size and cohesion by drawing external boundaries to distinguish the claimant community from other indigenous communities. The second is concerned with the way that community, once described, recruits new members. In both contexts, the public policy goals of certainty, efficiency, and finality in claims settlement are furthered by the use of descent rules. In the discussion that follows I evaluate the efforts of tribes and States to strike an appropriate balance between certainty and adaptability in institutional arrangements, using the concept of descent to constitute recognized tribes. Before embarking on this analysis, I offer an overview of the claims processes operating in Australia and New Zealand, in order to point out important structural differences.

**Claim processes: Australia and New Zealand**

Australian PBCs and New Zealand TSEs both emerge from the settlement of historic claims, but the land claims processes in each country operate with a different logic and methodology. These explain some (but not all) of the variations in the formal constraints operating on tribes in their institutions, especially the scope left to tribes to alter membership criteria by amending their constitutions. Most centrally, the Treaty of Waitangi claims settlement process is political, while native title determinations are made by the Australian federal court. Second, native title recognizes those rights and interests that a community has maintained since sovereignty was acquired over the territory in question, while Treaty settlements provide reparation for historic and contemporary losses caused to tribes by the Crown's breach of the principles of the Treaty of Waitangi. As a consequence, native title claimants must show their continuing connection to land and water through the observance of traditional laws and customs in order to receive a determination that native title exists in the claimed territory. The cause of any loss of connection is irrelevant to the outcome. In effect, New Zealand tribal claims are directed to showing what has been lost, and claiming reparation for that loss, while native title claimants are seeking recognition of property rights they maintained through the continuous observation of traditional laws and customs.
The Treaty of Waitangi is not an independent source of legal rights. Claims are made to the Waitangi Tribunal and progressed through negotiation between the Crown and claimant representatives. Any Maori person may make a claim to the Waitangi Tribunal alleging that the Crown has breached its obligations under the Treaty of Waitangi through historic or contemporary acts or omissions, including (p. 168) in respect of matters not directly related to land. Historic claims are usually tribe-specific, and pertain to breaches of the principles of the Treaty of Waitangi occurring before 21 September 1992 (the date that Cabinet agreed to the principles for settling historic claims). Contemporary claims concern events occurring after that date, and include the claim that led to the 1992 pan-tribal Maori commercial fisheries settlement discussed below.28 The Waitangi Tribunal usually conducts hearings and prepares recommendatory reports on claims submitted, to be used in direct negotiations, although claimants may also choose to bypass the Tribunal inquiry.

Importantly, the settlements process itself is not governed by legislation and so is not subject to ordinary judicial review. Executive discretions in Treaty settlements are largely unconstrained by judicial oversight. Courts have found that Treaty of Waitangi claims are ‘...entertained by the Crown as part of a political process and not part of a legal process... [and so] [t]he Court has no role in the Minister’s process unless it is so flawed that the Court would be obligated to intervene...’29 Judicial forbearance is especially evident in matters involving the Crown’s recognition of the mandate of bodies representing claimants in negotiations.30 Courts have been unwilling to provide injunctive relief in such circumstances, citing the political quality of the negotiations, the need for executive discretion in policy making on Treaty matters, and the necessity of claimants reaching agreement amongst themselves on matters of representation and governance.31 The Courts’ deferential ‘political question’ approach to Treaty settlement negotiations is periodically blamed for escalations of intra- and inter-tribal conflict during the claims settlement process.32 In short, in New Zealand, Treaty (p. 169) claims settlement lies within the sole purview of the executive. Since 2004, some scope has existed for judicial consideration of aboriginal title claims to the foreshore and seabed outside of the Treaty settlements process, but the consequences of such claims and their institutional implications are as yet unknown.33 This means that the negotiation of human boundaries in the Treaty settlements process, including the description of claimant communities and their membership, is beyond the scope of judicial oversight. Similarly, the Waitangi Tribunal is legislatively barred from revisiting the substance of settlement agreements, but retains the capacity to consider procedural matters where these raise the possibility of a contemporary Treaty breach, including the Crown’s management of the mandating and negotiation process.34

In contrast, Australian native title claims are based on the common law doctrine of native title. Claimants must show that they are a society united by their continuing observation of traditional laws and customs, and that they have exercised the claimed rights and interests in accordance with those laws and customs since sovereignty was acquired over the territory in question. If a claim is not contested by a third party, the federal court can proceed to endorse the terms of a determination agreed between the parties without holding a hearing on its substance. This results in the issuing of a consent determination. Conversely, contested claims are litigated in the federal court.35 In the case of native title (p. 170) determinations, claimant communities must register a claim with the Native Title Tribunal, and meet the registration test, which requires claimants to identify themselves in terms sufficiently precise that it can be discerned whether any particular person is or is not a member of that group.

In both countries, public law and policy governing the settlement of claims includes mechanisms that are designed to identify the claimant group, assign a tribal institution, and give legal effect to membership criteria. The degree of specificity in such legal mechanisms
determines the extent of discretions left to tribes in the development and implementation of membership rules.

**Choosing tribal boundaries: the impact of public law and policy on the external boundaries of tribes**

As noted above, settler governments are concerned to ensure that the claims settlement process is efficient. The public law and policy that governs claims is designed in part to limit the number of claimant groups and opportunities for future claims. The claimant definition that identifies the recognized community is an important part of this process. To provide requisite certainty, the description of the group must be inclusive enough to encompass all potential claimants. However, from the State’s perspective, the claimant definition need not be a guarantee that beneficiaries are entitled to membership in the post-recognition community, so long as their claims have been settled. Tensions arise where communities resist inclusion in the claimant group, within the external boundaries decided in the settlement of the claim. Once incorporated within the beneficiary group, they lose the capacity to bring a claim on their own behalf to the same territory, or (in New Zealand) in respect of the same events.

Aggregation of this kind can require groups to cooperate in governance where previously they were autonomous from one another, or bound only by ad hoc agreements. It raises the stakes of a group’s attempts at disengagement, by transforming it into a type of secession, in which it may lose access to the resources and property rights held by the representative body of the ‘rump’ community. In this way, aggregation can suppress or interfere with the ‘self-help’ function of schism. As Tim Rowse has observed, ‘the splitting of large collectivities into small groups was and remains a normal and mutually beneficial response to political difference. If you do not get on, you can always get out.’

Consequently, while aggregation can help communities to realize greater efficiency in governance, and increase their political power by creating a larger, more populous, and well-endowed coalition, it raises some social challenges. One challenge is to design membership rules that can be used to group together communities that consider themselves to be sociologically distinct. Descent rules are an effective mechanism for organizing membership in an aggregated community, because they can encompass and transcend local affiliations. All that is required is the identification of a common ancestor high enough in the genealogic pyramid to be shared in common by intended members. Their capacity to facilitate aggregation, and so to improve the efficiency of claims settlement processes, is one reason why descent rules are favoured as constitutive devices in tribal constitutionalism.

The impact of aggregation policy on tribes is illustrated by the institutional manoeuvring of tribal communities in New Zealand. Most New Zealand tribal ‘membership disputes’ concern the construction of the external boundary of an aggregated group, rather than the design of membership criteria per se. The Crown’s official policy has been to negotiate only with what it calls ‘large natural groupings’ of Maori. ‘Natural’ ordinarily indicates shared descent from a common ancestor. This policy has been a source of much controversy. Problems arose during the final stages of the implementation of the 1998 Ngai Tahu settlement, when two hapu contested their inclusion in the claimant group, complicating the passage of implementing legislation. As a result, in subsequent negotiations the Crown has required claimant representatives to acquire a ratified Deed of Mandate from the claimant community prior to commencing negotiations. Once negotiations have been concluded, a draft constitution for the new tribal institution is reviewed by the Crown, to confirm that the class of beneficiaries identified in the constitution is the ‘same group whose claims have been settled’ and to ensure that the membership criteria in the constitution match the definition of the beneficiaries included in the settlement legislation. Claimant communities must then ratify the constitution of the Treaty Settlement Entity (TSE) by majority vote. These mechanisms help
to ensure that the institution and the membership criteria it includes have the support of at least a majority of those who will be represented and governed by them.\textsuperscript{43} Resistant minorities will, however, be included by dint of a majority vote.

Another element of New Zealand tribal arrangements, that mitigates against the possible disputes over aggregation, is the variegated and complex landscape of tribal governance. Tribes may be represented by more than one TSE, in addition to tribal institutions fulfilling particular, non-settlement related tasks (such as service delivery). Tribes may aggregate for one settlement, and represent themselves independently for others. For example, some tribes that have been recognized for the purposes of the pan-tribal fisheries settlement concluded in 1992, have not yet begun or completed a historic claim,\textsuperscript{44} and some have independently pursued a historic claim, but are represented as part of a larger collective for the purposes of the fisheries settlement.\textsuperscript{45} Although the Crown prefers to negotiate with ‘large natural groupings’ as opposed to smaller groups or groupings of tribes that are not related by descent, it has in recent years (on the recommendation of the Waitangi Tribunal) shown more willingness to reach agreements with groupings that have shared interests in specific resources or territories, but are otherwise represented by separate tribal bodies.\textsuperscript{46} This again adds to the flexibility accorded to tribes in post-settlement governance, including membership governance. A single, descent-based tribal constituency may be represented by more than one institution, affording members a degree of internal affiliative choice, and providing intra-tribal checks and balances on the performance of tribal governance.

