MANAGEMENT OF NATIVE TITLE – AUSTRALIA’S NEXT “WICKED PROBLEM”

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Abstract

The legal recognition of Indigenous rights in land and waters in Australia came late. Since 1992 there has been extensive debate around the attainment of native title, focussing largely on proving the existence of native title under processes set up by the *Native Title Act 1993* (Cth). More than two decades on, Australia is now faced with an entirely different problem; the management of native title and responsible governance of the corporate institutions entrusted with that task by statute.

This new Indigenous corporate sector is underwritten by traditional laws and customs, but operates in a network of Anglo-Australian rules and regulations, Indigenous perspectives and internal and external stakeholder expectations. In addressing this complex and “wicked” problem, Australia would be well served by looking to the evidence based approaches to responsible land governance developed over several decades in the world of international aid and banking, and the developing world.

Drawing on these international learnings suggests that the way forward for Australia in managing native title to its fullest potential is to develop a unified framework which is both integrated and interactive, embodying partnerships between governments at all levels, native title holders, industry and the Australian community.

**Key Words:**
Corporate institutions, Governance, Management of Indigenous land, Unified approaches
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THE JOURNEY TO NATIVE TITLE

“[T]he Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands” (Mabo v Queensland No 2 (1992) 175 CLR 1 (Mabo), p. 217).

On 3 June 1992, with those words, the High Court inserted the legal doctrine of native title into Australian law, replacing a doctrine of 17th century origins upon which British claims to possession, and justification of dispossession, of Indigenous lands were based.

The decision in Mabo that the common law recognized and protected Indigenous rights in land that existed at the time Britain acquired sovereignty, over two hundred years prior, was truly a watershed moment in Australian legal history, shaking the foundation of land law on which British claims to possession of Australia were based. The change is voiced most clearly by Justice Brennan who wrote:

The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country. (Mabo, p. 42)

The Mabo decision opened up possibilities for Indigenous people in Australia which had previously been closed to them (Tehan, 2003, pp. 537-538), including:

- possibilities for a completely new land management order with acknowledgment of indigenous interests in land and direct involvement of Indigenous people in decision making about their land;
- the possibility for a realignment of power relations in land and resource allocation that challenged pre-conceived systems of decision making; and
- the possibility of a new relationship between Indigenous and non-Indigenous people that went beyond land management to embrace fundamental issues of rights and status.

These possibilities produced excitement, optimism, caution, anxiety and fear among Indigenous people, governments, industry and the popular media. The immediate response to Mabo was mostly positive with
the declaration received by the Council for Aboriginal Reconciliation “in a spirit of joy and celebration”; the Australian Mining Industry Council initially expressed the belief that the decision “would not have a dramatic impact on the resource sector” (Gardiner-Garden, 1993, pp. 1-2.). Hopes were high that the decision would bring positive change in race relations and empower Indigenous groups in Australia politically and economically.

However, it did not take long for the voices of the dissenters to come to the fore, with Aboriginal lawyer and activist, Michael Mansell arguing that the Mabo decision offered a “puny reward” for the efforts and costs of litigating, “something for those who are grateful for small blessings, but nothing in the way of justice” (Mansell, 1992). Others argued that it offered too much, with the then Managing Director of Western Mining, Hugh Morgan, airing his view that reconciliation was an “exercise in the politics of guilt” and that terra nullius should remain the legal foundation of Australian settlement with calls for the Commonwealth to repeal all or most of the Racial Discrimination Act 1975 (Cth) (RDA) so that states could extinguish native title. Commentator Padraic McGuiness even suggested a referendum to overrule the High Court’s decision and forestall years of costly litigation (Gardiner-Garden, 1993, pp. 2-3).

In June 1993, the Prime Minister announced that the federal government would respond to Mabo by enacting legislation to facilitate validation of existing land titles, define native title, establish a system of tribunals to register and determine land claims and set parameters for compensation for Indigenous people whose native title rights had been extinguished contrary to the RDA (Gardiner-Garden, 1993, p. 14).

