Centre for Mining, Energy and Natural Resources Law
UWA Law School

Co-designing Benefits Management Structures:
A Summary Overview

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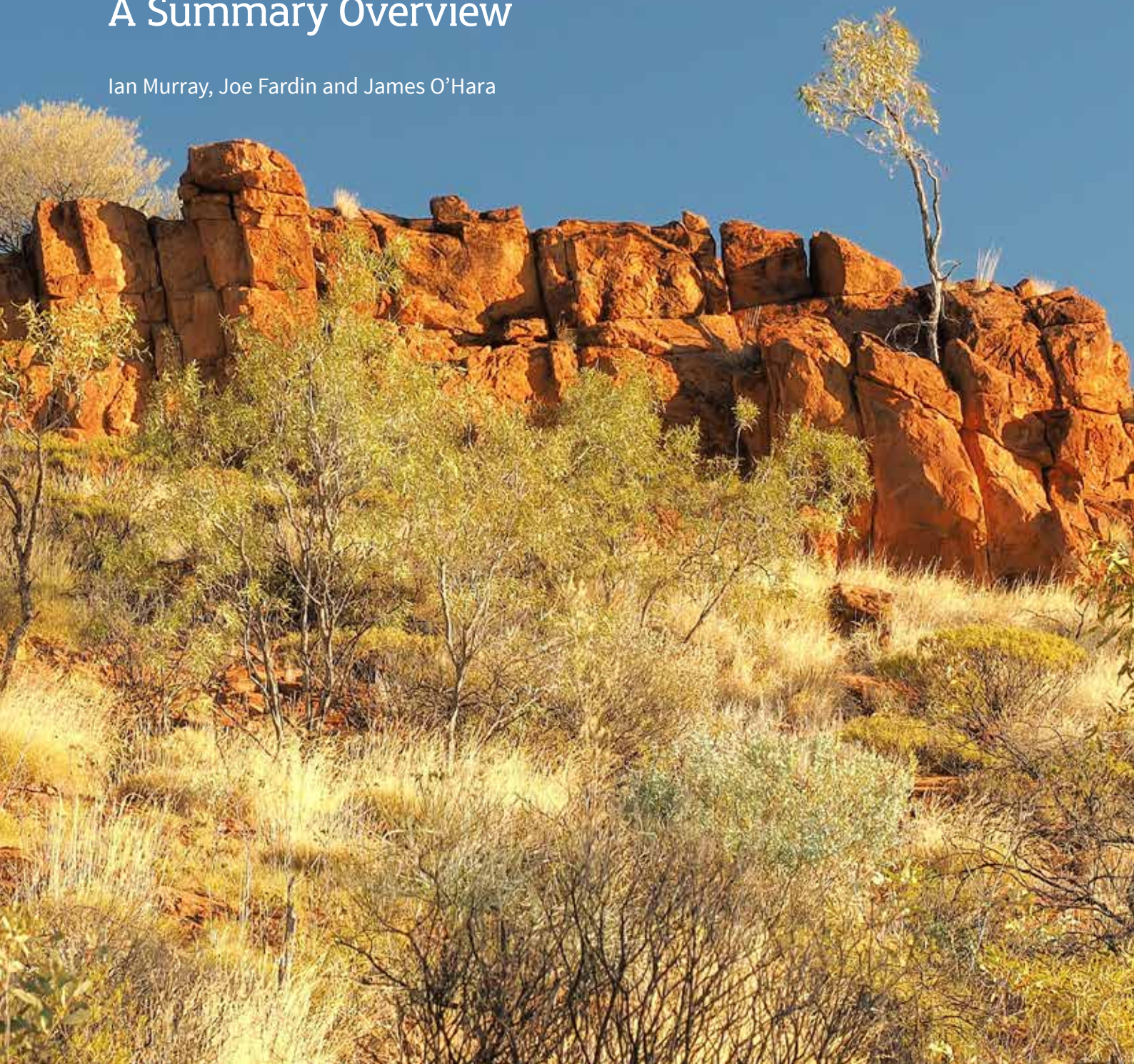
Introduction

Australia has seen an expansion in the number and size of resource and other projects affecting Indigenous land, coupled with ongoing recognition of Indigenous interests through Native Title and other related processes.

A significant result of this activity has been the formation and operation of 'Benefits Management Structures'. BMSs are structures that receive payments from land use agreements and that hold and distribute assets for Indigenous peoples and groups. As the term BMS is widely used in Australia by resource proponents and Indigenous communities we have also adopted it even though it is controversial to label payments connected with acts that impair native title rights as 'benefits'.

This overview:

- Examines the structure, operation and purposes of BMSs.
- Reviews general research on the structure and operation of Indigenous organisations.
- Identifies key issues raised in practice by BMSs.
- Builds on the key issues for BMSs and the information that currently exists about Indigenous organisations by offering twelve design considerations that can guide the design or review of a BMS. It does so starting from a neo-institutional framework, but as informed by stakeholder feedback.
- Applies the design considerations to an example BMS, the 'pilot BMS', based on a common structure in Western Australia's Pilbara region. This pilot BMS shows how the design considerations work, where improvements can be made and potential examples of 'best practice'.
- Employs the design considerations to develop a range of more general best practice approaches, in response to several of the key issues raised and the areas for improvement and 'best practice' examples.

Why is research needed into BMSs?

Land use agreements resulting in payments to BMSs present significant opportunities and risks for Indigenous peoples.

The management of assets provided under such agreements to a BMS is critically important.

This research should benefit BMS stakeholders by helping them:
* Understand and establish a BMS.
* Consider structural and operational improvements.
* Identify beneficial features of existing BMSs.