Human boundary changes and the multiplicity of inter-group relations are made legible by the Treaty settlements process, but are also the continuation of the shifting affiliations and alliances that have long characterized tribal dynamics in New Zealand.\textsuperscript{47} Many hapu affiliate to more than one tribal configuration, and ‘rearrangements’ of hapu are relatively common, both as historic phenomena and as events within living memory. An Iwi’s component hapu may be renamed, amalgamated, or designated as separate in the course of an Iwi’s history, as is evident in changes to the tribal constitutions in the study (again there is no comparable historic documentation in Australian PBC constitutions). For example, in 2002, Muaupoko amended its charter to include Ngarue as a seventh hapu,\textsuperscript{48} and in 2004, Ngati Raukawa (ki te Tonga) amended its 1991 charter to include Ngati Tukorehe in the list of 24 groups represented by Te Runanga o Raukawa.\textsuperscript{49} The 2004 version of the Charter of Te Whanau o Apanui records that three hapu withdrew from the federation in 1988 during debates about the allocation of fisheries assets, and affirms that the tribal body now only represents the remaining ten consenting hapu.\textsuperscript{50} Name changes are also common.\textsuperscript{51} Tribal institutions in New Zealand have had to accommodate inter-tribal relatedness and boundary change, while representing the tribal continuity and ‘naturalness’ (p. 174) that is deemed necessary in historic claims settlement. One tribal response has been to build into tribal constitutions the possibility of dissolving an inter-tribal confederation, that is, to formally govern schism as part of tribal constitutionalism.

Constitutional designs show the promise of conditional forms of aggregation that allow for boundary changes as a matter of tribal constitutional law, which allow for tribal federalism, periodic review of tribal aggregations, and the possibility of partition. The Mandated Iwi Organizations that represent Iwi for the purposes of the Maori fisheries settlement include four entities known as ‘joint mandated Iwi organizations’, each representing more than one Iwi.\textsuperscript{52} The constitutions of joint Iwi organizations specify the process for effecting the withdrawal of a component tribe and the partition of assets, based on the withdrawing group’s population.\textsuperscript{53} The possibility of withdrawal encouraged reluctant tribes to agree to the terms of their confederation during the claims process.\textsuperscript{55} These innovations show the promise of more subtle and complex organizational tools for tribes in New Zealand as post-settlement governance evolves, but the scope for such institutional developments in Australia is much more limited. The human boundaries of native title-holding communities

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are legally fixed by native title determinations and tied to the continuity tests applied to identify a native title-holding ‘society’, as defined by its continuing observation of traditional law and custom. Aside from the onerous mechanisms for the review of a native title determination, the boundaries of the group cannot be changed once determined.

This is because in Australia, the external boundaries of the claimant community are decided by a federal court on the basis of evidence or agreement on the traditional laws and customs by which the society in question is constituted and establishes its connection to land. The legislative regime provides at least two mechanisms by which the membership jurisdiction of a PBC can be varied by a court order: first, the determination itself can be varied or revoked; and second, the membership decisions of a PBC 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 a PBC by a native title holder is a challenge to the PBC’s interpretation of the traditional laws and customs that constitute the group. Both provide ways that native title holders can modify, via a (p. 175) federal court determination, the constitutive legal framework that empowers and constrains them in their membership decision making.

The Native Title Act limits the range of people who have standing to bring a claim for variation of a determination. Applications may only be sought by an appropriate State or Commonwealth minister, the PBC itself, or the Native Title Registrar. The revision provision has never been successfully used. Further, the determination may only 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’. This means that the formal identification of the native title holding community may be altered, in the circumstances described, as a result of a successful variation application by a person qualified to make one. These provisions raise the possibility of a change to the membership components of a determination at the request of a PBC. They also provide an avenue for a post-determination challenge from a party opposed to a successful determination. Importantly, however, while a person ‘who holds a non-native title interest’ in the area in question can apply for a native title determination (a non-claimant determination), they are ineligible to apply for the variation or revocation of an existing determination. This ensures a degree of permanence and stability for the rights and interests identified in the determination, while allowing some scope for their alteration in changed circumstances.

While the provision has never been used, from time to time disaffected indigenous groups have petitioned State or Commonwealth governments to seek a variation of a disputed determination on their behalf. However, the Act provides very limited opportunities for the revision of a native title community's description, as it appears in the native title determination, in ways that would allow the PBC to amend the membership rules in its constitution. Any such change would have to be consistent with findings on the content of the traditional laws and customs of the applicant group that define the ‘society’ in question, including common law continuity tests.

Alongside macro-level decisions about how to identify the claimant community, claims settlement also entails decisions about how to identify members. Just as descent rules assist in the aggregation of groups who otherwise perceive themselves to be distinct, they are also favoured as membership criteria at the ‘retail level’ for the reasons discussed below. In the following section I show how (p. 176) descent rules emerge from the interaction of tribes with public actors in claims settlement, first in New Zealand and then in Australia.
II: The Function of Descent Rules in the Claims Process and Post-claim Tribal Governance

In claims settlement, public decision makers prefer to frame descent as a stand-alone constitutive rule, a position that may be in tension with the efforts of tribes to supplement or qualify descent with other types of affiliative rules, such as measures of cultural proficiency, familial ties, or residency. Descent rules lend themselves to formalization. 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. As discussed in Chapter 2, 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. The relevant ancestor for descent purposes is ordinarily a person who was an occupant of the claimed territory at a designated time in the colonial history of the State. New Zealand claimant definitions (which appear in the Deed of Settlement and in settlement legislation) identify relevant ancestors as those people who exercised customary rights in the tribal 'area of interest from 1840' (the date of the signing of the Treaty of Waitangi). In Australia, the community must show that it has continued to exist since sovereignty was asserted, 'as a society united by its observance of traditional law and customs'. Descent rules appear to serve this probative function well. The utility of descent rules means that 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 its content and scope. Consequently, descent rules are often proposed as stand-ins for more complex social arrangements, and can entail the translation of a variable and contingent set of cultural protocols into the singular, semi-permanent state of descent-based membership.

Because of their perceived selectivity and inflexibility, descent rules are often viewed with suspicion. Critics suggest there are more authentic, traditional, and inclusive ways for a tribal community to select its members. As discussed above, however, the ideally inclusive tribe is difficult to describe, since it requires the prior identification of a group of persons entitled to membership. Inclusivity in tribal membership is consequently an elusive concept. It may refer to the size of a tribal community (tribes should not be too small), to optimal cultural pluralism (tribes should be culturally diverse), or to coherency within the tribal community (tribes should maintain cultural integrity). Descent rules are thought to frustrate these goals, on the grounds that people who might be excluded for lack of requisite descent should be included on some other basis in order to achieve optimal inclusivity, that is optimal size, pluralism, or coherency. However, descent rules are not inherently more exclusive than other forms of recruitment. As discussed above, the content of descent rules is provided by the terms of the relationship they describe, that is, by the legal relationship specified in tribal law between identified ancestors and applicants. Given the (often involuntary) dispersal of tribal members from their traditional territories and communities, descent criteria offer an important mechanism for the re-constitution of tribes on bases other than shared occupation. Descent rules accommodate estranged kin more easily than rules based on face-to-face interactions, or ‘non-discriminatory’ rules such as parental enrolment and measures of cultural competency. The important variable in each case is whether the tribe in question is able to exercise control over the meaning and interpretation of descent rules.

The constitutive moment of recognition and formalization provides an opportunity for tribes to repair estrangement by re-establishing the continuity of the tribe and providing for the enrolment of descendants. Settler governments are concerned to ensure that all persons who are the successors of historic property holders are included in the community whose claims are settled. Settler and tribal policy goals coincide on the necessity of extending membership beyond the intact community to include those who have lost connection with
the tribe, that is, they can agree on the need to recruit. Descent rules provide a principled basis on which to do so. However, the prioritization of descent at the expense of other modes of affiliation can have the effect of devaluing connections that are derived from non-descendant ancestors, including non-indigenous ancestors, or ancestors distinguished by their ‘recent’ (post-contact) migration to the claimed territory. In both Australia and New Zealand, the transition from pre- to post-settlement community can involve the ‘shedding’ of non-descendants from the formal description of the tribe. Such persons may be full participants in the social and cultural life of the tribe, but will lack formal status and standing (for voting and access to resources, for example), and will be unable to legally ‘transmit’ membership status to their children. For tribes that seek to recruit non-descendants, an externally imposed requirement that descent rules cannot be supplemented by other recruitment mechanisms is a constraint on self-constitution.

The extent to which descent rules can underpin more elaborate customary norms of organization depends on the degree to which they can be amended, qualified, or supplemented by the tribal community. In this respect, there is a major divergence between the legal regimes in place in Australia and New Zealand. In Australia, as will be discussed, PBCs must ensure that their prospective membership rules are reasonably continuous with the (pre-contact) traditional laws and customs that define the community in a native title determination. New Zealand tribes apparently enjoy much greater flexibility and much greater control over their institutional forms, although, as is discussed below, some of the limits imposed on tribes by settlement legislation have yet to be tested.

Changes brought about by formalization are difficult to observe except where tribes have pre-settlement governance entities, established by written constitutions in which transitions are documented. This is the case for Australian native title holding groups, who are formally constituted for the first time in the native title claims process. Patterns of institutional change are evident, however, in the subset of New Zealand tribes for whom multiple constitutional iterations are available. Among this small group of tribes, there is an observable reduction over time in the frequency of references to members or beneficiaries who are non-descendants. This manifests in 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 original form of the charter made no explicit reference to either beneficiaries or members. In 2002, the tribe introduced the concept of community membership based on descent from its eponymous ancestor. 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 by the Fisheries Commission, and requires both descent and affiliation to a Nga Puhhapu:

‘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 a representative body to a responsible institutions includes the shedding of voluntaristic terminology from tribal constitutions. In order to qualify as descendants, applicants need not show a commitment to the tribe and its purposes. As with Ngapuhi, Ngati Koata’s constitution, for instance, 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’. This was changed in
Likewise, multiple iterations of New Zealand 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 the local ‘Maori community’ of a particular region. Of the eleven ‘oldest’ New Zealand tribal constitutions in the dataset (those in existence prior to 1990 and unamended since then) three include non-descendant Maori resident in the tribal territory. Formulations of this kind have become less common over time, particularly as Treaty Settlement policy requires tribes to register beneficiaries ‘wherever they reside’. Only one tribe that has been recognized for Treaty settlements purposes has elected to include non-descendant residents (Ngati Kahungunu), and then only to accord those persons limited participatory rights. These changes reflect the shift in the functional mandate of tribal bodies engendered by the settlement of Treaty claims. Tribal entities that once were primarily tasked with representation and service delivery are now managing Treaty settlement assets on behalf of named beneficiaries.