After a period of intense negotiations between governments, representatives of Indigenous groups, pastoralists and the mining industry, the Native Title Act 1993 (Cth) (NTA) was passed in late 1993 and came into effect on 1 January 1994. It provided a national system for the recognition and protection of native title – and for its co-existence with the national land management system. It also provided a mechanism for determining claims to native title and compensation with a focus on resolution of native title by agreement.

Debates about “certainty” and “workability” from government and industry perspectives continued, with Indigenous people arguing for “co-existence” and recognition of their unique relationship with land. A number of issues left unclear after Mabo and the NTA found their way to the High Court of Australia which decided seven significant native title cases between 1996 to 2002.¹ Development of native title law through the courts and legislative amendment of the NTA, particularly the 1998 amendments, placed substantial hurdles in front of native title claimants seeking recognition of their right; it also constrained

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and confined the scope for empowerment of Indigenous communities through that recognition. Reflecting on native title in Australia in 2003, Tehan (2003) wrote:

> Ten years of the NTA has seen the common law of native title emerge, blossom, change and wilt. The promise engendered by *Mabo* has failed to materialise in the form of a robust and enforceable native title. To that extent, the sun may have set, with native title fatally wounded by the NTA and the High Court. (p. 571)

But in 2013, the High Court judgment in *Akiba v Commonwealth* (2013) 250 CLR 209, followed swiftly by two other cases (*Karpany v Dietman* (2013) 252 CLR 507 and *Western Australia v Brown* (2014) 253 CLR 507) created a renewed sense of optimism for native title reaching the broader potential promised after *Mabo*. The confirmation that native title rights can have a commercial aspect in *Akiba* and the emphasis on co-existence over extinguishment, evident in *Akiba, Karpany and Brown*, re-awakened the promise of *Mabo*, with the possibility of unlocking greater economic potential for all native title holders and empowering them.

The picture of native title as it has been determined in Australia is not as bleak as the earlier High Court cases may suggest. It has not been fatally wounded, nor has it been “washed away by the tide of history”.

As at 31 December 2016 there had been 314 determinations that native title exists in the entire or part of a claim area. Of those determinations, 288 had been by consent; only 26 had been litigated. Native title had been determined to exist over 31.4% of the land mass of Australia – 11.3% of which was subject to exclusive native title; and 20.1% was non-exclusive native title where native title rights and other interests co-exist, for example, over pastoral leases. Figure 1 is a map showing native title as it had been determined in Australia at 31 December 2016.

Across the mainstream and Indigenous political spectrum, there is almost unanimous consensus that while native title holds great potential for Indigenous groups in Australia, the full benefits have not yet materialised.

There are two key components to the challenge of realising the potential of native title – each poses a completely different problem. Since the NTA was passed over twenty years ago, there has been extensive debate around the attainment of native title – which continues to this day. The journey to native title can be long and arduous. In legal and cultural terms, the attainment of native title, and what exactly that means, is incredibly complex. Ultimately however for native title claimants there is a definable answer at law – you either achieve a determination that native title exists, or you do not.

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2 For an explanation of this phrase, see Ritter (2004).
THE NEXT LEVEL - MANAGING NATIVE TITLE

No one in their wildest dreams could imagine getting beyond winning native title… All was focused on winning native title and getting the land, there was never a plan for after native title. So there was no structure for us. No way to go to the next level. (Mulardy, 2008)

Following a determination of native title, the NTA requires that the native title holders must establish a corporation to represent them and manage their native title interests – either as agent or trustee. These organisations are known as Prescribed Bodies Corporate (PBCs). They are required to incorporate under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (CATSI Act) and be registered with the National Native Title Tribunal.

The challenge of leveraging native title to reach its full potential presents a completely different problem to that of attaining it. This is the **management problem**. This problem involves an unstructured but complex network of Anglo-Australian rules and regulations, Indigenous perspectives and internal and external stakeholder expectations.

PBCs must comply with the NTA, its Regulations and the CATSI Act, whose corporate rules are often at odds, or difficult to reconcile, with traditional laws and customs. One example is the tension between corporate directors’ duties on the one hand, and family obligations on the other, a tension that heightens the risk of conflict of interest in decision making. PBCs also have obligations and responsibilities under a wide range of Commonwealth, State or Territory legislation relating to matters such as cultural heritage, land and water management, tenure issues, biodiversity and environmental protection and land use planning (including town planning).