What is the research project and what are its limitations?

In 2016, researchers at UWA asked the following research question:

* **What considerations are relevant to designing or reviewing the legal structure for a BMS?**

To address this question, the researchers reviewed the academic literature on BMSs, Indigenous organisations that might form part of BMSs and on institutional design, using neo-institutionalism as the key theoretical framework.

* **Neo-institutionalism focuses on how BMS rules might be applied by human beings and under social institutions and how the actions of people and social institutions might result in changes to BMS rules.**

The researchers also undertook a case study review of several existing Western Australian Pilbara BMSs to create an amalgam 'pilot' BMS for testing.

At the same time, the researchers conducted a series of interviews and focus groups with relevant stakeholders. The stakeholders include Aboriginal community members, Aboriginal corporation executives, trustees, resource proponents, and professional advisers. The stakeholders had a focus on BMSs used in the Pilbara.

The interviews and focus groups helped identify BMS purposes and challenges which informed the design considerations and also helped to refine and add to the design considerations and best practice suggestions derived from the literature and desktop analysis of the 'pilot' BMS.

Aboriginal Community and Corporation Stakeholders		
Officer, Pilbara Aboriginal Corporation 12 March 2019	Aboriginal Director of Pilbara Aboriginal Corporation 6 and 21 June 2018 and 8 May 2019	CEO of Pilbara Aboriginal Corporation 10 May 2018
Aboriginal Former CEO of Aboriginal Corporation and Management Consultant 14 February 2019	Aboriginal Director of Pilbara Aboriginal Corporation 7 and 20 June 2018	Ngarlawangga Traditional Owners and BMS committee members 3 May 2018
CEO of Pilbara Aboriginal Corporation 5 July 2018	Executive Officer of Pilbara Organisation 7 June 2018	Executive Officer of Pilbara Aboriginal Corporation 2 May 2018 and 7 March 2019
CEO of Pilbara Aboriginal Corporation 4 July 2018	CEO of Pilbara Aboriginal Corporation 21 May 2018 and 19 March 2019	
Professional Advisers and BMS Facilitator		
Independent Facilitator of BMS Matters 21 March 2018 and 7 March 2019	Partner, Jackson McDonald 12 July 2017, 31 January 2018 and 5 March 2019	Partner, Ashurst 16 November 2017 and 3 May 2019
Trustee Officers		
Trustee Officer, Bulhari 28 June 2018	Professional Trustee Officer, Australian Executor Trustees 16 May 2018 and 5 June 2018, 8 March 2019	Legal Counsel, Australian Executor Trustees 18 May 2017
Professional Trustee Officer, Perpetual 19 June 2018 and 9 April 2019	Background discussion with Professional Trustee Officer 5 July 2017	
Resource Proponent Representatives		
Rio Tinto Heritage & Agreements Team Comments 5 September 2018 and 17 June 2019	Agreements Implementation Advisor, Communities, Rio Tinto 10 August 2017	BHP, Agreement Implementation Manager 24 January 2017, 4 April 2019 and 19 May 2019
Manager, Rio Tinto 10 August 2017	BHP, Social Investment Manager 22 February 2017	
Multiple Groups of Stakeholders		
Attendees at Rio Tinto organised BMS Forum in Karratha, 2-3 May 2018. Attendees comprised Rio Tinto staff, executives and directors of a number of Pilbara Aboriginal corporations and BMSs, community members from several Pilbara Aboriginal communities, trustee officers and professional advisers. All groups of attendees were present during the workshop.		

Whilst the literature analysed is drawn from Australia and around the world, the interviews and focus groups are focussed on the Pilbara, as are the BMS 'pilot' structure documents. So some caution is justified before applying the proposed design considerations and best practice approaches in other settings. In particular, the duration and quantum of payments for many of the Pilbara structures will justify more complex arrangements than should be adopted elsewhere.

The particular structures used in the Pilbara should be viewed as examples, not the only possible outcomes from the design considerations. Eg, there may be space to consider greater devolution of decision making or broader involvement in decision making, or a lesser reliance on trusts fulfilling such a wide array of functions.

Nevertheless, a close examination of the Pilbara structures and the views of the stakeholders involved in those structures is a useful starting point for thinking about principles that may have general application.

This is for three reasons. First, given the size and duration of the Pilbara BMSs, the various stakeholders have engaged in much thought and planning to design the structures, often over many years. Second, the Pilbara BMS documents are being used as reference documents in other contexts, thereby influencing planning and negotiations in other areas. Third, the generally large duration and quantum of payments mean that Pilbara BMSs are likely to have a proportionately large impact justifying closer examination of their design.
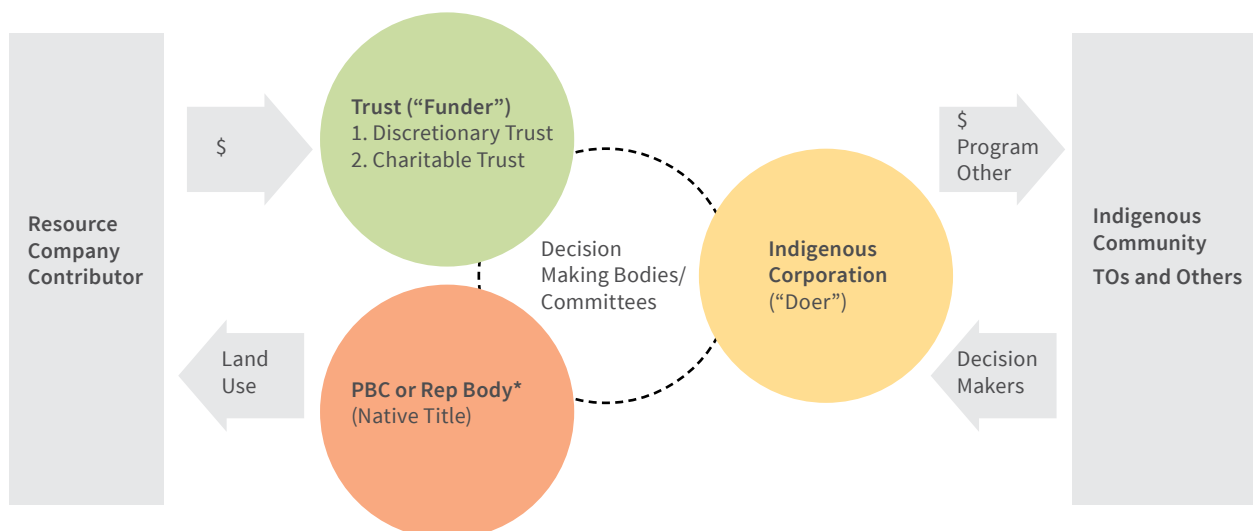
What are Benefits Management Structures?