The status of non-residents is a major source of tension in New Zealand tribal politics and governance. Descent rules ‘override’ residency by admitting persons to the group who do not live 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 in situ community of the tribe, who are responsible for exercising traditional guardianship roles and for maintaining the ‘ahi kaa’ (home fires). Local residents complain that they are sometimes ‘swamped’ by non-resident descendants in tribal decision-making processes. Commentators have expressed some sympathy with the position of resident members, associating non-residency with opportunism and cultural inexperience.

The New Zealand Law Commission, for example, has 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’. Emphasizing the negative effect that ‘cultural ignorance or disregard has on the maintenance of traditional hapu 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’. Descent rules, then, are seen to work against the maintenance of traditional governance where they confer on non-residents the right to vote in tribal decision making. Tribes may amend their constitutions to impose residency requirements on voters, but demographic information suggests that the resident population would not succeed in securing a majority vote in favour of an amendment of this kind.

Those few tribal residency statistics that are publicly available give some indication of the demographic import of tribal non-residence. Ngai Tahu, for example, whose traditional territory covers most of New Zealand’s South Island, reports that only 38 per cent of registered members live within their traditional territory. Ngapuhi, the largest tribe in New Zealand, reports that 80 per cent of its members live outside its territory, and for Nga Rauru the figure is 82 per cent. Ngati Mutunga reports that 75 per cent of its registered members live outside the Taranaki region, of which its territory is a small part. If those statistics are typical for New Zealand tribes (data of this kind is not officially collected), it means in effect that the resident segment of tribes, claiming a large share of control of tribal political affairs, are a small proportion of tribes’ 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 demographies and internal politics. They do so by introducing persons into the formally defined tribal community whose cultural membership may be in question (including non-residents, legally adopted children, and members of resistant ‘sub-tribes’). They also seem to encourage the exclusion of cultural affiliates who cannot show descent (such as spouses and long-term residents—Maori or non-Maori). As the discussion above shows, there is a reasonable degree of consensus between New Zealand tribes and the Crown on the importance of descent as an ordering principle of tribalism. They disagree, however, on its legal meaning. These tensions are evident in efforts to define ‘descent’ for the purposes of Treaty settlement legislation and Deeds of Settlement, the documents that contain the definition of the beneficiary class that appears in the first iteration of a TSE’s constitution. In the following section I examine the concepts of descent operating in settlements policy and take a closer look at the relation between the concepts of ‘beneficiary’ and ‘member’ in the law and policy of Treaty settlements.

**Maoriness and membership in New Zealand: descent and the Treaty settlements process**

The relationship between the concepts of ‘beneficiary’ and ‘member’, is likely to become of increasing importance as tribal governance evolves away from its link with settlements. The constitutions of Treaty Settlement Entities contain a definition of the beneficiaries as established in the Deed of Settlement and in settlement legislation. The Crown’s position, however, is 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 charter:

> 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 CEO 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 beneficiaries included in settlement legislation or the Deed, even if it is free to amend its constitution. Further, those groups constituted under private legislation (Ngati Awa and Ngai Tahu for example) whose charters are governed by Settlement Entity legislation cannot unilaterally amend their constitutions except in accordance with the Act. It is more accurate to say, then, that tribes can alter the consequences of beneficiary status by amending their 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 beneficiary definition in their constitution. Those matters are legislatively determined. One consequence of tribal 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 in fact. Alternatively, some members may not be legal beneficiaries of the settlement, and would not be entitled as a matter of public law to be registered or to share in settlement assets, although the tribe could confer benefits on them as it could on any third party.
The flexibility accorded to New Zealand tribes to enrol non-descendants and exclude descendants is made possible by the distinction in public law and policy between tribal members and ‘beneficiaries’. Membership is determined by tribes, but beneficiary status is conferred by legislation. What obligations are owed by tribes and the Crown respectively to persons who are in one class but not the other: non-member beneficiaries, and members who are not beneficiaries? The uneasy relationship between the two categories is evident in the law and policy giving effect to the 1992 pan-tribal settlement of Maori claims to commercial fisheries.

As in individual historic Treaty settlements, the documents giving effect to the fisheries settlement show some ambiguity about the relation between beneficiaries and members. For a start, the Deed of Settlement identifies the settlement beneficiaries as ‘all Maori’. The identification of the Maori collectives who were entitled to represent ‘all Maori’ was the subject of protracted litigation prior to the passage of the implementing legislation, and involved a series of challenges from non-tribal Maori groups (represented by Urban Maori Authorities) claiming the right to receive assets or otherwise benefit from the settlement. Te Ohu Kai Moana, (TOKM), (the body tasked with distribution of fisheries settlement assets) 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 Maori Fisheries Act 2004, implementing the settlement, accordingly defines the beneficiary of the settlement as ‘Iwi and, through Iwi, ultimately all Maori’. By implication, ‘all Maori’ are to be represented for the purposes of the settlement by Mandated Iwi Organizations (MIOs), the representative institutions of tribes recognized as Iwi by TOKM. These institutional arrangements assume the coincidence of the two constituencies identified in the settlement instruments: ‘Maori’ and ‘members of Iwi’. They do not accommodate persons who are in one category but not the other, for instance non-Maori beneficiaries who are Iwi members and Maori who are not Iwi members. The two constituencies are created by the slippage between official and tribal concepts of descent, enacted in public and tribal law respectively, and by the use of the concept of ‘descent’ as the mechanism for the identification of settlement beneficiaries notwithstanding its indeterminacy.

While it has generated a significant body of analysis directed to the question of what constitutes an ‘Iwi’, commentary (and jurisprudence) on the fisheries settlement has not engaged with the way in which individual Maori come to be beneficiaries of that settlement. Having established the method for the identification of Iwi, there remains the question of how a person comes to be an Iwi member, and so also a beneficiary of the settlement, and the degree of discretion afforded to tribes in the selection of members. It seems clear at least that a non-Maori person (a person who is not a ‘member of the Maori race of New Zealand’ or a ‘descendant of such a person’, by adoption or otherwise) could not be a legal beneficiary of the settlement, even if they were enrolled as a member of an Iwi. However, the extent to which tribes are obliged to enrol eligible beneficiaries as members is uncertain.

The Crown’s stance on this point is ambiguous. According to government policy, ‘individual Maori 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’. 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’. However, as discussed above, Iwi membership is defined in the Maori Fisheries Act. 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, the Act obliges MIOs to register any applicant descendant as a beneficiary, because all descendants are legislative ‘members’ for settlements purposes, and MIOs are required by the Act to ‘make ongoing efforts to register all Iwi members’. Therefore, 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’.

This indeterminacy has real-world consequences. First, one in six persons identifying as Maori in the national census reported that they did not know from which Iwi they were descended.91 The ‘all-Maori’ category is established through self-identification, but the ‘Iwi member’ category is established by tribal law and policy. As might be expected, there is an immediate shortfall between the larger class of Maori, and the smaller class of Iwi members. Second, some self-identifying Maori could be expected to not register, even if they were aware of their Iwi genealogy. If too few Maori register as Iwi members, then the legitimacy of the fisheries settlement is compromised. The logic of the ‘through Iwi, all Maori’ framing, itself a compromise reflecting years of debate and litigation, would be unconvincing if only a small minority of Maori had any prospect of benefiting from the settlement. What, then, would be a reasonable proportion for settlements purposes? The Fisheries Commission ultimately decided that in order to receive assets, an Iwi organization must register a named minimum (p. 185) proportion of the ‘notional Iwi population’, a figure based on the number of Maori 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.92 This suggests that for public policy purposes, if one in five self-identifying Maori were registered as Iwi members, the settlement would legitimately benefit ‘all Maori’, as intended.

In addition to the friction between the classes of ‘all Maori’ and ‘Iwi members’, the principles of whakapapa (customary genealogy), legal descent, and legal adoption also collide in the legal instruments governing the fisheries settlement. 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 for debates on the purpose and structure of Treaty settlements and on the reach of tribal self-governance. The public law and policy of adoption encroaches on the authority of tribes to assert and enforce customary law through their formal post-settlement governance of membership.

This question has arisen as a major point of contention in the negotiation of individual historic Treaty settlements. The Crown’s position is that legally adopted children must be included as beneficiaries of Treaty settlements, by virtue of their legal descent from tribal ancestors. Accordingly, Treaty settlement legislation must be subordinated to the Adoption Act, the Human Rights Act, and the Bill of Rights Act, and cannot be used to allow tribes to make distinctions between biological descendants and adopted persons.93 The Crown Law Office has advised that the inclusion of a provision in settlement legislation that allows the exclusion of legal adoptees from beneficiary rolls could be contrary to the Bill of Rights Act.94 Tribes are very resistant to any intervention touching on whakapapa, which lies at the core of the tribal customary legal order.95 As a (p. 186) result, the status of legal adoptees was a central issue in the negotiation of four of the most recently concluded Treaty settlements, involving the claims of Ngati Mutunga,96 Ngati Tuwharetoa,97 Ngati Awa,98 and Ngaa Rauru.99 Maori and non-Maori Members of Parliament have debated the ethics of ‘overriding’ whakapapa by including legal by adopted persons in the definition of descent used in settlement legislation. Outcomes have varied. The legislation enacting the Ngati Mutunga, Taranaki Whanui ki Te Upoko o Te Ika, and Ngati Awa settlements define
descent to include legal and customary adoptees, while the Acts for Ngaa Rauru, Ngati Tuwharetoa, Ngati Ruanui, Ngati Tama, and Te Roroa make no reference to adoption.  

Outside 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 on the status of adoptees. Ngai 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 Ngai Tahu Census. Adopted persons are therefore not eligible to enrol as Ngai Tahu beneficiaries unless they are of Ngai Tahu descent.’ Ngaa Rauru and Te Roroa have succeeded in having statements asserting the dominance of whakapapa over adoption law included in their Deeds of Settlement. Importantly, at the insistence of the Crown, such tribal statements about the meaning of whakapapa that appear in Deeds of Settlement are not reflected in 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 is a ‘political statement’ that has no legal effect.