PBCs also become the focus point for non-Indigenous people concerned about native title affecting other property and commercial interests. As well, PBCs have increasingly become representatives of their members and are called upon to fulfil a broader role on Indigenous issues. These corporations are subject to separate demands from their membership who often expect them to almost instantaneously address the wrongs of over two centuries. The pressure of unrealistic expectations on PBCs on the part of all involved – governments, native title holders and the broader community - can be immense and debilitating.

Bauman, Strelein and Weir (2013, p. 10) identify sources of conflict for PBCs, including internal questions of native title group composition and eligibility for PBC membership. Related to this is eligibility for, and distribution of, benefits. Tensions also arise over PBC Board membership where family groups consider they are being disempowered within the group by not being part of the corporate decision making in respect of matters where they would traditionally have the right to make decisions.
The already difficult role of PBCs in negotiating this complex legal and socio-cultural minefield is not assisted by the significant tensions between governments, native title holders and others about the meaning of native title. This extends to how native title is expressed and interpreted in different laws and policies, in matters such as economic development and land use planning, and more generally in day-to-day business by, and with, native title holders. It also extends to different interpretations of the roles of PBCs.

Administratively, the NTA prescribes the roles of PBCs in two parts: (Bauman et al, 2013, p. 6)

- as the legal entity holding and/or managing native title rights and interests on behalf of native title holders; and
- as the corporate interface for third parties seeking access to native title lands.

But governments, native title holders and other external parties often view these roles differently. Some may take a narrow view of the role of PBCs, often in-line with their narrower understandings of native title generally as being inherently vulnerable, rather than the enduring connection to, and authority for, country upon which native title is based. Others see native title as an anachronism which will eventually be extinguished to make way for development or more productive use. For others native title is merely another layer of regulation, much like land planning regulation or environmental regulation.

There are also misconceptions within Indigenous groups about what being a native title holder means, and what native title can provide. For example, it is difficult to explain to a native title holder who has just celebrated a determination of native title why they cannot go and live wherever they like on their native title land. Their perception that they now “own” the land does not allow for the co-existence of other interests which, under Australian law, prevail over their native title. Nor does it allow for the existence of legislation, including planning and other regulatory law, which limit the capacity to use the land – whether or not the native title is said to be exclusive. The question of what “exclusivity” means is at issue in various parts of Australia, for instance, where groups seek to regulate access to exclusive native title lands and are challenged by local and state governments.

These misconceptions, misunderstandings and misleading views of native title held by government agencies, native title holders and others make it very difficult for PBCs to work effectively with governments and other external agencies as well as with the native title holders for whom they manage.

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3 Native title is “exclusive” if it confers “possession, occupation, use and enjoyment of [the] land or waters on native title holders to the exclusion of all others”: NTA, s 225(e).
native title rights and interests. Inevitably there are conflicts when perceptions of native title are so diverse.

For a PBC, beyond mere compliance with the corporate rules, there is no common definable answer as to what success looks like – at least from the corporation’s viewpoint. From the government’s perspective both at Federal and State level, “success” is often measured through the attaining of the same economic and social benefits available to the wider Australian population through the mechanism of native title. This can be seen as part of the Federal Government’s “Closing the Gap” strategy. This is clearly articulated in a statement by the Australian Government (2009) announcing further funding for the native title system as part of the “Closing the Gap on Indigenous Disadvantage” campaign.

A review of funding in the native title system in 2008 found that the level of resources available to the system was inadequate for effective operation, and that additional funding was needed to increase the rate of resolution of native title claims. In particular, the review found that NTRBs [Native Tribunal Representative Bodies] were substantially under-resourced for the task they were expected to perform in the system.

The additional funds will improve the rate of resolution of claims by increasing the capacities of NTRBs, allowing them to negotiate effectively on behalf of their native title clients and leverage improved social and economic conditions for affected communities in the process.

In addition, the measure will support the development of new approaches to the settlement of claims with the States and Territories and increasing the quality and quantity of anthropologists and other experts working within the system.