Typically, BMSs include one or more trusts, a trustee and a representative incorporated entity and may include a Prescribed Body Corporate or Native Title Representative Body. While the trust or trusts do the 'funding', the corporations undertake the 'doing' of activities or business on behalf of the local Indigenous community.

The entities comprising a BMS are, fundamentally, private associations, presenting significant flexibility in addressing matters such as decision making processes and the allocation of decision making powers. Independent or stakeholder involvement may be incorporated into BMS decision making, and different approaches can be adopted for different classes of decisions. Asset protection may be effected through the use of external custodian trustees or capital protected 'future funds'. Finally, different approaches are also possible for structuring information flows between BMS decision makers and stakeholders.

A diagrammatic example of a BMS is set out below.

Diagram No. 1 – Common BMS

Resource Company Contributor

$

Trust ("Funder")
1. Discretionary Trust
2. Charitable Trust

Decision Making Bodies/ Committees

Indigenous Corporation ("Doer")

$ Program Other

Indigenous Community TOs and Others

Decision Makers

Land Use

PBC or Rep Body* (Native Title)

*May be the same entity as the Indigenous Corporation.

What has the research project found?

BMSs share common features of their legal structures and of distribution and asset protection functions, such as the use of a trust and hybrid decision making powers within each entity. They are reasonably flexible and will vary from place to place in order to fit the diverse circumstances in which they operate.

While noting that BMSs should not be expected to pursue all goals of an Indigenous community, stakeholders were materially consistent in the BMS purposes that they identified, but different groups of stakeholders placed different levels of emphasis on certain purposes. In particular:

- Aboriginal community and corporation representatives tended to focus first on BMSs as vehicles to build autonomy and self-determination and second on socio-economic development.
- While supporting autonomy, resource proponent representatives and trustee officers tended to place greater emphasis on socio-economic development for an Indigenous community, sometimes viewing autonomy as an instrumental means to achieving such development.

All groups of stakeholders noted that expectations that BMSs should be able to address all issues or pursue all goals of an Indigenous community were unrealistic.

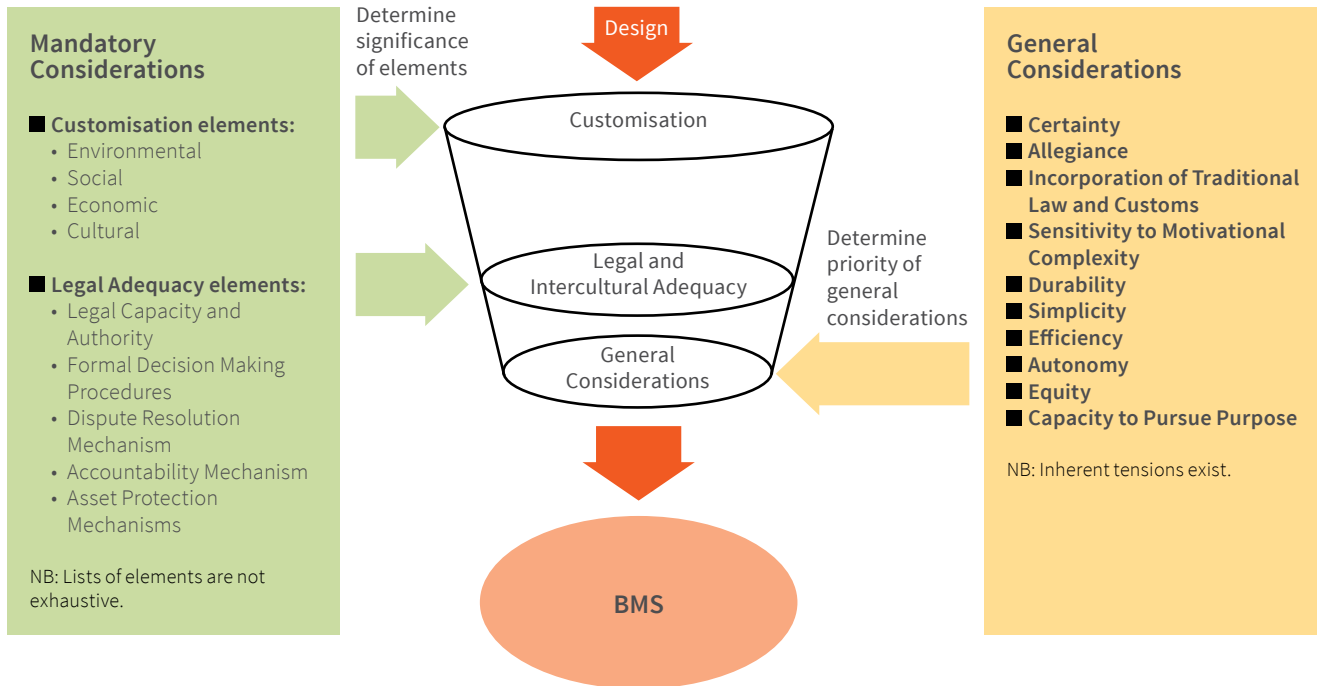Key issues raised in practice by BMSs include:

The need to support autonomy	Recognising every community, family and individual is different	Incorporation of traditional law and custom
Need for capacity building	Governance	Communication and participation in decision making
Overlapping decision making bodies	Filling boards/committees and succession planning	Administration costs and the scale of compliance activities
Achieving equity	Timing of funding for the Indigenous corporation 'doer'	Restrictions on economic development
Geographical remoteness and dispersion	Professional trustees and inherent conflicts of interest	Interactions with pre-existing structures and with government
Strategic planning to achieve BMS purposes	Change	Implementation versus structure
Siloing		

These findings mean there is no ideal BMS model. However, the research has found:

- Twelve, more flexible, institutional design considerations that can be applied to design and amend BMSs.
- There are many features of current BMSs that are operating well; there are also aspects that can be improved. Specific examples are set out further below.

Design considerations for BMSs

Diagram No. 2 – Design Considerations

Mandatory Considerations

- ■ **Customisation elements:**
  - • Environmental
  - • Social
  - • Economic
  - • Cultural

- ■ **Legal Adequacy elements:**
  - • Legal Capacity and Authority
  - • Formal Decision Making Procedures
  - • Dispute Resolution Mechanism
  - • Accountability Mechanism
  - • Asset Protection Mechanisms

NB: Lists of elements are not exhaustive.

Determine significance of elements

Design

Customisation

Legal and Intercultural Adequacy

General Considerations

Determine priority of general considerations

BMS

General Considerations

- ■ **Certainty**
- ■ **Allegiance**
- ■ **Incorporation of Traditional Law and Customs**
- ■ **Sensitivity to Motivational Complexity**
- ■ **Durability**
- ■ **Simplicity**
- ■ **Efficiency**
- ■ **Autonomy**
- ■ **Equity**
- ■ **Capacity to Pursue Purpose**

NB: Inherent tensions exist.

It is important that **Customisation** and **Legal adequacy** must always be satisfied, even though the remaining 10 considerations can be balanced against each other. This is because all BMSs must be customised to the particular environmental, social, cultural, economic, and political conditions of the relevant Indigenous community.

In addition, **Legal adequacy** must be satisfied in order for the BMS to exist and straddle Indigenous laws and cultures and the broader Australian legal system and society.

Summary of the design considerations:

- **Customisation:** Building or changing a structure to suit a particular community looking at factors such as group size, family/language group composition, where people live, what they want to do and how they make decisions. It is also important to get the proper balance between individual and family needs and the needs of the whole community.

- **Legal adequacy:** Structures need to comply with the law and work within the law. They need a way of knowing who is in the community and who can speak for a family or the community, how to make decisions and who is in charge of those decisions, how to resolve disputes, and how to take care of the community's property (money, vehicles, etc).

- **Certainty:** Structures need a clear way of working with people from outside the community and to protect money or other things received from those people and to resolve arguments.

- **Allegiance:** Structures need to hold the trust and respect of the community because a structure is meant to represent and work for that community.

- **Incorporation of traditional law and custom & intercultural adequacy:** Structures should be built on and help to protect Indigenous culture.

- **Sensitivity to motivational complexity:** People have different reasons for doing things. Structures need to be able to work with this. Structures should help people feel like they share the same goals as the structure. For example, by including different people in decisions, having decision makers explain reasons for decisions to the community and having ways to encourage decision makers to think about what other people might want.

- **Durability:** There need to be ways to change a structure so that it can keep growing and improving over time. But it should not be too easy to change.

- **Simplicity:** Keeping structures as simple as possible.

- **Efficiency:** It is important to keep costs down, both in running the structure and when dealing with other people outside the structure. Sometimes spending money up front on ways to build trust and develop certainty can save money in the long run.

- **Autonomy:** Members of the community need to be able to make their own decisions individually and as a whole: self-determination. Structures should give members the information and support they need to make decisions in a timely and appropriate way.

- **Inter and intra- generational equity:** Money and other things should be distributed fairly between members of the community and a fair share should be set aside for future generations. This may mean that some money needs to be prioritised for current generations who have missed out on opportunities that will be available through the BMS for future generations.

- **Capacity to pursue purpose:** The structure should support the community to work out what to do with their structure, how best to do it, and how to monitor and keep track of achievements over time. This can be about cultural, economic, social or other goals.

The design considerations can be used to understand the form and function of BMSs, as well as allowing the deliberate prioritisation of one consideration against another. Key trade-offs include **Certainty/Autonomy** and **Simplicity/Incorporation of traditional law and custom**.

Application of design considerations to pilot BMS

The research project applied the 12 design considerations to some existing BMSs, amalgamated together as an example 'pilot structure', to test the practical application of the design considerations and to identify beneficial features and areas for improvement.

The 'pilot structure' comprised a charitable trust, a discretionary direct benefits trust, a professional trustee company and an Indigenous corporation (the Local Aboriginal Corporation). A portion of the funds received had to be retained in a 'future fund', which is essentially a capital and (to some extent) income protected endowment fund.