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 settlement legislation. The Crown accordingly reviews tribal constitutions to ensure that the definition of beneficiaries they contain includes all legally adopted persons, as is required by settlement legislation. As long as this is confirmed, the Crown seems amenable to allowing the tribe to state (as Ngaa Rauru and Te Roroa have done) that beneficiary status does not confer whakapapa. 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. The Crown refused to approve the charter, insisting instead that its terms reflect the settlement legislation by including legally adopted persons in the category of descendants (uki) and therefore as beneficiaries of the settlement. The class of ‘taurima’ now identified in the Ngaa Rauru constitution, as a result, refers to customarily adopted persons, effectively whangai (customarily adopted children), who are not legal descendants by adoption and so can be excluded or ‘demoted’ in accordance with tribal policy without contradicting the settlement legislation. In public law, legally adopted children are descendants, and in tribal law they are not. This divergence is the source of the juridical friction expressed in debates about membership criteria of New Zealand tribal constitutions.

The status of adopted children was likewise a major source of contestation between the Crown and TOKM during the drafting of the Maori Fisheries Act 2004, implementing the pan-tribal fisheries settlement. As it has been since in historic Treaty settlements, the Crown argued strongly that legally adopted persons should be beneficiaries of the settlement in the same way as biological descendants, while the Commission argued, as tribes have done, 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’. During the passage of the Maori Fisheries Act, the Select Committee requested that it be amended to allow Iwi to exclude legally adopted persons from the register. Had it been enacted, 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 to allow the exclusion of adoptees. Provisions for whangai were made in the Act as a compromise.

For the purposes of the fisheries settlement legislation, then, a member of an Iwi 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]’. 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...’ Whangai is defined ‘as
a person adopted by a member of an Iwi in accordance with the tikanga\textsuperscript{112} of that Iwi, but who does not descend from a primary ancestor of the Iwi’ (emphasis added).\textsuperscript{113} The question remains as to whether persons who are not descendants by law or custom (such as a spouse) can be legal beneficiaries of the settlement. If the answer is yes, the implication is also that they are included in the class of ‘all Maori’ whose claims have been settled. The broader impact of definitions of ‘Maori’ in New Zealand legislation, then, appears to be that legal Maoriness can be conferred on adopted persons who have no biological Maori ancestry, by virtue of their descent from a Maori person.\textsuperscript{114}

(p. 189) 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. 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 cannot be legal beneficiaries of the settlement unless provision is made in the relevant legislation for their inclusion. The Maori Fisheries Act and some tribe-specific settlement acts make reference to the inclusion of whangai as beneficiaries (for example the Ngati Awa Claims Settlement Act 2005),\textsuperscript{115} and others do not. The language used suggests that the Crown’s intent is to capture in the beneficiary definition all descendants, including legally adopted persons, and to make some allowance for customarily adopted children, but to prevent the conferral of beneficiary status on persons associated with the tribe who are not descendants by law or custom. 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.

Paradoxically, the jurisdictional split between the concepts of ‘beneficiaries’ (established by public law and policy) and ‘tribal membership’ (established by tribal law and custom) affords the parties room to manoeuvre on their respective obligations to beneficiaries and members, and to reach agreement on the entitlements of persons who are in one category and not the other. Because of this split, conflicts about membership and boundaries have the character of jurisdictional disputes. Tribes seek to retain the authority to determine membership and the consequences of membership, and may be amenable to reaching agreement on the identity of beneficiaries, so long as this does not impinge on their membership jurisdiction. The Crown’s public responsibilities are to all legal descendants, but it exercises forbearance on tribal efforts to define whakapapa. The underpinning idea is that membership is a matter of whakapapa, and so within the tribal customary realm, irrespective of the agreement on the legal class of beneficiaries, and however that agreement is reflected in the institutions of the tribe. Something like this sentiment is evident in the New Zealand Law Commission’s view that ‘unlike an incorporated society, a tribe cannot refuse membership to, or (p. 190) expel, a legitimate tribal member’.\textsuperscript{116} Likewise, the constitution of Ngati Ranginui provides that ‘no member whose membership of the Society has ceased…shall thereby cease to be a member of the Ngati Ranginui Iwi and any such person shall continue to have the right of participation in Iwi affairs generally’.\textsuperscript{117} Similarly, the governing council of Ngaa Rauru (Te Kaahui o Ngaa Rauru) includes the following statement in its tribal registration form:

To be part of an Iwi is the birth right of every Maori. Secondly, we can whakapapa to more than one Iwi. Te Kaahui o Ngaa Rauru is not the Iwi of Ngaa Rauru. It is an organisation set up to work on behalf of all Marae and Hapu of Ngaa Rauru and to advance the economic and spiritual well being of all the descendants of Rauru Kii Tahi.\textsuperscript{118}
The degree to which descent rules constrain a tribe in the definition of its cultural membership depends on the control it has over the interpretation, supplementation, and amendment of formal descent rules. In summary, in New Zealand, recognized tribes are able to include as members persons who would not qualify as beneficiaries, although they must register all legally qualified beneficiaries (at least for the purposes of the fisheries settlement), including legally adopted persons, until such time as the tribal constitution has been validly amended. There is acknowledgement, in some settlement legislation, that persons can become legal beneficiaries by virtue of customary adoption. Australian native title groups have far less discretion. In the following section I discuss the constraining role of descent rules in the constitution of native title holding communities in Australia, and the constraints under which PBCs operate in giving effect to membership governance.

**Competing official and tribal concepts of descent: Australia**

Australian Native title is a common law doctrine, given its content by judicial pronouncements on tribal claims to land and resources, in accordance with the Native Title Act 1993 (NTA). Importantly, Australian jurisprudence has limited the content of ‘recognizable’ native title to those rights and interests still held under ‘traditional laws and customs’, as opposed to adopting the presumption (p. 191) that title proved by historic tribal occupation is an effective fee simple (as in Canada). In Australia, ‘native title rights depend on proof of the existence at the time of Crown acquisition of sovereignty of traditional laws and customs, which are then used to define the nature and content of the rights’. According to the High Court’s controversial 2002 decision in *Yorta Yorta Aboriginal Community v Victoria*, in order to be ‘traditional’, laws and customs must be those that existed ‘at sovereignty’ and that have remained ‘substantially uninterrupted’ since then. Significantly for membership governance, in order to be recognized, each claimed ‘right and interest’ must independently meet the continuity test. This includes those rights and interests possessed under the traditional law and custom of membership.

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, as is required by the NTA. The Registrar must be satisfied that the persons in the claim group are either named in the application (on a membership list), or that the claim group is ‘described sufficiently clearly so that it can be ascertained whether any particular person is in that group’. Guidelines issued by the Tribunal include suggestions as to how a group might illustrate an ‘objective way of verifying’ the members of the claim group. 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. The Guidelines also stress that the applicant group should explain (through 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. That is, if customary rules other than descent are to be used, these must be described in sufficient detail to be ‘objective’ determinants of membership. Descent rules are inherently objective, but other rules are not.

The registration test has proved controversial. The description offered for the purposes of registration adheres throughout the substantive claims making. Groups that opt to describe a set of membership rules are required to agree on, and explain in writing, the operation of customary law. This would be an onerous task for any indigenous community, but is especially challenging for claimant groups, who are likely to lack formal institutions and to have experienced various forms of dislocation and dispersal. They are also subject to the time pressures inherent in the claims process. Under the circumstances many groups could
be expected to make the strategic decision not to advance a description of their traditional laws and customs on membership:

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 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.¹²⁸

The stringency of the test is explained in part by the rules introduced by the 1998 amendments to the NTA governing cross-claims. These prevent the registration of a claim to the ‘same area under traditional law and custom’¹²⁹ if the group definition refers to a person already included in a prior registered claim.¹³⁰ Claimants faced with the possibility of membership overlap must either redraw the boundaries of the claimant group to emphatically include or exclude the individuals in question, or else act quickly to be the first claimant group to register the claim, thereby excluding contenders.¹³¹ At least one federal court judge has pointed out that the necessity of redrawing claimant boundaries in this way is an element of the NTA that may be in tension with traditional law and (p. 193) custom.¹³² If customary rules can be read in a way that appears to include a member of another claimant community, they complicate the registration of the group’s claim. 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.

In order to succeed in securing a positive determination of native title from the federal court, claimants must show they possess rights and interests in relation to land or waters in the terms specified by section 223 of the NTA. They must show that they hold those rights and interests under traditional laws and customs, that have been ‘substantially uninterrupted’ since sovereignty,¹³³ that they maintain a connection with the land or waters in question, and that the rights and interests are recognized by the common law of Australia.¹³⁴ 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, which is tasked with defining a native title community and enumerating the rights and interests that it is entitled to exercise.

One of the first questions to be addressed by the 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 and interests 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, with the need of third parties for reasonable certainty. Judicial approaches to group definition have varied. Ten of the 38 native title determinations in the study contain a provision naming, in effect, a native title right to govern membership in the native title community. Standard phrasing is as follows:

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].

(p. 194)

An indication of the complexity of framing a native title right to determine membership is shown in *Northern Territory v Alyawarr et al.* The 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’. The claimants accepted that the right was ‘more appropriately recognized as part of their laws and customs rather than as a right or interest in relation to the claim area’. 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 recognized by the community, there is no need to reiterate the group’s capacity to decide its membership.

Parties opposed to a claim or concerned about its scope accordingly direct their efforts to increasing the specificity of the native title description, in order to reduce the discretion exercised by the group in recruitment. In *Alyawarr*, the description included persons ‘recognized by the [the group] as members...by virtue of non-descent based connections, being adoption or birthplace affiliation’. The Northern Territory sought the removal from the determination of references to the identification of members by ‘recognition’ arguing that this would entail the assertion of a right to enforce ‘laws and customs’. This would amount, the Territory claimed, to the operation of a parallel legal system, rather than the exercise of rights in accordance with those traditional laws and customs.

The court rejected the Northern Territory’s submission that the recognition portion of the description was too indeterminate (but allowed the replacement of ‘including’ with ‘being’) and noted that further specification could compromise the group’s privacy:

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 (p. 195) kind of organism in amber whose microanatomy is available for convenient inspection by non-indigenous authorities.