These initiatives will harness the significant potential of native title to contribute to the Government’s target to close the gap on Indigenous disadvantage and improve economic development outcomes.

The more timely recognition of native title can also help reset the relationship between Indigenous and non-Indigenous people in Australia and facilitate improved governance and leadership in Indigenous communities. In addition, the resolution of native title claims can remove barriers to investment and infrastructure and allow for the leveraging of native title rights and interests for economic development opportunities.

The focus on further funding to improve the rate of resolution of claims only addresses the first step in realising the potential of native title, that of attaining native title. But managing native title once it is determined is what will allow for the leveraging of native title rights and interests for economic
development opportunities. Indeed a focus on the management of determined native title rights and interests is a focus on long term outcomes.

The other “gap” which is not addressed in the 2009 statement is aspirational i.e. the gap between what government expects of Indigenous people and what they want for themselves and their families. Through native title recognition, Indigenous people in Australia aspire to self-determination, with the ability to influence and control their own affairs. Yet the “Closing the Gap” strategy is perceived as a “top-down” approach, with policies set by government and then applied to Indigenous people, without adequate Indigenous participation and consultation.

THE “WICKED PROBLEM”

A wicked problem is likely to be one whose solution requires large groups of individuals to change their mindsets and behaviours. (Hunter, 2007, p. 37)

The problem facing groups holding native title is how to manage their native title through PBCs to ensure that they realize the full potential of their native title and access the opportunities it presents, in accordance with their own aspirations, not that of governments or the broader community. This is a space in which there are no right or wrong answers; where stakeholders have radically different world views and different time frames for understanding the problem; and where constraints and resources for solving the problem change over time. Managing native title so that it works for both native title holders and governments in such a complex legal, cultural and policy environment is truly a wicked problem.

There are now over 160 PBCs managing native title in Australia and the number will grow as more native title applications are determined. This could be described as a “new corporate sector”, underwritten by traditional laws and customs but required to comply with Anglo-Australian corporate rules (Bauman et al, 2013, p. 1). It might fairly be said that good governance of a PBC is more complex than governance of a multi-million dollar company beholden only to its shareholders.

There is great diversity across PBCs. The Office of the Registrar of Indigenous Corporations (ORIC) publishes information about the Aboriginal and Torres Strait Islander corporations registered under the CATSI Act, including information about PBCs. Reporting for 2014-2015 ORIC (2016) shows that there were 144 PBCs at the relevant time. Income statistics for PBCs extracted from that report (Table 1), show that just over 54.2% (or 78 of 144 PBCs) had an income greater than zero. Of the 78 which had any income, other information (as to large, medium and small categorisation) suggests that the higher average incomes accrue to a very few PBCs with over 80% being classified as ‘small’ – (i.e. at least two of the following criteria apply: gross operating income <$100,000; consolidated gross assets < $100,000; Staff <
Employee statistics for PBCs are extracted in Table 2, supporting the view that much of the done in smaller PBCs is by a dedicated few unpaid native title holders volunteering their own time.

Langton (2015, p. 177) refers to these small organizations as “a dead zone in the native title world” facing great complexity and required to “continue without the necessary resources to administer their bit of the native title world”.

Even larger successful PBCs with healthy income streams, with access to good legal advice, competent accountants and financial advisers, have challenges to meet – with inter or intra claim conflicts or inter-family disputes; conflicts over benefit distribution, balancing native title holders demands for scarce resources with the need to make investments – and even finding investment partners.

It is an understatement to say that many PBCs need resources and they need effective governance. The many challenges facing these organisations have been well documented in recent reviews of the native title system and Indigenous land administration, for example, Deloitte Access Economics (2014) and Senior Officers Working Group (2015). Challenges identified include:

- chronic under-resourcing;
- a lack of access to appropriate skills and advice;
- the ongoing tussle between federal and state and territory government about who is responsible for supporting them; and
- limited access to infrastructure.