Diagram No. 3 – Interrelationship and Decision Making Bodies comprising the 'Pilot Structures'
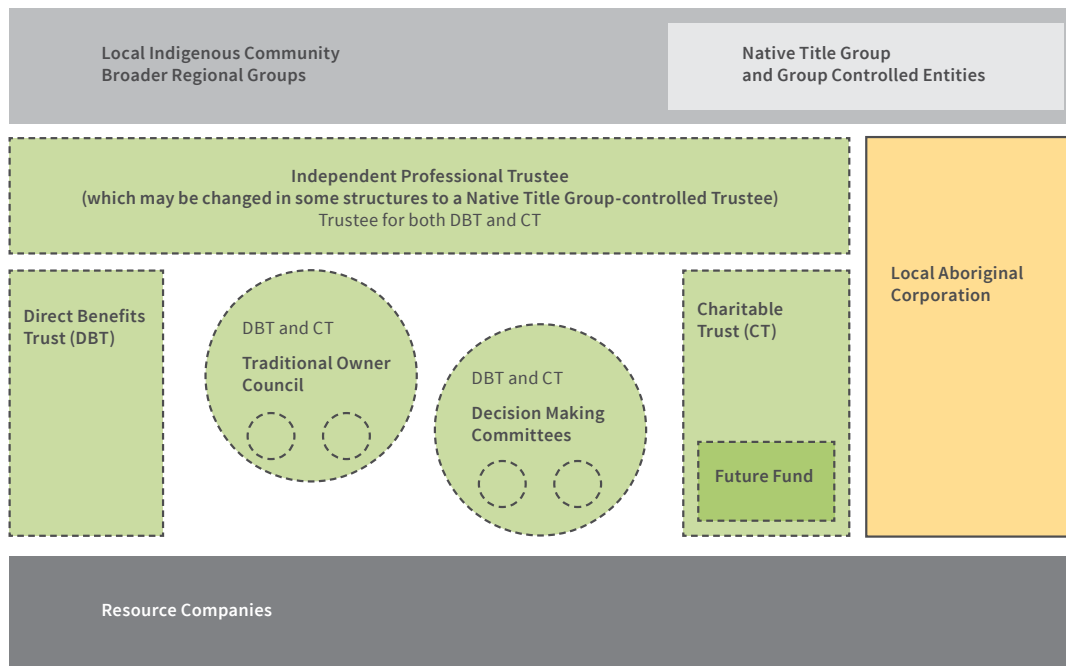
- The pilot structure provides for representation on the Traditional Owner Council to be a fair and just representation of the local Aboriginal community. The Council makes strategic decisions, such as approving BMS distribution policies and strategic plans. It contains no independent members. There are no formal training requirements for its members. It was originally envisaged as the primary representative body for the local Aboriginal community.

- The Local Aboriginal Corporation applies for funding from the trusts and implements projects.

- There are greater financial and legal compliance expertise requirements for Decision Making Committee members, reflecting the committee's greater focus on oversight of trust administration, although it too is required to be representative of the local Aboriginal community. A certain number of places on the Decision Making Committee may be reserved for representatives of identified sub-groups. A place is also reserved for an independent member. The Decision Making Committee generally consults with the trustee in relation to trust administration and can also issue binding directions on some matters such as distributions of assets and the preparation of annual and strategic plans. However, the professional trustee has a compliance veto. The Decision Making Committee is involved in strategic and day-to-day operational decisions.

The review found that the pilot BMS does relatively well at satisfying **Customisation** and **Legal adequacy**. It also prioritises 6 of the remaining 10 considerations moderately or highly:

Diagram No. 4 – BMS Priorities
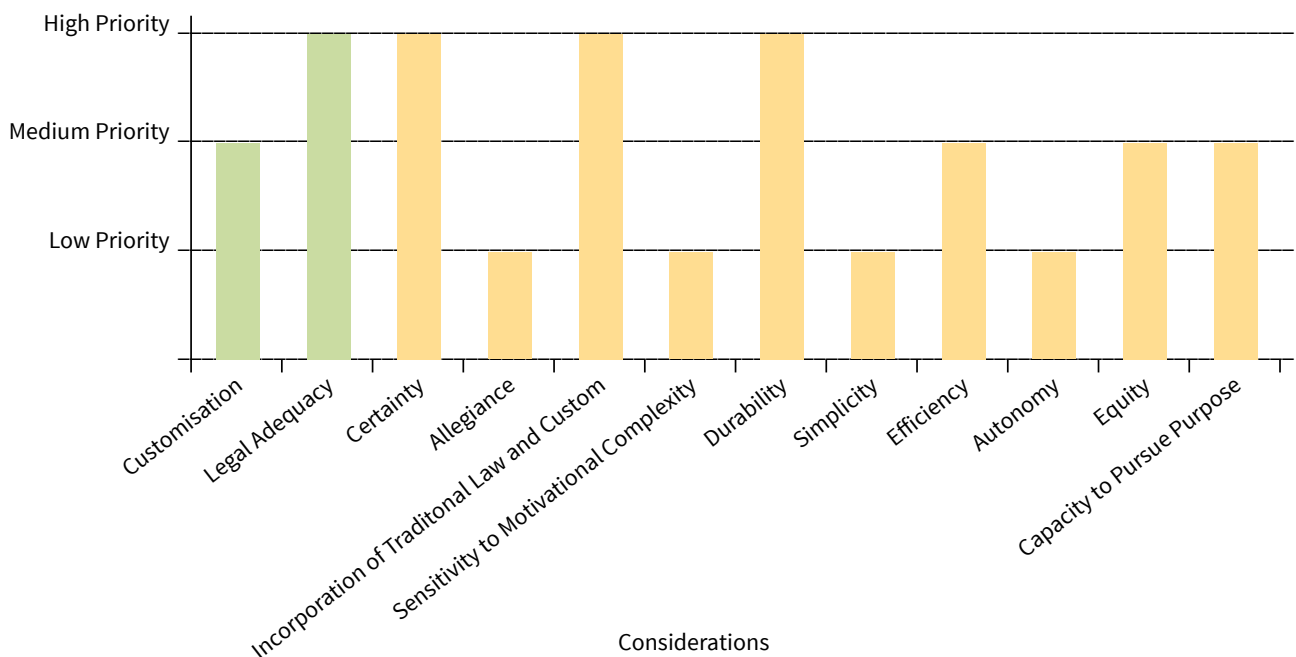
Areas where the pilot BMS prioritises design considerations highly or moderately provide potential examples of best practice. For instance:

- The 'windows approach' of providing mechanisms to support and recognise, but not codify or internalise, traditional law and custom. Recognition of traditional law and custom is subject to limits that are both temporal (eg the trustee may act without consent or consultation if the trustee has attempted to consult or obtain consent at least twice within three months) and derived from substantive norms in the broader Australian community (eg trustee veto for failure to comply with Australian law and for oppression

of minority members). This helps maintain a balance between **Certainty and Incorporation of traditional law and custom & intercultural adequacy**.

- The use by the pilot BMS of a charitable trust, incorporating a future fund, plus a discretionary trust works well to ensure some financial saving for future generations, a broad range of benefits to individuals from the current generation and broader and development-focussed community projects that are sensitive to traditional law and culture and to levels of need within the current generation. These represent best practice features in aid of **Equity**, albeit some improvements could

be made to better acknowledge non-monetary benefits for future generations and the need to prioritise those in need in the present generation.

However, the pilot BMS could perform better against the principle of **Allegiance**, in particular, by improving information flows and creating greater potential for direct involvement in decision making by members of the relevant Aboriginal community. These processes, combined with capacity building (which should be made a more express and extensive requirement under the pilot BMS documents), would also improve performance against **Autonomy**.

There is scope to enhance **Sensitivity to motivational complexity**, especially by applying this consideration to trustees so as to screen out some options, impose sanctions and encourage internalisation of BMS goals.

Simplicity is not satisfied by the pilot BMS. However, lack of simplicity is not easy to address as much of the complexity brings other advantages. In particular, significant scope and flexibility to address factors such as the size and capacity, complexity, aspirations and organisational culture of the relevant Aboriginal community, in aid of **Customisation**. However, the complexity of the BMS documents, has the potential to impede the practical achievement of flexibility and so **Customisation** could be improved by supporting or simplifying implementation processes contained within or contemplated by the pilot BMS documents.

The pilot BMS features multiple decision making bodies with overlapping functions. This is partly due to using a professional trustee company, which supports governance and asset protection (in aid of **Legal adequacy**), as well as separation of powers (helping **Sensitivity to motivational complexity**). The multiple and hybrid decision making bodies maintain **Autonomy**. It can be viewed in this sense as a potential best practice model, at least for Indigenous communities that need time to build

capacity. However, uncertainty about roles, responsibilities and liabilities can also reduce **Legal adequacy** and **Efficiency** and hinder achievement of BMS goals (**Capacity to pursue purpose**).

While the pilot BMS provides an ability to articulate the precise purposes within the broad possibilities enabled by the BMS, articulation of those purposes and measuring achievement of outcomes against those purposes could be improved via better strategic planning for **Capacity to pursue purpose**.

It might also be possible to improve the pilot BMS by reflecting further on the inclusion of some entities or the weight of the roles they are given in a BMS, due to the following changes that have occurred since structures akin to the pilot BMS were first developed:

- The number of PBCs has increased dramatically and proposed reforms to the CATSI Act may improve their **Efficiency** and **Legal adequacy**. If a community already has a PBC with a degree of operational capacity, it may be possible to give that PBC a greater role – especially in communication and participation – and to use it in place of a trust committee such as a Decision Making Committee. The Noongar Settlement BMS and the Canadian Innuvialuit structure provide examples of structures which provide a greater role for Indigenous corporations within a BMS.
- Charity and taxation law changes have reduced the gaps addressed by use of a discretionary trust, meaning that in some circumstances, a community might elect to have only one (charitable) trust, materially aiding **Simplicity** and **Efficiency**. Technical and practical issues will remain in other circumstances.

Best practice

Based on the key issues and the areas for improvement and 'best practice' examples, the following best practice approaches were tested with and generally supported by stakeholders.

An important contextual note, arising from **Customisation**, is that the pilot BMS and many of the stakeholder interviews related to Pilbara BMSs with large asset bases and large annual revenues. Some measures recommended as best practice should be implemented only in part for smaller BMSs.

