BELL GULLY

WHAT HAPPENS AFTER TREATY SETTLEMENTS?

Paper by Damian Stone

Treaty settlements and beyond conference
Lexis Nexis
17 June 2009

Introduction

It is almost fourteen years since the Waikato Raupatu Claims Settlement Act 1995 came into force,[1] and the first Treaty of Waitangi settlement assets were transferred to a PSGE.[2] As a result, many would say that the concept of a PSGE is not new and that, after almost fourteen years of operation, we ought to know exactly what works within a PSGE structure, and what does not.

The purpose of this paper is to discuss what happens after a Treaty settlement. In doing so, I wish to focus on the post-settlement governance arrangements that have been established by groups who have received Treaty settlement assets, with a view to identifying commonalties between those structures, including (and perhaps most importantly) the areas where tension commonly arises.

In considering the issues, this paper identifies and develops two key theories. Those theories are:

- Relatively speaking, PSGEs are recent phenomena. They are "young" organisations. We should expect challenges and change within these young organisations.

- Although each PSGE structure is different, there seem to be some common "hotspots". In this paper I attempt to identify those "hotspots" and suggest some cooling mechanisms.

I must record at the outset that, in the case of PSGEs, I am an outsider looking in. In my professional capacity I have advised on the establishment of a number of PSGEs. I also advise a number of PSGEs, and so am aware of issues that can often arise post-establishment. But, my experience has been gained in that context, rather than through working within a PSGE structure.

This paper is set out in two parts. Part 1 poses the question, "what is a PSGE?" It looks at the legal structures that are often employed as PSGEs. Finally, Part 1 makes some comparisons between PSGEs and other organisations in order to support the theory that PSGEs are young organisations.

Part 2 then looks at the common areas of tension within a PSGE structure. These "hotspots" are analysed and some suggestions are made to address them.

---

[1] This Act came into force as from 15 November 1995, except where otherwise provided.

[2] PSGE means post-settlement governance entity, a term that is commonly used to describe the legal entity that receives Treaty settlement assets on behalf of the beneficiaries of those assets. I note also that there have been a number of historical "settlements" between the Crown and various Māori communities prior to 1995, but it is generally recognised that the 1995 Waikato-Tainui Treaty settlement was the first settlement under the current Treaty settlement policy framework.

PART 1 – What is a PSGE?

Types of legal entities commonly used as PSGEs

As context to this paper, I set out below a brief summary of some of the more commonly used legal entities for PSGEs and their potential advantages and disadvantages.

Common Law Trusts

There are a number of advantages to using a common law trust as a representative iwi or hapū entity. Trusts are governed largely by common law principles. The deed of trust provides flexibility, and for the most part, can be drafted according to the wishes of the iwi or hapū. Furthermore, the trust deed need not be registered in a public register, nor is it overseen by any government department or agency.

However, trustees' duties can be unclear. Setting up a trust can be costly and time consuming. Importantly, common law trusts can only operate for a period not exceeding 80 years (the perpetuity period). After eighty years, the trust assets must be distributed to the beneficiaries. Commercially, trusts are relatively unwieldy. For example, the trust itself cannot hold property. This can add to the complexity of transactions and make efficient economic development more difficult than it might otherwise be.

Regardless, most claimant groups have used trusts as PSGEs and, through private statutory recognition, have specifically excluded the rule against perpetuities. However, the ability to have a statutory provision that overrides the application of the perpetuity period to a common law trust is arguably only going to occur if there is other related legislation (such as settlement legislation) that needs to be enacted in any event.

Statutory Bodies

Ordinarily, a statutory body provides a number of significant advantages, not least of which is the fact that a statutory body is established pursuant to its own legislation. It is possible, for example, to deal comprehensively with the vesting of assets (including transfers from existing legal entities and associated tax consequences) through legislation. Statutory recognition of a legal entity may also be an advantage in a commercial environment.

An iwi may choose to set up a structure under special legislation. This allows for iwi control and is clear, comprehensive and flexible. The legislation may set out the ownership rights of beneficiaries, the objects and powers of the statutory body, the constitution or requirements for a constitution, and the form, procedure and accountability of management to the beneficiaries. This flexibility has enabled a

number of Māori statutory bodies to successfully advance Māori economic development through commercial functions.