These native title corporations have “a precarious existence, balancing uncertainty over funding against the incessant demands of third parties, carrying out consultancies and negotiations, usually free of charge, and usually while dealing with dire community and family circumstances.” (Bauman, Strelein & Weir, 2013, p. 21)

Managing native title in Australia involves at least three types of governance: land tenure governance, PBC corporate governance and Indigenous cultural governance. All three are inextricably linked, yet each have their own set of challenges, often with internally conflicting goals or objectives. The potential for conflict can be seen even at the simplest level of analysis. In Australia’s federal system land administration is a matter for States and Territories, native title and PBC corporate regulation is a Federal matter and Indigenous cultural governance is a matter for native title holding groups.

Some of the fundamental problems for management of native title in Australia arise because of the imposition of non-Indigenous governance structures which contrast to Indigenous cultural governance. In a somewhat prescient statement in 2001, it was suggested that “the failure of the NTA to deal with the
relationship between the rights and structures created by that Act and the common law has the inevitable consequence that PBCs will have fundamental problems. The NTA did not leave the common law alone; nor did it replace the common law with a new structure for Aboriginal land holding. Instead it ‘meddled’. PBCs are an example of that approach” (Selway, 2001).

But Australia is not the only country where there have been attempts to recognize and manage indigenous rights and where formal governance structures imposed by law contrast to customary processes, thus “meddling” with customary mechanisms for management of traditional land. In looking at international Indigenous experiences, there is a temptation to look only to those British colonial countries which share common histories of colonization and confront many of the same economic, social, legal and political challenges today – namely the United States, Canada and New Zealand. But other regions such as South and West Africa, the Indigenous populations of South America and the Pacific Island nations, face similar issues in part as a legacy of the imposition of colonial legal systems in those countries (Godden & Tehan, 2010, p. 2).

A common theme in these regions has been the view that communal customary land tenure was impeding economic development with the issue of customary land tenure reform being at the fore. Thus it has been asserted: “communal ownership has not permitted any country to develop. In the African context, government interventions in customary land tenure regimes are said to have been based on arguments linking customary tenure arrangements with low agricultural productivity” (Besteman, 1994, p. 484). A vigorous debate over land reform in the Pacific region (Fingleton, 2005) was inflamed by arguments that communal land ownership is an impassable barrier to development everywhere (Hughes, 2003, 2004; Gosarevski, Hughes & Windybank, 2004, p. 137).

At the same time, Indigenous rights as an obstacle to development was being debated in Australia, with strong advocacy for the notion that communal landownership was acting as a brake on wealth being generated in Indigenous communities. Concern was also expressed that the government’s interest in the debate was to “free up” Indigenous land for non-Indigenous investors and the resource industry, rather than encourage Indigenous economic development (Calma, 2005, pp. 8-9).

In 2006, the Federal government in Australia “embraced an emerging generalized critique of communal ownership” and passed amendments to the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) which were characterized as “heralding an end to the ‘days of the failed collective’” (Central Land Council (CLC), 2013, p. 5 referring to House of Representatives, 2006, p. 4). The amendments were intended to facilitate economic development and increase private home ownership on Aboriginal communities. Further land reform policies have been developed since that time, directed towards the same objectives. The Indigenous Economic Development Strategy 2011–2018 sets out a long-term
agenda for Indigenous economic participation that will guide government decision-making and program
development through to 2018 (Australian Government, 2011).

In its 2013 paper entitled “Land Reform in the Northern Territory: evidence not ideology”, the CLC was
critical of the lack of input from Aboriginal land owners to land tenure solutions developed in that
strategy (CLC, 2013, p. 6). It called for an evidenced based approach to tenure reform in Australia,
referring in its submission to the Senate Standing Committee, Inquiry into the Stronger Futures in the
Northern Territory Bill 2011 and Two related Bills, to a two volume report called “Making Land Work”,
released by the Australian Government in 2008 in an attempt to better understand the complex issues
affecting customary land reform in the Pacific (CLC, 2013, p. 6 fn. 5).