The dispute over recognition in *Alyawarr* gives some insight into the difficulty of deciding the degree of specificity appropriate in a native title determination, especially as to the discretions afforded to native title groups to determine their own membership. Too much detail could unreasonably constrain a group in the exercise of its laws and customs and invite undue scrutiny from third parties, possibly encouraging efforts to have the determination revised. Too little precision would fail to provide the certainty that is a primary goal of the native title process. Again, descent rules provide requisite objectivity, but other forms of recognition are regarded as indeterminate and are likely to be contested during the claims process. Importantly, continuity tests also define the scope of post-settlement membership 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 the test in the prospective membership governance of the community. The definition of the native title holding community is defined in the determination. Just as the group cannot (via the PBC) exercise a native title right that is not identified in the determination, it cannot admit as a member a person who does not qualify in accordance with the terms of the determination, a PBC cannot, then, admit as a legal member a person who is not a native title holder at common law. Applying the continuity test that is the basis of the determination, the group cannot enrol persons who would not
have been members in accordance with law and customs operating ‘at sovereignty’, subject only to ‘reasonable adaptations’. There are very few opportunities to shift human boundaries beyond those that can be proven to have existed at that date. 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 colonization.

Not least among these demographic changes is the historic (sometimes pre-sovereign) arrival in indigenous territories of potential group members who are not indigenous. Native title legislation prevents a PBC from conferring membership on a person who is not a native title holder, and, as per recent judicial interpretations of the NTA and its regulations, a non-indigenous person cannot (p. 196) be a native title holder. This rule pertains whether or not a case can be made at common law that pre-sovereignty traditional laws and customs could be reasonably adapted to accommodate non-indigenous persons. While other indigenous corporations may, in accordance with the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI), enrol non-indigenous members (provided they are a numeric minority), PBCs may not. This principle is sometimes reinforced in the text of the determinations themselves. Of the ten native title determinations in the study that expressly refer to the group’s right to determine its membership, seven include language confining that right to Aboriginal persons or Torres Strait Islanders. 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.

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’, but in doing so, it need not name the members of the group. According to a recent judgment in the Federal Court, ‘[o]ften a statement of the group name will identify the group of persons sufficiently for the purposes of [the Act]’. Unless the court considers that there is some uncertainty as to the group's membership, it need not supply further detail in the determination. In Western Australia v Ward, the Federal Court was of the view that:

…it 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 (p. 197) 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. The tendency now is 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 NTA, requiring the decision-maker to specify the ‘nature and extent of native title rights and interests’, in contrast to earlier requirements that
they simply determine ‘those native title rights and interests that the maker of the determination considers to be of importance’. They do so by considering ‘the substance of traditional laws and customs, including those identifying the native title holders. The more detail included in the definition, the closer the Court comes to determining the content of the group’s traditional laws and customs. Paradoxically, however, determinations that lack substantive detail may provide more scope for the post-claim contestation of the PBC jurisdiction, via legislative mechanisms allowing the variation of determinations.

(p. 198) 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 two mechanisms by which the membership jurisdiction of a PBC can be altered by a court order. First, as discussed above, under limited circumstances, some persons are enabled by the Native Title Act to apply for a variation of the native title determination. Second, the membership decisions of a PBC can be contested by members of the native title holding community it represents. This amounts to a challenge to the PBC’s interpretation of traditional laws and customs. Both provide ways that native title holders can modify, via litigation, the determination that empowers and constrains them in their membership decision making.

The second mechanism for adaptation or correction of membership provisions is provided by the CATSI legislation, which allows native title holding members to challenge a PBC’s decisions on traditional laws and customs. PBCs are obliged by their regulations to consult with and obtain the consent of the common law native title holders in accordance with this regulation before making a decision that affects native title. 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 the Office of the Registrar of Indigenous Corporations (ORIC), and ultimately may have recourse to the Federal Court for one of the judicial remedies specified in the CATSI legislation.

Although the point has never been litigated, the available materials suggest that if the membership decisions of a PBC are questioned, they would be reviewable in the Federal Court, under the auspices of the federal CATSI Act. They further indicate that in considering whether the PBC’s decisions accord with native title legislation and with its determination, the Court is obliged to assess whether a practice is properly one described in common law as an expression of traditional laws and custom, since these empower and constrain the governance powers of the PBC. 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:

[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. 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 recognized as common law holders. That would be a dispute between people with a close knowledge of the relevant traditional laws and customs.\textsuperscript{160}

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 a determination, since this determines the criteria for subsequent judicial review. In sum, then, a PBC 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 definitions of indigeneity. A PBC that is thought to have acted \textit{ultra vires} these constraints may be challenged by its own members under the CATSI Act, or the determination itself may be challenged by specified official actors (ministers and the Native Title Registrar) under the NTA, acting in the public interest or on behalf of an affected individual or community. In each case, the PBC may be required to demonstrate that it has exercised its jurisdiction through the continued observance of traditional laws and customs, consistently with its native title determination.

\textbf{Indigeneity and membership in Australia: debates about descent in the native title process}

To further discuss the scope and flexibility of native title determinations on membership, it is necessary to recall the purposes of tribal constitutionalization 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 organizational 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.\textsuperscript{161} If the observance lapses, or changes in ways that cannot be understood as ‘reasonable adaptations’, the society ceases to exist, or becomes a different society, lacking requisite continuity 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.\textsuperscript{162}

Accordingly, unless a claimant group can demonstrate that the adoption and incorporation of non-descendants was 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 prescribed by the determination. Consequently, the description of the community for claims purposes is one in which post-sovereignty 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 the least likely to pass the common law test as an allowable post-determination adaptation.\textsuperscript{163} For the reasons discussed above, descent rules are the criteria most likely to survive the legal constitution of the group that occurs during the claims process. In the following discussion I consider the ways in which descent rules have been used to define native holding groups in native title jurisprudence.

In parallel with discussions of the customary and legal meaning of descent in New Zealand, 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’. Significantly, in \textit{Mabo (No 2)}, Brennan J referred to biological descent as a requirement for membership in a native title holding community.\textsuperscript{164} However, biological descent is not required by the NTA and has not
been imposed as a criterion in subsequent Federal Court determinations. In fact as federal court judge Olney J concluded in *Ngalakan People v Northern Territory*:

[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.165

However, the biological test may nonetheless surface where an applicant'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 (p. 201) cannot be a native title holder at common law (and in any case, a PBC 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'.166 As discussed in Chapter One, a three-part definition is used to define indigeneity in Australian public 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.167 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, since biology is required to establish legal indigeneity. In contrast to New Zealand, it appears there is no scope for the conferral of legal indigeneity on the legally adopted child of an indigenous person.168

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 inclusion of persons who are not descendants of the ancestors or family groups named in the description.169 Eleven descent determinations in the study make reference to adoption or incorporation in accordance with the traditional laws and customs of the group.170 Occasionally, where adoption or incorporation is not mentioned, descent rules are combined in the determination with criteria requiring community recognition or acceptance. These mirror the tripartite definition of indigeneity used in Australian public law and policy, wherein recognition serves as evidence of descent.171 The description of the Kulkalgal People in *Warria v State of Queensland* is illustrative: (p. 202)

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.172

As native title governance matures, the distinctions between the concepts of ‘recognition’, ‘incorporation’, and ‘adoption’ in post-settlement governance arrangements may become the subject of dispute and possibly litigation. For the time being, the interpretation of these terms remains within the purview of a PBC’s application of traditional law and custom, constrained, however, by the operation of common law and legislation, as well as by the terms of the determination itself.
III: Separating Culture and Governance: Strategies for Managing ‘Membership Juridification’

As discussed in Chapter One, relational theories of cultural pluralism offer an account of culture as a productive, differentiating process, in which identity markers are debated, selected, and ranked in the politics of social life. More recently, relational scholars have also emphasized the stabilizing function of traditions in cultural production, and the interplay between tradition and innovation in the production of indigenous custom. So far this approach has not extended to the possibility that tribal institutions and the formal rules they contain may also be cultural products. In the discussion that follows I consider the application of relational accounts of culture to debates on the formalization of membership rules.

It is difficult to discuss indigenous cultural production within the confines of claims processes. It may be very apparent to observers that tribal cultures evolve, and do so in a structured way, but these mechanisms are difficult to express in the juridical language of continuity demanded for claims making. As the mediators of much of this translation, anthropologists and lawyers are pressed to explain cultural change in a way that does not compromise tribal continuity claims. Evidence describing cultural production can undermine indigenous historic claims by raising the possibility that a community has reinvented itself as a ‘new’ society that cannot properly be regarded as the successor of historic occupants of the claimed territory.173 Recent scholarly work on indigenous cultural production, however, has emphasized the interplay of tradition and innovation in cultural change, arguing that production is constrained by cultural values and principles, and innovations are based on a stable, relatively unchanging ‘essentialist’ core that guides adaptation.174 In this model of cultural change, some practices are understood by the community to be mutable, and designated as such, while others are not.175 The adaptations observed in indigenous cultural production are in a ‘constant dialectic’ with traditions, rather than in opposition to them.176

In parallel with moves in the theory of culture, recent contributions from legal pluralists propose that indigenous legal systems provide underlying values and processes to guide the production of legal norms.177 Traditions can form the ‘building blocks’178 of a customary legal order, in the same way that constitutional principles and values underpin and constrain the production of law in Western legal systems. These values, (or traditions), allow indigenous custom and law to adapt while retaining continuity with its underlying structure.179 Chief Judge Eddie Durie has suggested that in efforts to recognize tikanga:

...one must seek first to define the jurisprudence of that law—that is, its jural concepts, its key principles and the processes by which those principles are acted out. It is necessary to look not just at the practices but why those practices have been maintained. It is only (p. 204) by studying the philosophy behind custom law that we can begin to understand its logic and consistency.180