However, depending on the current political environment and legislative timetable, it may be difficult to establish a statutory body for an iwi or hapū. In addition, the legislative process is time-consuming, and the costs associated with such an establishment can be prohibitive. At the end of the day, there is no guarantee that the legislation will progress through the parliamentary process, or that the nature of the entity enacted will be exactly what the iwi or hapū want.

Incorporated Societies

Traditionally, incorporated societies have been used as legal entities for collections of individuals who wish to associate for a particular purpose other than for pecuniary gain. Many existing Māori organisations, including many representative iwi organisations, are established under the Incorporated Societies Act 1908. The tax treatment of an incorporated society depends on what the society has been established for. If its purposes are charitable, it will be eligible for a general charitable tax exemption.

There are, however, some issues with the use of an incorporated society as a representative body for an iwi or hapū. From a legal perspective, members of an incorporated society have a contractual relationship with the society, and it is through that relationship that they are able to enforce the rules of the society. Therefore, arguably only those iwi members who have actually registered and become members of the incorporated society can enforce the terms and the rules of that incorporated society. This may mean, for example, that an iwi member who is not a registered member of the incorporated society has no standing to enforce the rules of the society (for example, to require the society to act in accordance with its rules).

Furthermore, there are issues surrounding the prohibition on members of incorporated societies from associating for pecuniary gain. This prohibition impacts on the activities that an iwi or hapū may wish to undertake and how those activities can benefit the iwi members, and also potentially affects the growth of settlement assets through commercial ventures.

Māori Trust Boards

Māori Trust Boards are established under the Māori Trust Boards Act 1955. Māori Trust Boards are by legislation, directly accountable to the Minister of Māori Affairs. As there is no direct statutory reporting requirements to the beneficiaries, beneficiaries do not usually have absolute control over their affairs. Māori Trust Boards are able to perform a wide range of functions, but their powers are often limited. Māori Trust Boards are usually only used as PSGEs where there is an existing Māori Trust Board for the claimant community.

Companies

Another option for an iwi is to form a company under the Companies Act 1993. The company structure provides legal and commercial certainty and strong accountability and protection for shareholders. A company's constitution can allow for a flexible, iwi specific structure.

A company is a separate legal entity (from its shareholders) that has full capacity to sue and be sued, and the full rights, powers and privileges to carry on or undertake any business or activity, to do any act or enter into any transaction. The liability of shareholders and directors for acts done in the name of the company is generally limited, unless the company's constitution expressly provides otherwise.

A company can also have financing and commercial powers and, from a commercial perspective, is the entity most commonly recognised by financial leaders. Therefore, the company structure is widely accepted in commercial transactions. It also has certain tax advantages. Companies are taxed at a flat rate of 30%, losses incurred for tax purposes can be carried forward to future income years or offset between commonly owned group members, profits can be returned to shareholders, and, in some instances, returns of capital and capital gains are tax-free.

However, there may be some difficulties in identifying the shareholders of the company as a representative iwi structure. It is almost impossible to identify all beneficiaries and to issue them with shares and allow them to have an interest in the entity that manages and owns the assets. Therefore, the issuing of shares becomes an issue in itself, as does the transferability of those shares. Further, individual share holdings may not sit well with communally owned iwi and hapū assets.

The Nature of a PSGE

PSGEs are unique. They are, by necessity, constructs of the Westminster legal system. The legal entities used as PSGEs are products of a legal framework conceived and developed in Great Britain, and transposed to Aotearoa – New Zealand. However, they are required to operate within and reflect a Māori paradigm. This blend creates uniqueness.

PSGEs are also unique in that they must perform a number of functions:

- A PSGE must be representative of its claimant community.[3] That always requires the "governors" of the PSGE to be elected by the community that it represents. PSGEs are, therefore, democratic organisations.

[3] See the criteria that the Crown applies in assessing a post settlement governance entity, in the form of the Crown's "20 Questions".

- A PSGE must receive and manage Treaty settlement assets. The nature of those assets can vary significantly, but often comprise cash, land, properties and forestry assets. PSGEs are, therefore, commercial organisations.

- A PSGE must provide benefits to its members. That requires the governors to consider and make decisions on how best to apply funds to meet the needs and wants of the beneficiaries. PSGEs are, therefore, philanthropic organisations.

- A PSGE represents its Māori members. It must operate within a Māori paradigm. PSGEs are, therefore, Māori organisations.