“Making Land Work” was produced as part of AusAID’s Pacific Land Program. The first volume,
“Reconciling customary land and development in the Pacific”, is an overview of the main issues that
Pacific Island countries, Papua New Guinea (PNG) and East Timor (broadly, the Pacific region) are likely
to face if they reform their land policies and institutions to promote social and economic development
(AusAid, 2008a). Volume two is a collection of 16 studies, including in Australia, that look at problems
and innovative practices in land tenure and in administration across the Pacific region (AusAid, 2008b).
Some of the evidence based research has relevance to the management of native title in Australia,
particularly its consideration of incorporated bodies created to manage and deal with the Indigenous land
interests of the group. Among the constraints identified was the lack of business experience and the need
for education and training to improve governance, management and administration (AusAid, 2008b, 14-
16; 129-151).

Preliminary research by Hunt (2006) had explored the realities of Indigenous community governance in
Australia. Hunt (2005b) sets out ten key findings from the preliminary research. They are:

- Family connections, land ownership relationships, and governance histories associated with
  particular communities and sets of regionally linked communities, are fundamental to community
governance dynamics and arrangements.

- The process of building governance has to be based on local realities—it has to encompass
  culturally-relevant geographies and governance relationships which resonate with traditional
  relationships, jurisdictions, laws, customs, and specific histories.

- Appropriate cultural match appears to be central to the legitimacy of Indigenous organizations
  and the extent of members’ confidence in, and support of, them.

- Governments need to recognize the importance of the cultural geographies of governance that
  lend legitimacy to different aggregations and scales of governance for different purposes.
• The effectiveness and legitimacy of community governance arrangements appears to be positively advanced as a result of building institutional capacity.

• Leadership is critical to the development of a strong governance culture within organizations and communities.

• Governance capacity is a fundamental factor in generating sustained economic development and social outcomes.

• The role of government within this environment is a critical factor for the outcomes of community governance—it can enable or disable effective Indigenous community governance.

• Enhancing governance capacity requires a systems and developmental approach.

• Governments and Indigenous people have different criteria for evaluating governance effectiveness.

Hunt (2005) researched the concept of “capacity development” in the international development context drawing from not only from North American and Canadian experiences but also from a major study by the European Centre for Development Policy Management (ECPDM) for the Organisation for Economic Cooperation and Development Network on Governance and Capacity Development (ECPDM, 2003). This research involved 20 case studies which investigated how organizations and systems, mainly in developing countries, have succeeded in building their capacity and improving their performance (Hunt, 2005, p. 7). Hunt set out some key international lessons for Australia and highlighted a number of constraints to successful capacity development in Indigenous Australia, each of which is directly relevant to the problem of managing native title and PBCs.

In terms of a national policy framework, the first is the lack of partnership with and participation by Indigenous people, with no effective national Indigenous voice and a lack of participation in policy processes. The lack of a collective single voice of Indigenous people often leads to consultation being undertaken with a select few. Capacity development experience overseas suggests that this will frustrate the policy goals, because there is no adequate process of gaining a mandate for them. There is also a gap between what capacity development means for government and for Indigenous people in Australia. According to Hunt, government see capacity development largely as a means to service delivery and employment; for Indigenous people capacity development is an end in itself – to participate in sustainable development on their own terms. The question posed by Hunt is whether governments in Australia really see themselves in partnership with Indigenous communities or organizations, or whether, philosophically they treat Indigenous people merely as disadvantaged citizens. In other settler states such as Canada and New Zealand which have recognized the special situation of Indigenous people and made negotiated
provision for them, while offering mainstream opportunities, socioeconomic progress has been greater than for Australia’s Indigenous communities (Hunt, 2005, pp. 19-20).

The second constraint is the complex legal and regulatory frameworks, with different levels of government, different departmental approaches, different funding regimes and different land tenure regimes – all relevant to managing native title. What is required is a whole of government approach. This will require significant shifts in inter-departmental relations and government processes, as well as a change in the dynamics of the relationship between governments, among different levels of government, and with Indigenous people (Hunt, 2005, p. 21).

Thirdly, there is a fundamental need for a power shift – with greater power and resources moving to Indigenous communities or organizations. While there is a power imbalance, there will be a lack of trust both ways. Building trust is an important consideration in capacity development (Hunt, 2005, pp. 21-22).