Improving BMS communication and participation by moving away from heavy reliance on general meetings and representatives	This might involve: • Reporting mechanisms to ensure trustees are motivated to pursue communication and consultation. • Other procedural mechanisms to motivate communication and consultation such as a charter of good conduct, communication protocols and general board/committee coordination processes. • Capacity building about the opportunities for communication and participation at both the community and BMS corporation board/trustee/BMS trust committee levels – including stronger trust deed and constitutional requirements for capacity building. • Exploring alternative consultation and communication approaches such as family group meetings and electronic communications (for instance, to disseminate strategic plans). Note that this does not mean that all Indigenous community members should be asked to vote on every BMS issue.
Enhancing strategic planning by specifying outcomes and impacts in plans (in addition to financial inputs and activity and distribution outputs); and measuring and reporting achievement of those outcomes and impacts	BMS annual and strategic plans generally focus on expenditure and on BMS governance and administrative systems, with broader outcomes and impacts only considered to a limited extent. Approaches to address this would include: • Trust deeds and corporation constitutions should more strictly require the identification of outcomes (client specific effects) and impacts (longer-term social changes) that a BMS intends to achieve – but mindful of the costs involved. • Trust deeds and corporation constitutions should require trustees and corporations to report on steps taken to identify outcomes and impacts. • Increased use of demographic and other data to identify specific outcomes and impacts, which could potentially be a BMS document requirement as it is under several land use agreements. • Greater Indigenous community communication and participation in strategic planning, as recommended immediately above. • Improved alignment and coordination of strategic planning processes between BMS decision making bodies. In terms of measuring achievement of outcomes, while BMS trust deed reporting provisions do often require trustees to report generally on achievement of outcomes against the annual and strategic plans, the specific items that trustees are required to include in reports are BMS costs, activities and distributions – not the effect of these actions. To address this: • BMS constituent documents should be amended to reduce reporting on costs, activities and distributions and increase reporting on outcomes and impacts and on actions taken to measure such outcomes and impacts. This reporting process requirement is generally recommended rather than KPIs due to the risks for mission drift and implementation costs. • Consideration should be given to measurement at the level of individual community members where appropriate and where IT systems support it.

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<td>Balancing the pursuit of outcomes and impacts against other BMS goals such as investment and distributions to discretionary trust recipients will be aided where an independent monitor is in place, for instance, akin to the auditor of the Trustee's Annual Report under the pilot BMS.

A further simple measure that would help the pursuit of outcomes and impacts is for BMSs to ensure that decision makers have access to a copy of the BMS's mission and strategic goals at all meetings so that they can identify how their decisions relate to the mission and goals.</td>
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<td>**Reducing transaction costs arising from interactions between overlapping decision making bodies through an Efficiency lens of building certainty and inter-personal trust**</td>
<td>Uncertainty can be reduced through institutional mechanisms and opportunism can be reduced by building interpersonal trust. In particular, measures would include:

- Enhanced coordination and communication processes, such as joint BMS entity meetings; the establishment of a coordination committee made up of members from the various entities; and communications protocols.
- Clarifying or changing the functions of decision making bodies. While amalgamation was suggested by various stakeholders, amalgamating the Decision Making Committee and Traditional Owner Council may reduce **Customisation** and **Incorporation of traditional law and custom & intercultural adequacy** and so would need to be approached sensitively. However, changes such as reducing the role of the Traditional Owner Council to purely strategic matters might materially improve certainty without eliminating the Traditional Owner Council. Alternatively, given the greater prevalence of PBCs, the Decision Making Committee could itself be replaced by a PBC board, leaving the Council intact. Indeed, even for **Efficiency** reasons, it may be preferable to leave two committees/decision making bodies in place, but with a better delineation of responsibilities.
- More radical approaches might involve:
  » Reducing the trust functions to asset protection and investment and increasing the BMS Indigenous corporation functions, so that the roles of the trust committees are materially reduced. A variation of this approach that envisages a slightly more active role for the trustee would involve the trusts as grant-making philanthropic foundations akin to the Gates Foundation – setting broad themes and holding grant- recipients accountable. At least the second of these approaches is possible under the pilot BMS documents. However, shifting decision making to BMS Indigenous corporations will also shift some of the uncertainty that currently exists under the trusts to the corporation, so the shift should not be considered a solution purely of itself.
  » Devolving many of the operational functions of the Decision Making Committee to subgroups within a community, such as family or clan groupings, which would be consistent with improving communication and participation at such local levels. While this may improve **Efficiency** through greater personal trust at the local level, there should be caution in balancing these gains against the potential for high governance demands and administrative costs from the creation of local level decision making bodies.
- Guaranteeing some core ongoing funding for decision making bodies, such as a BMS Indigenous corporation, particularly where it has PBC statutory responsibilities.
- Training more potential committee members so that members can be replaced more easily if they act opportunistically.
- Reporting measures, such as the provision of progress reports by each BMS entity on policy implementation to all decision making bodies; or reporting by an independent monitor on the level of coordination between BMS entities – which could, for instance, be included in a role such as that under the pilot BMS of the auditor of the Trustee's Annual Report, with coordination another matter in the Trustee's Annual Report audited by the auditor.
- Greater resourcing and support of dispute resolution processes, including development and adoption of a code of conduct by BMS stakeholders.