PSGEs as democratic organisations

In the sense that PSGEs are governed by elected representatives, I believe there are similarities between PSGEs and Parliament. The members of both are elected by constituents. Both have a governance role (for Parliament it is the governance of the realm of New Zealand and for PSGEs it is the governance of settlement outcomes and, often, the claimant community generally). Both usually have "employees" to assist in that governance responsibility. Both usually task corporate entities to manage strategic assets (state owned enterprises in the case of Parliament and (usually) wholly owned subsidiary companies for PSGEs). Both use the profits from those assets for the benefit of their constituents.

Indeed, many consider PSGEs as the "parliament" of a claimant community. The governors of the PSGE can be considered as elected "MPs". They hold office subject to the political whim of the constituency. Their drivers are usually political in nature.

Of course, there are some significant differences between Parliament and PSGEs. One obvious difference is the fact that PSGEs operate within a Māori context and are subject to influences of Māori tikanga and custom. I deal with that issue later in this paper.

I do not think it hyperbole to say that PSGEs are the "new parliaments" of Māori communities. They are a direct result of the Crown's policies that require Treaty settlement assets to be received and managed by representative, transparent and accountable organisations. While traditional leadership models have operated within Māori societies for centuries, PSGE structures often entail the "codification" of those models within a Westminster oriented construct. The result is what I consider to be a "new" form of organisation whose constitutional framework is based on attempts to fit long standing traditional

leadership models and conventions into an existing Westminster based legal entity. This is more than a "square peg, round hole" issue (that is, trying to fit traditional leadership structures (the square peg) into Westminster based legal entities (the round hole)). Often, the shape of the peg is not known or fully understood, and it is the shaping of that peg (that is, the distillation of the nature and extent of traditional leadership structures and how they operate) that is often the most important (and difficult) issue.

This brings me back to the first key theory of this paper – that PSGEs are young organisations. This can be demonstrated by drawing comparisons to Parliament.

The concept of Parliament is centuries old. The Westminster system has its origins back to 1066, when William of Normanby brought a feudal system to England, by which he sought advice of a council of tenants-in-chief and ecclesiastics before making laws. Under this feudal system, English monarchs called Great Councils, during which they consulted with the nobility and senior clergy. It was these Great Councils that eventually evolved into the Parliament of England, which emerged as an institution from 1272 onwards. In 1341 the Council met separately from the nobility and clergy for the first time, effectively creating an Upper Chamber and Lower Chamber (later to become the House of Lords and the House of Commons, collectively known as the Houses of Parliament).

Due to the history and influence of the British Empire, the English Parliament has become a model for many other national legislatures (including Aotearoa - New Zealand). From the adoption of the Westminster system of government by the first New Zealand Parliament in 1854 until today, there have been many challenges, conflicts and changes which have formed the history of, and developed, the New Zealand Parliamentary system.

New Zealand's original Parliament had no political parties, no simple Government – Opposition split, and consisted of the Governor, the House of Representatives and the Legislative Council. Today's Parliament is vastly different. In 1951 the Legislative Council was abolished, and after conflicts in the 1980s, the Governor-General took on more of a symbolic role, resulting in the form of Parliament that we have today. The electoral system was completely changed in 1996 from FPP to MMP, which ended the two party domination of National and Labour, and as a result, governments are now formed by coalitions and agreements between parties. The New Zealand Parliament is now larger (the House of Representative usually has 120 members, up from the original 37 members), and includes more parties, more women and more Māori.

An illustration of the importance that history plays in an organisational structure is evidenced by constitutional conventions (for example, the existence and functions of Cabinet, the practice of the Governor-General in always giving consent to Bills and the practice of Cabinet collective responsibility). Throughout the history and development of Parliament, constitutional conventions were created with the

development of the Westminster model of government and were formalised through agreement, consent and practice in New Zealand. Constitutional conventions are followed by members of government due to the observance of custom and historical usage. These conventions, therefore, have effectively developed over time with the benefit of hindsight and experience.

Because PSGEs have only been around for a relatively short period of time, they have not had an opportunity to evolve and develop. The people that operate within them have not had an opportunity to develop rules and conventions based on operational experience. They are, in many respects, sailing unchartered waters. The history of the English Parliament, and indeed our own Parliament, is a story of significant challenges (on 5 November each year we still celebrate one of the more significant challenges), change and development. In my view, the PSGE story is yet to unfold.