Fourthly, Hunt (2005, p. 23) highlighted under-resourcing in Indigenous Australia, with no significant resourcing of Indigenous governance capacity development, noting that there is no Australian institution equivalent to The Native Nations Institute for Leadership Management and Policy in the US which Indigenous organizations can call on for assistance. Other examples of capacity developing organizations are INTRAC (based in the UK but working in a range of developing countries), the Community Development Resource Association in South Africa and the donor supported Africa Capacity Building Initiative. While the Office of Registrar of Indigenous Corporations has a role in corporate governance, and the Australian Indigenous Leadership Centre provides leadership training, there is no body providing broad national capacity development services to Indigenous organizations and communities in Australia. This remains the case in 2017.

Finally, Hunt (2005, p.23) noted the importance of process, including communication flows and relationships within the system, with cultural assumptions needing to be considered at different levels and in different contexts – including the cultures of both the non-Indigenous and Indigenous systems. A considerable barrier is a lack of cultural understanding from the non-Indigenous perspective.

**TACKLING THE PROBLEM**

It’s about time that the government trust us. They gave us the land back, now they need to trust us to manage it. (Thomas King Jnr quoted in Weir, 2013, p. 20)

International research emphasizes four fundamental preconditions to strong and effective Indigenous governance: (Hunt, Smith, Garling & Sanders, 2008, p. xviii)

- power (“de facto sovereignty” or genuine decision making authority for “self-rule”);
• ownership and access to resources (natural, human, capital etc.);
• effective governing institutions and accountability; and
• legitimacy and “cultural match”.

Pared down to bare bones, this suggests that effective management of native title by PBCs in Australia requires: genuine Indigenous control over PBCs and decision making; capable, effective PBCs that can get things done; and PBCs that have cultural legitimacy in the eyes of native title holders. The problem is how PBCs get to that point when faced with the many challenges identified previously.

Part of the solution to the problem of managing native title in Australia will require sustained behavioral change within governments, industry groups and the broader community, as well as within Indigenous communities. International research suggests that collaborative governance is a valuable process for making progress on complex problems (Eppel, 2013) and that collaborative strategies are the most important in dealing with wicked problems that have many stakeholders amongst whom power is dispersed and where behavioral change is needed (Australian Public Service Commissioner (APSC), 2012).

What then, is required? The steps, at least as they apply to governments, are well understood and can be stated shortly (APSC, 2012).

The first step in solving, or at least managing, a wicked problem is to recognize it as such – there needs to be broad recognition and understanding, including from governments and Ministers, as well as the Indigenous community and the broader community, that there are no quick fixes and simple solutions.

Secondly, handling of wicked problems requires a holistic approach. A narrow approach must be avoided in favor of innovative and flexible approaches.

Thirdly, policy development and evolution needs to be informed with on-the-ground intelligence about operational issues and the views of stakeholders and be regularly modified in the light of feedback about what works, and what does not.

Fourthly, it is important to work across organizational boundaries. This can be a challenge, particularly for governments, as recognized by this statement:

   In terrain which is politically contested, in which the resources to address difficult human issues are necessarily finite, there are rarely clear questions, let alone easy answers. Progress is nearly always marked by consultation, discussion, negotiation and iteration. (Shergold, 2004, p.9)
Fifthly, in addition to working across organizational boundaries, governments must take a “whole of government” approach.

Sixthly, federal government must work with state governments and as well local governments and other organizations outside government. Part of this approach is an understanding that a problem may need a “bottom up” perspective and should not be addressed by “top-down” coordinating control. Bilateral support is essential to avoid constant changes in policy direction with changes of government at federal, state and even local government level.

Lastly, a crucial step in addressing complex problems is effective engagement across the full range of stakeholders. To be successful in addressing whole of government issues (as native title is, or should be) real involvement and participation in decision making by the people and communities affected is required, together with a shared understanding of the problem and a shared commitment to the possible solutions.