These ideas are promising contributions to debates on the institutions and formal rules emerging from tribal constitutionalism. As discussed in Chapter One, reconceiving culture as a process of production has follow-on implications for the associated concept of recognition. In a relational approach, what is to be recognized is the distinctive processes of producing culture, namely the ways in which culture is contested within and across communities, alongside the ‘outputs’ of such processes. Relational legal pluralism has evolved along a similar vector, by suggesting that ‘law’ is to be identified by reference to the subjective experience of those involved in its production, and accordingly the law-making process is to be evaluated and recognized alongside legal outputs. Relational legal pluralism could re-energize debates on indigenous institutional design, by inviting attention to the indigenous processes that build and shape institutions. These approaches are an
advance on those that purport to evaluate institutions ‘objectively’, in isolation of the subjective experience of the communities that produced them. It is the claim to objectivity that permits the conclusion that institutions are incommensurable with indigenous culture and custom, and so cannot be understood as legitimate cultural products. These assumptions lead too rapidly to the conclusion that all institutions are imposed, circumventing more useful discussion on the continuing legitimacy of the processes by which institutions are designed, and the legitimacy of the institutions themselves. They exclude at the outset the possibility that, to use Tim Rowse’s phrase ‘formal associations are an adaptive continuation of indigenous tradition, not a symptom of their capitulation and decline’.181

As regards claimant groups, relational legal pluralism also helps to shift the focus away from indigenous property rights, to broader questions about indigenous law-making. Relational legal pluralism offers a lens through which to observe the existence and operations of indigenous legal systems, as well those more visible elements of indigenous law that have been formally recognized in common law or legislation (usually as property rights). Even while public actors in Australia and New Zealand are reluctant to refer to the law-making capacities of tribes, because positivist legal doctrine vests this capacity solely in the institutions of the State, the tribal management of collective property rights entails numerous regulatory functions. These include the distribution of individual entitlements, the regulation of dealings with third parties, and the resolution of disputes. They require the elaboration and implementation of indigenous law, (p. 205) via an indigenous legal system.182 The recognition of tribes as property-holding collectives therefore implicitly includes recognition of their capacity to regulate the use of such property in accordance with custom. Political theorist Duncan Ivison neatly sums up the situation as follows:

...what is being recognized is not simply a discrete or ‘confined set of rights’ but the capacities of a legal and normative order for determining the evolution of its law accordingly to its own self-understandings and practices, albeit always in (an uneasy) relation to the wider legal regime.183

Beginning with the concept of institutions and formal rules as products of indigenous legal systems, it seems reasonable to assume that indigenous communities would prefer to formalize only those elements of indigenous custom that are or should be sheltered from ordinary political process. In the context of membership governance, then, it is appropriate to conceive of institutions not as comprehensive expressions of cultural practice, but rather the scaffolding for the elaboration of cultural norms. In this way, institutions might act as the ‘external constitution’ of the tribal cultural arena, within which the elaboration of custom and law takes place. Importantly, descent rules may fall into the category of norms that are susceptible to formal expression, because descent is the constitutive principle of tribes and is intrinsically connected to the continuity of tribal communities.

This approach stands in contrast to the incommensurability argument in anthropological scholarship, which is premised on the assumption that indigenous communities must import culture wholesale into an institution, if they elect to have one at all. A more useful model of the relationship between culture and institutions is that offered by the Harvard Project on Native American Economic Development (the Harvard Project), elaborating the concept of ‘cultural match’. By this, Project staff refer to the ‘fit between the formal institutions of government and indigenous conceptions of how authority should be organized and exercised’.184 It is the quality of this fit, the 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 land base, its population, location, and the extent of its natural resources. Importantly, the Project does not propose that customary governance should be given effect in or by formal tribal institutions. In fact they (p. 206) emphatically reject the proposition that cultural match entails traditional governance. ‘It is not an appeal to tradition’, they say,
‘it is an appeal for legitimacy’\textsuperscript{185} (emphasis in original). The Project’s conception of cultural match includes measures designed to separate tribal governance from tribal politics, and so to use formality to serve the political agendas of the tribal community.\textsuperscript{186} This can be done by exempting constitutive values (which might include membership rules) from the ordinary political processes of tribal governance by formalizing them.

One of the most useful ideas contained in the 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 rules that they did not design or that they are unable to amend:

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 organize a resonance between formal institutions and what people currently view as appropriate for them.\textsuperscript{187}

Applying this approach, and drawing on the concepts of indigenous legal and cultural production discussed above, I propose that the way forward is not to extirpate indigenous custom from formal institutions, or to reject institutions altogether, but rather to ensure that tribal communities have a reasonable capacity to decide which elements of tribal custom it is necessary or desirable to formalize.

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 institutionalization involves a series of translations and approximations of ‘real life’.\textsuperscript{188} 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 governed by them. It matters (p. 207) 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, and 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.\textsuperscript{189}

As a matter of institutional design, this approach emphasizes the procedures by which customary law on membership is developed and contested, and the operation of indigenous legal systems, in addition to the content of indigenous law. This might encompass, for example, the types of innovation in boundary management that have emerged in New Zealand, where the constitutions of tribal aggregates set out the conditions under which periodic review, withdrawal, or dissolution might occur. The model would also encourage the enactment of descent rules as the underpinning principles of tribal membership regimes, because these rules are relatively stable and uncontested. Membership criteria could leave scope for the discretionary enrolment of non-descendants in accordance with more relational forms of incorporation. In general this approach requires settler governments to allow tribes the agency, through their institutions, to devise ways of managing cultural change, and to deal with enquiries and challenges from outsiders as necessary, rather than attempt to ‘lock in’ formal membership rules at the outset. This would require more leniency from public actors and third parties on requirements for tribal legibility and certainty, and more ‘jurisdictional’ dialogue between tribal and public settler institutions on matters that implicate the interests of both parties, especially the allocation of public funding and access to tribal territory.
IV: Conclusion

In New Zealand, there is an emerging legal distinction between the class of treaty settlement beneficiaries, defined by the Crown, and tribal members, defined by tribes. While this new legal pluralism is controversial, it allows for the continued operation of tribal customary law in the self-constitution of the tribe. To comply with public law and with negotiated agreements giving effect to a settlement, tribes must include all descendants of the relevant ancestor as beneficiaries in accordance with the first constitution of the TSE, and may not exclude legally adopted children, but may include any person as a tribal member. 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 MIOs in the registration of beneficiaries for purposes of the Maori Fisheries Act). 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 these rules in accordance with evolving customary law.

As the law and policy of Treaty Settlements now stands in New Zealand, tribal institutions and the descent rules they contain provide the legal framework for tribal self-constitution but do not unreasonably limit it. In contrast, the continuity tests applied to native title holding communities define the legal operation of traditional laws and customs on membership, and do not allow a person who does not qualify as a native title holder at common law to legally exercise any of the rights held by that community. Amendments to membership rules must be consistent with the determination, which enumerates only those rights held under traditional laws and customs that have been continuously exercised since sovereignty. Changes to membership rules can only be effected by changes to the determination itself, in fulfilment of a successful appeal for variation of the determination, brought by the PBC, the Registrar, or by appropriate officials of the Commonwealth or State governments. These are significant constraints on the capacity of groups to supplement descent rules with recruitment criteria based on other forms of affiliation, although they may qualify them by deciding to exclude some native title holders. 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.

In both countries, however, descent rules provide a useful ‘middle-ground’ for the minimal certainty required of representative organizations established to receive and manage property allocated in the settlement of land claims. The validity of the claim that these rules juridify tribes and so displace custom depends on the extent to which they can be modified, supplemented, or qualified by the tribal communities they represent. In both countries, tribes must enact constitutions that record the identity of persons covered by the relevant settlement or determination. 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. The negative consequences of juridification, eventuating from the entry of law into a field of tribal life previously governed by custom, are mitigated where legal rules can be designed and controlled by the tribe itself, that is where tribes decide which aspects of the custom of membership should be expressed as formal rules. 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.
Footnotes:

1 Dataset Three: New Zealand Iwi and Hapu Constitutions (2008) and Dataset Four: Australian Native Title Holding Communities Constitutions (2008).


4 New Zealand official Andrew Hampton explains the Crown’s goals as follows: ‘[t]he Crown doesn’t try to define with any precision who the members of the claimant community are during settlement negotiations but we should know how to identify one, if one comes along later…Our only concern is that the legislative definition is wide enough to stop people putting on another hat and coming back to us [to make another claim].’ Interview with Andrew Hampton, Office of Treaty Settlements, in Wellington, New Zealand (14 March 2006).


7 Ibid, 375.


15 Ibid.


18 eg, David F 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, Melbourne 2004), 75; also Jeffrey Sissons, ibid.

19 As Burton explains, writing about the Australian Native Title process, ‘...we can see that a collection of people with joint rights in a property created a contrived owning entity to win recognition from a court. That accomplished, what is seen is not fragmentation but a reversion to normality’. John Burton, ‘Registration, Determinacy of Groups and the “Owned Commons” in Papua New Guinea and Torres Strait’ in James F Weiner and Katie Glaskin (eds), Customary Land Tenure and Registration in Australia and Papua New Guinea: Anthropological Perspectives (Australian National University ePress, Canberra 2007), 188. See also Tom Bauman, ‘Nations and Tribes “Within”: Emerging Aboriginal “Nationalisms” in Katherine’ (2006) 17 The Australian Journal of Anthropology 322, 325.


25 Edward F Fischer, ‘Cultural Logic and Maya Identity: Rethinking Constructivism and Essentialism’ (1999) 40 Cultural Anthropology 478, 486. See also James Clifford,
‘Traditional Futures’ in Mark Salber Philips and Gordon Shoschet (eds), *Questions of Tradition* (University of Toronto Press, Toronto 2004), 152.


30 eg, *Hayes and Anor v Waitangi Tribunal and Ors* CP 111/01, HC (unreported, 10 May 2001), 17, per Goddard J: ‘...what in effect is sought is a review of the Crown's decision to recognize and accept the mandate of Ngati Ruanui to enter into settlement negotiations with the Crown, including on behalf of Pakakohi and Tangahoe. Such an attempt must fail because the process which it is sought to review is essentially political, involving questions of policy and political judgment’. See also, Jessica Andrew, ‘Administrative Review of the Treaty of Waitangi Settlement Process’ (2008) 39(2) *Victoria University of Wellington Law Review* 225.