So why is this relevant? I sense a generally negative public sentiment regarding the operations of PSGEs. This is probably (although not exclusively) as a result of the media focussing largely on instances where PSGEs are involved in conflict or loss, rather than on other more positive aspects. Irrespective of the source of this sentiment, I believe that, as “young organisations”, some level of conflict is to be expected. We cannot expect that, as if by magic, on the first day on which a PSGE is established its constitutional framework will be “perfect” and will never require amendment. To the contrary, as can be seen in the development of Parliament and associated conventions, we should expect that amendments *will* be required. Exactly what those amendments may be will only be known once the structure has had the chance to find its feet, live through its own experiences and develop its own conventions. In the case of Parliament, that process has taken centuries and will continue to evolve into the future. As democratic, Parliament-like organisations, PSGEs should be allowed that same opportunity.

PSGEs as commercial organisations

The primary reason for the establishment of a PSGE is to receive assets. Of course, Māori representative bodies (such as Māori Trust Boards) have been around for some time and I think it likely that most iwi would have developed their own representative structures even if the Treaty settlement process did not exist. However, the transfer of Treaty settlement assets is the key catalyst for the establishment of PSGEs.

Further, one of the key rationale behind the Crown providing commercial and financial redress within a Treaty settlement package is to "contribute to re-establishing an economic base as a platform for future development".[4] Again, the commercial element of a PSGE is self-evident.

Like the New Zealand Parliament, the law and history regulating New Zealand corporations has a long history and is sourced in English law. Modern commercial law in New Zealand (contained in statute, statutory regulation and case law precedents) grew out of the customs and usages of merchants, which were known as the "law merchant". Eventually the "law merchant" was absorbed into the English common law, and codified in England at the end of the nineteenth century and early this century, which was subsequently echoed in New Zealand legislation. Organisations such as companies and incorporated societies have been regulated by statute in New Zealand for over a century (e.g. the Incorporated Societies Act 1908 and New Zealand company legislation from 1860), and accordingly have had over a century of history and development.

Most PSGE structures include a company incorporated under the Companies Act 1993. Such companies therefore "inherit" the results of years of operational experience that is now codified and embodied in the Companies Act. In that regard, they inherit such things as (for example) the balance that has been struck between shareholder rights and obligations, director powers and duties, the mechanisms to prevent oppressive behaviour and financial reporting requirements.

However, although companies "inherit" some operational experience, they cannot inherit experience of operating for a shareholder that is a PSGE. The relationship between the governors of a PSGE and the directors of a subsidiary company is a novel one. As I discuss in Part 2, this novel relationship is often a key "hotspot" within a PSGE structure. I believe that reflects the fact that there is (relatively speaking) limited operational experience between a PSGE and its commercial subsidiary. To get back to my first key theme, this is a "young" relationship and, like any new relationship, we should expect some healthy conflict.

PSGEs as philanthropic organisations

Describing the "distribution" function of a PSGE as philanthropy may be overly simplistic, but it cannot be denied that an important part of the role of a PSGE is to determine whether and how to make distributions to the beneficiaries. This is easier said than done, for a number of reasons.

First, I believe there is a general misconception that Treaty settlements are a panacea for the current Māori socio-economic position. They are not. In fact, they are likely to have little impact on the general

[4] Ka Tika ā Muri, Ka Tika ā Mua – Healing the Past, Building the Future, pg 97.

socio-economic status of the communities that benefit from them. This general misconception puts pressure on the governors of PSGEs to provide benefits to their members that are just not possible. This expectation, however unrealistic, raises the importance of making good distribution decisions.

Secondly, usually the claimant community has had no “distribution” experience. That means that the governors have had little or no experience in *making* distributions and the beneficiaries have had little or no experience of *receiving* distributions. This, again, often requires the chartering of unchartered waters.

Thirdly, and perhaps most importantly, governors of PSGEs are essentially political appointments. They depend on the continued support of their constituents to remain in office. A governor is therefore mindful of how best to ensure that continued support. Making good distribution decisions is a key to that support.

PSGEs as Māori organisations

PSGEs are Māori organisations. As such, their constitutional documents usually incorporate elements of tikanga Māori. This necessarily results in the partial “codification” of tikanga.