Shared understanding does not mean we necessarily agree on the problem … Shared understanding means that the stakeholders understand each other’s positions well enough to have intelligent dialogue about the different interpretations of the problem, and to exercise collective intelligence about how to solve it. Because of social complexity, solving a wicked problem is fundamentally a social process. Having a few brilliant people or the latest project management technology is no longer sufficient. (Conklin, 2006, p. 29)

In light of the constraints on management of native title identified above, these steps to tackling “wicked problems” are reinforced by the United Nations Development Programme’s Ten Default Principles for Capacity Development United summarized as follows: (Hunt, 2005, p. 29)

- Don’t rush.
- Respect the value system and foster self-esteem.
- Scan locally and globally: reinvent locally.
- Challenge mindsets and power differentials.
- Think and act in terms of sustainable capacity outcomes.
- Establish positive incentives.
- Integrate support into national priorities, processes and systems.
- Build on existing capacities rather than creating new ones.
- Stay engaged under difficult circumstances.
- Remain accountable to ultimate beneficiaries.
In addition, the Voluntary Guidelines on the Responsible Governance of Tenure (Food and Agricultural Organization of the United Nations, 2012) set out principles and internationally accepted standards for practices of responsible governance of tenure. The Guidelines could usefully provide a framework for reaching a shared understanding of the complex problem of managing native title in Australia, and a shared commitment to possible solutions.

CONCLUSION

The management of native title through PBCs to realize the full potential of native title, in accordance with the aspirations of the group holding the rights and interests, not that of governments or the broader community, is a space where there are no right or wrong answers, where radically different world views collide, time frames differ and resources are necessarily finite.

To tackle this complex and wicked problem “large groups of individuals [need] to change their current mindsets and behaviours” (Hunter, 2007, p. 37) and expectations among all stakeholders need to be managed. What is needed is a unified framework which is both integrated and interactive, embodying partnerships between governments at all levels, native title holders, industry and the wider Australian community. This approach will bring renewed optimism for the possibilities opened up 25 years ago by Mabo.

Management of native title to its fullest potential will bring positive change in race relations and empower Indigenous groups in Australia politically and economically.
REFERENCES


Bauman, T., Strelein, L., & Weir, J. (2013). Navigating complexity: living with native title. In T. Bauman, L. Strelein, & J. Weir (Eds.), Living with Native Title: The Experiences of Registered Native Title Corporations (pp. 1-26). Canberra, Australia: Australian Institute of Aboriginal and Torres Strait Islander Studies


Weir, J. (2013). Karajarri: native title and governance in the West Kimberley. In T. Bauman, L. Strelein, & J. Weir (Eds.), Living with Native Title: The Experiences of Registered Native Title Corporations (pp. 147-174). Canberra, Australia: Australian Institute of Aboriginal and Torres Strait Islander Studies.
### TABLES

**Table 1 – Income statistics for PBCs in Australia in 2014-2015**

<table>
<thead>
<tr>
<th>State/Territory</th>
<th>PBCs with income &gt; 0</th>
<th>Average income</th>
</tr>
</thead>
<tbody>
<tr>
<td>New South Wales</td>
<td>3</td>
<td>$73,198</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>4</td>
<td>$351,354</td>
</tr>
<tr>
<td>Queensland</td>
<td>41</td>
<td>$217,967</td>
</tr>
<tr>
<td>South Australia</td>
<td>10</td>
<td>$2,287,942</td>
</tr>
<tr>
<td>Victoria</td>
<td>4</td>
<td>$1,464,213</td>
</tr>
<tr>
<td>Western Australia</td>
<td>16</td>
<td>$4,454,041</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>78</strong></td>
<td><strong>$1,436,136</strong></td>
</tr>
</tbody>
</table>

Information extracted from ORIC (2016)

**Table 2 – Employee statistics for PBCs in Australia in 2014-2015**

<table>
<thead>
<tr>
<th>State/Territory</th>
<th>PBCs with employees</th>
<th>No of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>New South Wales</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Queensland</td>
<td>20</td>
<td>61</td>
</tr>
<tr>
<td>South Australia</td>
<td>4</td>
<td>12</td>
</tr>
<tr>
<td>Victoria</td>
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<td>67</td>
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<tr>
<td>Western Australia</td>
<td>11</td>
<td>130</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>40</strong></td>
<td><strong>273</strong></td>
</tr>
</tbody>
</table>

Information extracted from ORIC (2016)
Figure 1 – Native title determinations in Australia at 31 December 2016

Prepared by NNTT Geospatial Services