31 eg, *Pirihira Fenwick v The Trustees of Nga Kaihatu o Te Arawa Executive Council and Others*, HC 2004-463-847, (unreported, 13 April 2006), para 79 per Allan J: ‘The system that the Crown has established to take into account, recognize and protect the hapu and their interests in the proposed settlement and subsequent creation of a governance entity, is the result of a political process involving decisions based on questions of policy and matters requiring political judgment. Such political decisions are not amenable to the supervision of the Courts in the absence of clear evidence of fraud or the like.’ For similar observations see *Pouwhare and Pryor v Attorney-General, Minister in Charge of Treaty Negotiations and Te Runanga o Ngati Awa* (20 August 2002) HC WN CP 78/02; and *New Zealand Maori Council and Ors. v Attorney-General* (2007) NZCA 269; *Greensill and others v Tainui Maori Trust Board* (17 May 1995) HC HAM M117/9 5; and *Waitaha Taiwhenua o Waitaki Trust v Te Runanga o Ngai Tahu* CP 41198 (17 June 1998).


Area (Tukutai Moana) Bill, designed to amend the Act, had passed its first reading in the New Zealand Parliament.


35 Claimants may also negotiate Indigenous Land Use Agreements under the auspices of the Native Title Act, which are not subject to judicial oversight, but are registered by the National Native Title Tribunal, which is responsible for ensuring that the agreement comply procedurally and substantively with the terms of the Act. Native Title Act 1993, Division 3.


37 ‘Most disputes appear to relate to how hapu are grouped for claim settlements and whether particular hapu should be in or out of the proposed aggregation.’ New Zealand Law Commission, ‘Waka Umanga: A Proposed Law for Māori Governance Entities’ (2006), 54.


41 Statement by Paul James, Director, Office of Treaty Settlements, New Zealand (Personal communication, 25 May 2006).

What are the benefits of registration?; Are there any registration requirements?; How will eligibility for registration be verified?; Who makes decisions on registration and how are those decisions made?; Can those decisions be appealed, and if so, how?’

43 Having voted to accept the settlement offer, voters show less interest in the form of the Treaty Settlement Entity. For the nine tribes for whom comparable voting data is available, all show a higher turn out for settlement ratification (with a mean turnout of 52%) than entity ratification (46%). Office of Treaty Settlements, Ratification Participation and Approval Rates (2007); approval rates are roughly the same for Deed ratification and entity ratifications (92.65% and 93.91% respectively). Voting data is not available for tribes ratifying the constitutions of Mandated Iwi Organizations for the purposes of the 1992 fisheries settlement.

44 Ngati Kahungunu (represented by Ngati Kahungunu Iwi Inc).

45 eg, the Treaty settlement negotiations under way with Ngati Whatua o Orakei (represented by the Ngati Whatua o Orakei Maori Trust Board) and Ngati Whataua o Kaipara (represented by the Ngati Whataua o Kaipara Claims Komiti). The two tribes are represented together for fisheries settlement purposes by Te Runanga o Ngati Whataua, a Mandated Iwi Organization: (http://teohu.maori.nz/iwiregister/?iwi_id=1).

46 Overlapping claims to mountains in the Auckland region were resolved through an agreement between the Crown and Nga Mana Whenua o Tamaki, a body representing 21 Iwi and hapu, some of whom are independently pursuing their own Treaty settlements. ‘Auckland Treaty Deal to be Signed Today’ National Business Review (12 February 2010). The agreement responds to the recommendations of the Waitangi Tribunal in the Tamaki Makaurau Settlement Process Report (Wai 1362, 2007).

47 Angela Ballara, Iwi: The Dynamics of Maori Tribal Organization from c.1769 to c.1945 (Victoria University Press, Wellington 1998).

48 RULES OF MUAPOKO TRIBAL AUTHORITY INC, cl 5.1 (2002) (Doc No C-NZ-1-C, on file with author). The other listed hapu are: Ngai Te Ao; Ngati Tamarangi; Ngati Hine; Ngati Pariri; Ngati Whanokirangi; and Punahau.


50 Te Whanau a te Ehutu, Te Whanau a Maruhaeremuri, and Te Whanau a Hine te Kahu.

51 The 1988 and 1999 versions of the charter contained a provision reserving a seat for Te Whanau a te Ehutu on the Runanga, but this provision was affirmatively cancelled by the terms of the 2004 amendments: ‘The Trust Deed of 19 April 1999 continued to record that Te Whanau a te Ehutu would always have reserved on the Runanga a seat without further deliberations should this hapu wish to participate. This deed changes and cancels that arrangement.’ DEED OF AMENDMENT OF TRUST DEED OF TE WHANAU A APANUI TRIBAL AUTHORITY, cl 13 (2004) (Doc No C-NZ-26-C, on file with author).

The Hauraki, Te Arawa, Ngati Kahungunu and Nga Puhi Joint Mandated Iwi Organizations.


Ibid, s 20. For the Hauraki and Te Arawa groupings, any Iwi may withdraw, and for Ngati Kahungunu and Ngapuhi, the specification applies only to one Iwi in each confederation; Rongomaiwahine and Ngati Hine respectively. The latter two were ‘persistent objectors’ during the aggregation process. They succeeded in having their claims to independent Iwi status recognized at the last stage of the legislative process, were named as Iwi in a controversial amendment to the Fisheries Bill included during the Select Committee Review. Fisheries and Other Sea-related Legislation Committee, Report on the Maori Fisheries Bill (2004), 14–17.

Native Title Act, ss 13(1) and 61.

The statutory provision was at issue in Re Yoren (2004) FCA 916, where the Walmbaar Aboriginal Corporation (WAC), one of three PBCs established under the Hopevale determination, brought a claim for revision of the determination in accordance with s 13(1)b. Interpreting s 61(1)b, the court found that where multiple PBCs hold the native title, one PBC could not proceed independently to apply to revise the joint determination.

Native Title Act, s 13(1).

Ibid, s 61.


eg, the commentary on membership provisions in Harrington-Smith and Ors on Behalf of the Wongatha People v Western Australia and Ors (No 9) 238 ALR 1, 91. ‘Descent from an apical ancestor does involve group continuity over time, the unifying feature of the claim group being descent from the same ancestor. However, on the evidence, descent from an apical ancestor is not a basis of a landholding unit according to traditional laws and customs of the Western Desert.’

Julie Lahn, ‘Native Title and the Torres Strait: Encompassment and Recognition in the Central Islands’ in Benjamin R Smith and Frances Morphy (eds), The Social Effects of Native Title: Recognition, Translation, Co-Existence (ANU ePress, Canberra 2007), 135, 145.

Te Runanga a Iwi Ngapuhi Trust Board Deed of Trust (1989) (Doc No C-NZ-6-A, on file with author): ‘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.’

Te Runanga a Iwi o Ngapuhi Constitution, cl 4.1 (2002) (Doc No C-NZ-6-C, on file with author): ‘“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.’


68 Te Runanga o Te Rarawa Deed of Trust, cl 2 (1988) (Doc No C-NZ-25-A, on file with author): ‘Te Iwi o te Rarawa are the people who descend from a tupuna of Te Rarawa and also those Maori people who consider themselves to be of Te Rarawa who are living in the rohe of Te Rarawa.’ One of the pre-1990 charters includes honorary members, and another incorporates spouses. See respectively Te Runanga a Rangitane o Waairau Inc, cl 5(a)-(b) (1988) (Doc No C-NZ-18-A, on file with author) and The Rules of the Runanga o Toa Rangatira Inc, cl 4.1 (1988) (Doc No C-NZ-2-A, on file with author).

69 Maori Fisheries Act 2004, s 12(1)(a). Tribes seeking to constitute an MIO must comply with the constitutional design criteria of the Maori 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’. 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’ (2000), 69.

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


74 Ibid.

75 Te Runanga o Ngai Tahu, Annual Report (2007), 26. 15% give no address.

76 Te Puni Kokiri, Case Study: Te Runanga a Iwi o Ngapuhi: (http://governance.tpk.govt.nz/share/ngapuhi.aspx).

77 Statement by Hayden Potaka, Tumu Whakarae, Te Kaahui o Rauru, New Zealand (Personal communication, 19 February 2008).


79 Statement by Paul James, Director, Office of Treaty Settlements, New Zealand (Personal communication, 2 May 2006).

80 ‘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.’ Interview with Andrew Hampton, Office of Treaty Settlements (14 March 2006).
81 eg, the Maori Fisheries Act 2004, which makes express reference to the capacity of MIOs to confer benefits on third parties, specifically, on ‘(a) Maori who are not members of the Iwi: [and] (b) the community generally’. Maori Fisheries Act 2004 s 5, Kaupapa 26.

82 Her Majesty the Queen and Maori, Deed of Settlement 4.5.1 (1992) ‘Maori agrees that the settlement evidenced by this Settlement Deed of all the commercial fishing rights and interests of Maori ultimately for the benefit of all Maori.’ Available at: (http://teohu.maori.nz/archive/legislation/DeedofSettlement.pdf).


84 Maori Fisheries Act 2004, s 5.

85 Ibid, inter alia, ss 5, 12, 14, and 32.

86 Ibid, s 5.

87 Statement by Hon Jim Anderton, Minister of Fisheries, (Personal correspondence, 25 January 2006).

88 Ibid.

89 Maori Fisheries Act 2004, s 5.

90 Ibid, Schedule 7, Kaupapa 5.


92 148,310 persons. The ‘total notional Iwi population’ (679,154 persons) is 12% greater than the total number of persons recording Maori ancestry in the 2001 census, because of the prevalence of multiple membership. Te Ohu Kaimoana, ‘He Kawai Amokura: A Model for Allocation of the Fisheries Settlement Assets: Report to the Minister of Fisheries’ (2003), 38.