Importantly, the “codification” of tikanga is, in my view, a relatively new concept, which has been highlighted by the requirement to establish PSGEs to receive Treaty settlement assets and the desire to ensure those PSGE’s operate appropriately within a Māori context. Codifying tikanga is a relatively difficult concept to give effect to in practice. It is even more difficult when it has to be given effect to within a Westminster statutory framework.

Coming back to the first key theme, the incorporation of tikanga into a Westminster legal entity is a relatively new concept. It adds to the “newness” of the concept of a PSGE, and reinforces the point that they are young organisations.

Conclusion

In many ways, PSGEs represent the convergence of some quite difficult concepts. They attempt to replicate a form of “Parliament” for a Māori community. They must do so within the existing Westminster statutory framework and in a manner that incorporates tikanga. They must operate commercially, but at the same time have philanthropic purposes. The result is an entity that, while incorporating some concepts that are familiar to Westminster law, is essentially a new beast.

It is with this in mind that I conclude that PSGEs are young organisations. They represent the amalgamation of the range of different concepts which have not been amalgamated previously. PSGEs

have not yet had a real opportunity to develop and adapt in a way that other institutions have. Change and challenge should be expected.

PART 2 – Common Hotspots

Hotspots

Although every PSGE is unique, there are aspects of, and areas within, the standard PSGE structure that can often give rise to friction and conflict. I term these areas as “hotspots”. They are the areas where, in my experience, PSGE structures often come under the most intense tension.

Elections

There is significant potential for tension to arise in the election processes that must be incorporated into a PSGE structure. The stakes are high. The opportunities for administrative error are high. Emotions usually run high.

For all of that potential, I think that election processes are not generally sources of significant tension. No doubt they will be from time to time, but generally speaking they seem to be proceeding without too much fuss.

Because of the potential for tension, I believe that thought should be given to how a structure could relieve that tension (when it arises) when the structure is being developed.

Separation of functions - Unclear roles and responsibilities

It is conventional wisdom that, within a PSGE structure, different functions should ideally be separated. This usually results in commercial functions being separated from other functions. Sometimes cultural functions are also separated out from commercial and other functions.

The general intent behind these separations is to ensure that the people with the appropriate skills are undertaking the appropriate functions. As mentioned above, governors of PSGEs are usually elected. They are usually elected because of their political expertise. Political expertise can, but does not always, accompany commercial expertise. Therefore, commercial functions are often separated and delegated to a team with the necessary experience so that the governors, who may not have that experience, are not performing a function for which they are not experienced to perform. There are also other reasons to separate out commercial activities (including for risk protection purposes) but for present purposes I will focus on the desire to have the right people undertaking the right jobs.

This may sound trite, but it is fundamental that when separating out functions, any PSGE structural documents must stipulate, as precisely as possible, the functions that are to be separated and who is responsible for performing them. By that I mean that there must be clarity about the roles that the

commercial arm is to perform, compared to the roles that the PSGE itself is to fulfil. This sounds so obvious, but it is so important to get right.

We often talk about the separation of "commercial functions", but do we really know what we mean? Do we assume that any function of a financial nature is a "commercial function" and therefore ought to be delegated to the commercial arm?

In my view, as much specificity as possible should be encouraged in this context. I am mindful that the greater the specificity, the greater the proscription, the more the PSGE structure may become inflexible. However, I believe that flexibility can be maintained through other mechanisms, while at the same time ensuring that there is absolute clarity over roles and responsibilities.

I wish to illustrate the point using a practical example. A PSGE constitution may say that a corporate entity is to be established, the function of which is to utilise the assets of the PSGE by operating a profitable and efficient business. That seems like a fairly clear mandate for the corporate entity. However, some questions arise:

- What assets will the corporate entity receive? Will all or some of financial redress assets be transferred to the corporate entity? Will the corporate entity "own" those assets?
- What is the makeup of those assets (are they assets focused on one particular sector, do they comprise mainly or solely of cash)?
- How is the corporate entity to "operate an efficient and effective business"? If the assets comprise mainly cash, what type of business can the corporate entity operate?
- Can the corporate entity use the assets in any way to achieve that purpose or are there any restrictions on the use of assets?
- What role, if any, does the PSGE and its governors have in influencing the way in which the corporate entity will operate an effective and efficient business?