There are cost implications to many of the measures, but if they reduce uncertainty and build trust, they may actually result in a net gain for **Efficiency**.</td>
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The use of a future fund, in conjunction with the use of a charitable trust and a discretionary trust represents best practice to achieve Equity, but could better acknowledge the importance of non-monetary benefits for future generations and could permit alternative interpretations of intergenerational justice	The importance of non-monetary benefits to intergenerational justice, such as the maintenance and transmission of culture, should be better recognised. Further, permitting alternative interpretations of intergenerational justice that contemplate more priority for those in need now, means not being so strongly tied to 'generational neutrality', which results from the pilot BMS definition of 'Target Capital Base' as being a capital amount that would permit future fund income to match the projected annual resource company contributions received over the foreseeable future.
	One way to achieve these changes without losing the benefits of a future fund, would be to permit a portion of the future fund to be used for social impact investment. While social impact investing raises risks for asset protection and hence ***Legal adequacy***, the best practice suggestions for strategic planning should assist in balancing pursuit of purpose and pursuit of monetary returns. Additionally, there appears to be greater capacity to pursue development projects under BMS charitable trusts than is currently being utilised. Improved strategic planning would help here too.
	There may also be scope to consider replacing some or all of the discretionary trust's functions through an expansion of the charitable trust's role and direct payments to individual community members. This would require resolution of technical and practical issues with economic development and investigation of the technical and practical bounds on the trustee of the charitable trust or the BMS Indigenous corporation playing a funds management facilitation role for the funds paid directly to community members.
Dealing with complexity in aid of achieving flexibility	A degree of complexity is required of BMS documents in order to provide flexibility to address factors such as the size and capacity, complexity, aspirations and organisational culture of the relevant Indigenous community. However, to ensure that complexity does not eliminate the practical achievement of flexibility, the implementation processes contained within or contemplated by BMS documents should be supported or simplified, while retaining optionality. For example: • More resources for capacity building (including individualised approaches) and stronger trust deed and constitutional requirements for capacity building. • Development of operational guides and procedures, including requiring such development in BMS trust deeds and constitutions. • Purchasing, partnering or building specialist expertise on matters fundamental to operating a BMS, which again might include support in constituent document service provider provisions or a constituent document mandate for the establishment or membership of coordinating bodies. The final example highlights the need to avoid a silo mentality and to coordinate with others, whether that be government, NGOs or other BMSs.

In addition:

The 'windows approach'	The 'windows approach' is exemplified by the pilot BMS and is an innovative response to some of the difficulties of incorporating traditional law and custom.
	It permits recourse to traditional law and custom for decision making, but does so without codifying those rules in the BMS documents, enabling law and custom to continue to evolve. However, it is a more structured approach than an unfettered ability to make determinations by way of an undefined concept of 'traditional law and custom', which would otherwise raise the difficulty of trying to obtain an authoritative declaration of laws and customs and the issue of timeliness of decisions. Instead, the windows approach provides an Indigenous community, or BMS committees, with the option of adopting traditional decision making processes in circumstances where the trust deeds or BMS Indigenous corporation constitution also provide a mechanism for recognising the selected traditional decision making process (so that an authoritative decision could be obtained from a court if required) and support for the implementation of that decision making process.
Professional trustees bring advantages and risks so that it is controversial whether they are a best practice feature in all circumstances. They are more likely to prove a net advantage for Indigenous communities that need time to build capacity, but if they are used, several precautions should be adopted to ameliorate several key risks identified by stakeholders.	Professional trustees can help ensure *Legal adequacy* due to their governance capacity and asset protection function as well as aiding separation of powers (helping *Sensitivity to motivational complexity*).
	However, there is a key tension between impeding *Autonomy* in the short term and building *Autonomy* (through support for capacity building) in the longer term. Often, to support *Autonomy* in the short term, there is an increase in the number and overlap of decision making bodies within a BMS so as to ensure that the Indigenous community retains a decision making role. This has, in particular, *Efficiency* implications, for which mitigating steps have been considered above.
	There are also risks that professional trustees might act in their own interests rather than in pursuit of BMS purposes. While conflicts of interest are relevant for all BMS decision makers, some are uniquely raised by professional trustees and need to be addressed:
	• Conflicts of interest arising from the investment of BMS funds with related parties should be addressed by prohibiting professional trustees under the BMS documents from taking on the investment mandate. Lessons can be learned here from the Financial Services Royal Commission. • The risk that trustees focus on technical compliance and quantum of services delivered rather than outcomes could be dealt with by way of unbundling trustee services to a greater extent and by incorporating extrinsic and intrinsic motivations for communication and strategic planning processes, as well as reporting on fees. • Rather than having the professional trustee manage the change of trustee process in all circumstances, a greater role could be given to the BMS Indigenous corporation.
	BMS provisions that permit the Indigenous community to select a lesser or greater scope of matters over which it wishes to make decisions and that permit a community to progressively build capacity and organisation over time (in support of *Autonomy* and *Customisation*) are best practice and should be included and strengthened where possible. In particular, enabling a transition from a professional trustee company to an Indigenous community-controlled trustee over time is a key example and should ideally be included.

Terminology

The term 'Aboriginal' is used in relation to Aboriginal people from the Pilbara region of Western Australia and their BMSs. Otherwise, the terms 'Indigenous people', 'Indigenous community', or 'Indigenous' have been used to refer generally to Aboriginal and Torres Strait Islander people and to First Nations people more broadly.[1] This has been done to highlight the relevance of the research to Indigenous peoples around the world and to provide consistency with the use of 'Indigenous' for international instruments that are relevant to the design considerations, such as the *United Nations Declaration on the Rights of Indigenous Peoples*.

[1] Cf AIATSIS, *Indigenous Australians: Aboriginal and Torres Strait Islander People* (21 March 2018) <https://aiatsis.gov.au/explore/articles/indigenous-australians-aboriginal-and-torres-strait-islander-people>.

Future research and further information

This summary overview and a research monograph will be made available on the UWA Centre for Mining, Energy and Natural Resources Law at: www.able.uwa.edu.au/centres/cmenrl

More specific research publications from the research project are also available:
*   Murray, Fardin and O'Hara, 'Designing Native Title Asset Management Structures for Culture, Law, Love and Money' (2017) 36(1) *Australian Resources and Energy Law Journal*

The stakeholder engagement focussed the best practice approaches discussed above on particular issues. However, the design considerations enable the development of a range of best practices, including by helping to formulate responses to each of the BMS issues. It is thus possible to formulate a 'tool kit' of best practice BMS features, drawn from examples that work well in practice, in response to each design consideration – and supporting the construction of alternative BMSs. That is the next stage for the research project, along with looking further into the issue of achieving economic development under a BMS.

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