95 Office of Treaty Settlements Report to Minister on Ngaa Rauru Deed of Settlement, Revised Timeframes (20 June 2003); Office of Treaty Settlements Report to Minister Ngaa Rauru Claimant Definition: Overriding Adoption Act 1955 (25 June 2003); Interview with Anake Goodall, Chief Executive, Te Runanga o Ngai Tahu (23 March 2006); Interview with Mike Neho, Chairman of Ngaa Rauru (12 March 2006).
96 ‘The Office of Treaty Settlements, the Crown, requires that Ngati 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, Hansard Vol 635, 6379 (6 Nov 2006) Ngati Mutunga Claims Settlement Bill, Second Reading. See also the Maori Affairs Select Committee, ‘Report on the Ngati Mutunga Claims Settlement Bill’ (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.’


100 eg, the Ngati Awa Claims Settlement Act 2005, s 13(4); ‘For the purposes of the definitions of Ngati Awa and Ngati 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) Maori customary adoption in accordance with the custom of Ngati Awa.’ Compare the Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005; the Ngati Ruanui Claims Settlement Act 2003; the Ngati Tama Claims Settlement Act 2003; and the Te Roroa Claims Settlement Act 2008.


102 See also Deed of Settlement of the Historical Claims of Te Roroa cl 1.5.1, (2005): ‘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 cl 1.11, (2003): ‘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.’


105 Te Kawa o Te Kaahui o Rauru, s 1.1 (2006) (Doc No C-NZ-4-E, on file with author).

106 Statement by Tamarapa Lloyd, Te Ohu Kaimoana, (Personal email correspondence, 4 March 2008).
Statement by Tamarapa Lloyd, Te Ohu Kaimoana, (Personal email correspondence, 4 March 2008).


Ibid.

Maori Fisheries Act 2004, s 5.

Ibid, Sch 7, Kaupapa 6(2).

Approximately: Custom or custom law.

This provision was inserted by the Select Committee, late in the passage of the Bill, replacing an earlier definition that defined whangai simply as a ‘person adopted into an Iwi’ (with no mention of adoption by a tribal member). Fisheries and Other Sea-related Legislation Committee, Report on the Maori Fisheries Bill (2004), 249.

Memorandum, Crown Law Office to the Director, Office of Treaty Settlements, ‘Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Bill’ (8 March 2005), 3: ‘...it appears that a non-Maori who had been legally adopted into a Maori family (and is deemed to be the child of his parents and therefore descend from his parents) could also be, theoretically at least, considered to be “Maori”. This is a consequence of s 16 of the Adoption Act 1955’. It is not clear that this view is shared by all public agencies administering legislation that refers to ‘descendants’ of Maori. eg, the interpretation of the Maori descent provision in the Electoral Act 1993: ‘...is the option open to whangai? Only if the whangai or adopted child/children are New Zealand Maori or descendants of New Zealand Maori’, elections New Zealand, Maori Electoral Option—FAQ, available at [http://www.elections.org.nz/maori/enrolment/maori-option-faq.html#gen7](http://www.elections.org.nz/maori/enrolment/maori-option-faq.html#gen7).

Ngati Awa Claims Settlement Act 2005, s 13(4).

New Zealand Law Commission, ‘Waka Umanga: A Proposed Law for Mäori Governance Entities’ (2006), 25. ‘In our view, the position is abundantly clear that a tribal corporation is not, and cannot be, the tribe, and “[a]lthough the creation of a legal structure can influence a people's perception of their tribe...[t]he charter of a tribal corporation must be devised by the tribe itself, and the corporation must remain accountable to the tribe, not take on an independent life of its own.’ New Zealand Law Commission, ‘Waka Umanga: A Proposed Law for Mäori Governance Entities’ (2006), 35.


Te Kaahui o Ngaa Rauru, Ngaa Rauru Kiitahi Iwi Registration Form (2006).

The latter approach, as followed in Canada, leaves the incidents of traditional law and custom for internal resolution as part of the management of communal title, or to be addressed in negotiations. Kent McNeil, ‘Legal Rights and Legislative Wrongs: Maori Claims to the Foreshore and Seabed’ in Claire Charters and Andrew Erueti (eds), Maori Property Rights and the Foreshore and Seabed: The Last Frontier (Victoria University Press, Wellington 2007), 87.

Ibid.


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.


Statement by Stephen Sparkes, Manager—Legal Services, National Native Title Tribunal (Personal email correspondence, 19 October 2007).

Native Title Act, s 190C(3). See also the discussion in Harrington-Smith and Ors on Behalf of the Wongatha People v Western Australia and Ors (No 9) (2007) 238 ALR 1, 370.

Harrington-Smith and Ors on Behalf of the Wongatha People v Western Australia and Ors (No 9) (2007) 238 ALR 1, 370. ‘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.’


Ibid, 475.

Ibid, 475.

Ibid, 456.

‘The Northern Territory, however, submitted that this amounted to the determination of a right in members of the native title holders to enforce traditional laws and customs. Such a right, it said, was not a right with respect to land and waters. It complained also that the determination, in this respect, gave effect to traditional laws and customs as a system of law operating concurrently with non-indigenous law’. Ibid, 462.

See the preamble of the Native Title Act: ‘The needs of the broader Australian community require certainty and the enforceability of acts potentially made invalid because of the existence of native title.’

A PBC 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.

*Harrington-Smith and Ors on Behalf of the Wongsatha People v Western Australia and Ors* (No 9) (2007) 238 ALR 1, 422. ‘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).’ See also the Native Title (Prescribed Bodies Corporate) Regulations 1999, s 4(b).

*Harrington-Smith and Ors*, ibid, 422. ‘However, Peter Muir is not a member of either the NK 1 or NK 2 claim group, because it is not shown that any adaptation of pre-sovereignty Western Desert laws and customs provides for a non-Aboriginal person to have native title rights and interests in land or waters.’

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


Native Title Act, s 225(a).


*Moses v State of Western Australia* (2007) 160 FCR 148, 238. 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.’

*Western Australia v Ward and Ors* (2000) 170 ALR 159, 230. See also *Hayes v Northern Territory* (1999) 97 FCR 32, 51: ‘I do not regard [s 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.’

Statement by Stephen Sparkes, Manager—Legal Services, National Native Title Tribunal (Personal email correspondence, 19 October 2007).

Native Title Act, s 225(b).

Ibid, s 225(b)iii (superseded).

‘The early determinations in particular had poor group descriptions. Some leave it up to the traditional law and custom of the groups etc.’ Statement by Stephen Sparkes, Manager—Legal Services, National Native Title Tribunal (Personal email correspondence, 19 October 2007).

Native Title Act, ss 13(1) and 61.

Native Title (Prescribed Bodies Corporate) Regulations 1999, s 8(2).

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

160 **Western Australia v Ward and Ors** (2000) 170 ALR 159, 213-14.

161 In this way, the ‘...laws and customs and the society which acknowledges and observes them are inextricably interlinked.’ **Members of the Yorta Yorta Aboriginal Community v Victoria** (2002) 214 CLR 422, 447.

162 **Members of the Yorta Yorta Aboriginal Community v Victoria** (2002) 214 CLR 422, 444.


164 He explained 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)** (1992) 175 CLR 1, 70, per Brennan J.

165 **Ngalakan People v Northern Territory of Australia** (2001) 186 ALR 124, 140.

166 Native Title Act, s 253. ‘“Aboriginal peoples' means peoples of the Aboriginal race of Australia.’

167 **Shaw and Anor v Wolf and Ors** (1998) 163 ALR 205, also **Commonwealth v Tasmania** 158 CLR para 50.

168 **Gibbs v Capewell and Ors** (1995) 128 ALR 577, 580. ‘It follows that adoption by Aboriginals of a person without any Aboriginal descent and the raising of that person as an Aboriginal (a possibility mentioned by the first respondent) will not, because of the statutory requirement for descent, bring that person within the description “Aboriginal person”.’

169 eg, **Rubibi Community v State of Western Australia** (2001) 114 FCR 523, 540: ‘Second Schedule: The common law holders of native title, comprising the Yawuru Community, are the descendants of [names].’

170 **Dataset Four: Australian Native Title Holding Communities Constitutions** (2008).

171 See discussion in Chapter One. eg, 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” **The Rules of the Dunghutti Elders Council (Aboriginal Corporation)**, cl 8.1 (1996) (Doc No C-AU-2-A, on file with author). For an identical formulation see **The Rules of Western Yalanji Aboriginal Corporation**, cl 10(a) (1998) (Doc No C-AU-4-A, on file with author) and **The Rules of Mualgal Torres Strait Islanders Corporation**, cls 10(a) and 2 (1999) (Doc No C-AU-6-A, on file with author).

172 **Lota Warria on behalf of the Poruma and Masig People v State of Queensland** (2005) 223 ALR 62, 68.


174 Edward F Fischer, ‘Cultural Logic and Maya Identity: Rethinking Constructivism and Essentialism’ (1999) 40 **Cultural Anthropology** 478, 486. See also James Clifford,
‘Traditional Futures’ in Mark Salber Philips and Gordon Shoschet (eds), *Questions of Tradition* (University of Toronto Press, Toronto 2004), 152.

175 As Chief Justice Eddie Durie has usefully pointed out in the New Zealand context: ‘Maori society, probably like most others, is conservative with regard to its fundamental values. The point is that it has been receptive to change while maintaining conformity with its basic beliefs.’ E T Durie, Ethic and Values, Paper Presented at the Te Oru Rangahau Maori Research and Development Conference, Massey University (7–9 July 1998).


Mechanisms include, eg, ‘depoliticized dispute resolution mechanisms such as tribal courts [and] depoliticized management of resources and enterprises…’ Stephen Cornell, ‘Indigenous Peoples, Poverty and Self-Determination in Australia, New Zealand, Canada and the United States’ (Joint Occasional Papers on Native Affairs No 2006–02, 10 2006).


As James Scott has pointed out, ‘[n]o administrative system is capable of representing any existing social community except through a heroic and greatly schematized process of abstraction and simplification’. James C Scott, Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed (Yale University Press, New Haven 1998), 22–23.

See eg, 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.’ Christos Mantziaris and David Martin, Native Title Corporations: A Legal and Anthropological Analysis (The Federation Press, Sydney 2000), 239.