I believe these questions (among others) should be thought about as soon as practicable when developing a PSGE structure. The sooner thought is put into these types of questions, the less likely issues will arise in the future.

Separation of functions - Who's the boss?

Most PSGE structures adopt a separate commercial arm that is usually a company incorporated under the Companies Act 1993. This necessarily creates two distinct sets of governors. The first set are those governors that sit on the PSGE proper (usually trustees). The second set are the directors of the commercial arm. With two sets of governors, there is increased chance of uncertainty as to each set of governors' role and resultant conflict.

Under the Companies Act, directors must act in the best interests of the company, unless the constitution allows them to act in the best interests of the shareholder. Usually, a constitution for a corporate entity within a PSGE structure allows the directors to act in the best interests of the shareholder. Questions then arise as to what is in the best interests of the shareholder and who decides that. In the absence of any clear statement by the shareholder of what its interests are, the directors of subsidiary corporate bodies are required to make an educated guess about what are those best interests and to act accordingly. This can often create tension. What the directors may consider to be in the best interests of the shareholder may not correspond with the shareholder's own views.

It seems to me that the default position, in the absence of any specific statement by the shareholder, is that it is in the best interests of the shareholder for the corporate entity to make as much money as possible on the assets that it manages. Indeed, in the absence of any clear indication from the shareholder, we should assume that the directors of the commercial arm will decide that making as much money as is possible is what the shareholder wants (after all, those directors would have been "hired" because of their money making abilities).

However, this approach can often ignore other factors that may be relevant to considering what is in the shareholder's best interest. For example, should a corporate entity be allowed to sell land received through a Treaty settlement if to do so would enable the corporate body to make a better financial return on its assets?

Often the corporate entity has all the assets associated with a settlement and in that instance the governors of the PSGE are heavily reliant on dividends from the corporate entity. This too can create tension. On the one hand, the directors know that if they do not provide sufficient dividends to the shareholder they may be removed from office. While this is usually a good incentive, issues may arise where the PSGE governors require funds for specific purposes for which the directors may disagree. This has the potential for the tail to wag the dog (even the use of this phrase assumes there is a dog with a tail, rather than a dog with congenital cephalic disorder). Usually the first remedy for this is to cut off the tail and replace it with a new one (through the shareholder exercising its right under the

Companies Act to replace the directors). This is painful for the dog and there is no guarantee that the new tail will re-attach properly or behave differently to the old one.

Reporting

Another hotspot relates to "reporting" between the corporate entity and the PSGE. Often the constitutional documents within a PSGE structure require some form of annual plan to be developed by the corporate entity, which details the manner in which the corporate entity intends to manage the settlement assets over the relevant period. Often the process involves the corporate entity itself developing the first draft of that plan for approval by the governors of the PSGE.

As mentioned earlier, often the key reason for establishing a corporate entity is to ensure that the people who manage the commercial assets have the expertise to do so. In many cases, that means that the same level of expertise is not located within and amongst the governors of the PSGE proper. This means that there is often an expertise imbalance between the PSGE and the corporate entity when it comes to understanding annual plans and financial forecasts.

An imbalance in expertise can give rise to a number of tensions. It potentially allows the directors of the corporate entity to prepare generic plans that do not address the real issues (as it is difficult for the shareholder to know what the real issues are without the appropriate expertise). It can result in ineffective oversight or monitoring of the corporate entity's performance. It can lead to plans being adopted that are not fully understood, which can lead to questions down the track as to whether a plan approved by the governors was fully understood by them and whether it was deliberately drafted by the directors of the corporate entity to satisfy their needs rather than those of the governors.

Location of the "Public Service"

Drawing again on the analogy between PSGE's and Parliament, PSGEs often require an internal management function which can be loosely described as the "public service" of the PSGE structure. If a separate corporate body is established, often that too requires a similar management function. As with the creation of two set of governors, establishing a separate corporate entity also has the potential of creating two separate management arms within the one PSGE structure.

Sometimes this is addressed by having one management arm that provides functions to both the PSGE and the corporate entity. This often makes sense from a cost perspective however, it does create accountability issues. It results in managers potentially working for two masters. It also means that one entity within the structure is dependent on the continued availability of the employees of another entity within the structure. This creates tension.

An associated issue is where any management function should sit. Because (usually) the assets sit with the corporate entity, it often makes sense for the management function to sit with the corporate entity. Sometimes there are other reasons for this, particularly where the PSGE is a trust that does not have its own legal personality and it is administratively simpler to have the management functions sit within a company (which has its own legal personality). However, this runs the risk of the tail wagging the dog again.

Accountability – The nuclear solution

Often a post settlement structure will provide that the directors of the corporate body are appointed and removed by the governors of the PSGE. That is usually seen as the ultimate manner in which the directors are accountable to the shareholder. However, while effective, it is relatively nuclear in effect. The potential for significant tension through the use of this accountability tool is palpable.

Some Suggestions

The constitutional arrangements for a PSGE structure should provide for mechanisms to limit tension. However, as tension is to be expected, there should also be mechanisms to address that tension without necessarily resulting in the activation of nuclear remedies. In other words, there must be "release valves" within the structure to relieve any build up of tension.

Election "ombudsman"

It is obvious to say that election provisions within a constitutional document should be drafted as clearly as possible. However, no matter how meticulous the drafting may be, there will always be incentives to call into question the meaning of otherwise unambiguous language. As elections will occur on a reasonably frequent basis, I believe that the constitutional documents should include a process for independent assessment of an election process other than through initiating litigation. This could be undertaken by an independent person (such as a lawyer or other person experienced in election processes) as a first step in responding to any election challenges. It may also be possible to provide that the independent assessment is final and binding on the parties.

Early identification of actual functions

As I say above, I think it important to identify as early as possible the specific functions that will be undertaken by each entity within a PSGE structure. So much falls out of this:

- it provides clarity of roles and responsibilities;
- it reduces the potential for uncertainty and erroneous assumptions;

- it informs the decisions regarding where management resource should be located, and what that resource should be; and
- it allows overhead costs to be assessed so that the overall structure can be built having regard to those costs.

Clear responsibilities

In my view, constitutional documents of a PSGE structure should include a number of statements relating to the responsibilities of different parts of the structure. The constitutional documents may not need to set out those responsibilities, but at the very least should include processes to have those responsibilities determined (and if appropriate agreed) so that, at all times, it is clear who is responsible for doing what. This could include, for example, dividend and re-investment policies or statements, debt equity ratios, any specific restrictions on the use of particular assets and other such matters.

Is there a need for more than one management function?

Management functions may not be required in all instances – If matters are dealt with upfront, it may become apparent that one of the entities within the PSGE structure may not require a management function at all. Once the nature of the assets transferred to the corporate entity is known and agreed, it may become apparent that those assets are of a class that necessarily involves investing in a particular way (for example, if the assets are predominantly cash, then the investment strategy may require that cash to be invested in fixed investments). Such a function may require limited management input and potentially could be undertaken by directors on an annual basis without the need for a team of managers to assist them in that process.

Clear shareholder expectations

Rather than having the corporate directors prepare an annual plan as to how they will manage the assets entrusted to them, I believe a better approach would be to have the shareholders' (being the governors of the PSGE) provide to the corporate entity (perhaps on an annual basis) a statement of the shareholder's expectations. This statement could then guide the corporate directors in the development of their annual plan. That would avoid issues associated with the directors making assumptions as to what is in the best interests of the shareholder and developing a plan accordingly. It also provides an opportunity for the directors to dialogue with the shareholder if there are any expectations that are unrealistic or may not be capable of being achieved.

Governance clarification process

Consistent with any relationship, we should expect that the relationship between the governors of a PSGE and the directors of a corporate entity will have ups and downs. The right kind of tension can be healthy. In anticipation of that tension, constitutional documents could include "relationship management" mechanisms that allow issues that may be causing tension to be addressed in an agreed manner. This could involve, for example, regular "relationship" meetings between the PSGE governors and the corporate directors, agreed processes where it is alleged that one may be acting outside of its functions and responsibilities and regular assessments of how the structure is working and how it could be amended to make it better.

He aha te mea nui?

Of course, the suggestions set out above are structural in nature. Ultimately the success of a PSGE is often highly dependent on the people who drive it. A structure is as good as the people that run it, and good people can make a bad structure work - a Morris Minor driven by Michael Schumacher will almost certainly beat me in a street race, even if I were driving his Ferrari! However, driving the Ferrari puts a person in the best possible position to succeed, so it is important to make sure that the structure adopted as a PSGE is a Ferrari (rather than a Morris Minor) from the outset.