Chapter Eight

Native Title 20 Years On:
Beyond the Hyperbole

The Honourable Gary Johns

We give the indigenous people of Australia, at last, the standing they are owed as the original occupants of this continent …[1]

— Paul Keating, *Native Title Bill*, Second Reading Speech, 1993

Owning land can at times in fact become a liability … some properties in the Indigenous estate may never be viable.[2]

— Indigenous Land Corporation, 2010

Aboriginal groups have acquired land under . . . pastoral leases, statutory Aboriginal freehold and trustee arrangements. Much of this land is . . . subject to native title claim . . . [which] has a high potential to . . . rigidify the Indigenous system.[3]

— Northern Land Council, 2011

Contracting opportunities for Aborigines in the Pilbara far exceeds the benefits of the trust money [from land rights].[4]

— Robyn Sermon, Rio Tinto, 2012

Disclaimer

On the 20th anniversary of the Mabo decision, to which the *Native Title Act* gave effect, Paul Keating commented, "Oh, a lot of people in the Labor Party [were] very nervous. A lot of my colleagues didn't want a bar of it."[5] In this, he was accurate. In 1992, as Parliamentary Secretary to the Treasurer, John Dawkins, my unsolicited advice to Dawkins was not to legislate for native title but, instead, leave it to the courts. He was not impressed. If not he, then certainly Prime Minister Paul Keating could sense greatness in the offing. The *Native Title Bill* 1993 vote was greeted with a standing ovation in the House of Representatives and in the public gallery. Like the audience at a Stalin rally, I, too, stood.

Large costs and uncertain benefits

The High Court found that Australia had wronged Aborigines by denying them land. In Keating's phrase, what if we who "took the traditional lands and smashed the traditional way of life" cannot repair our wrong by restoring the land?[6] Can the Aborigines be restored, as justice would demand?[7] What if native title rights not only fall short of expectations, or their benefits are squandered? what if they are a liability?

Although land rights talk is imbued with the language of spiritual connection to country,[8] there is clear evidence emerging that being left undisturbed on one's country

on other Aboriginal titles is insufficient to satisfy this goal. Native title is being claimed over other types of Aboriginal title because it provides an enhanced opportunity to extract rent. For example, in 2011, at Ooratippra, situated 300 kms northwest of Alice Springs, native title was successfully lodged over a Community Living Area and a Perpetual Pastoral Lease, which the Indigenous Land Corporation had purchased in 1999 and transferred title to the Ooratippra Aboriginal Corporation.[9]

Land rights talk is also imbued with the language of economic development.[10] But there is ample evidence that the uses to which the rent is put are unproductive. Because so much has been squandered, 20 years after the original legislation, the Commonwealth has sought to ensure that monies are put to better use, for example, to be set aside for educational scholarships.[11]

The cost of the native title regime is no small matter. The cost to administer native title, along with the Northern Territory Aboriginal Benefits Fund and Indigenous Land Corporation funds is well in excess of $340m per year.[12] To this amount should be added the Northern Territory and other State regimes, and the supplementary programs that buttress land rights. Noel Pearson's Family Responsibility Commission, for example, cost more than $4.6 million in 2010-11 to administer.[13] It would be nice to have evidence that the native title regime generates benefits at least equal to these amounts but, more important, that it will, in time, make owners self-sufficient. After 20 years of operation, it is time to evaluate native title.

It is time for land rights advocates, and governments, to ask who wins and who loses from native title and land rights? It is time to ask, if dispossession was the wrong that land rights was meant to right, has repossession worked? It may seem impolite to enquire whether the owners would have been better to leave their land. Remaining for generations, without work and in considerable turmoil, is a cost that is never assigned to land rights, but since the late 1970s that has been the result for many. But governments have persisted, and other land users have lost millions of dollars in lost opportunities and in costs.

"Good" agreements

In 1963, Nabalco commenced mining bauxite at Gove against the wishes of the people at Yirrkala Methodist mission. In 1964, the Queensland Government removed Aboriginal residents of Mapoon Presbyterian mission for Comalco's bauxite mine. No one would countenance a return to such processes. But times have changed. The 2011 Rio Tinto Alcan Gove Traditional Owners Agreement grants traditional owners up to $18m per annum over 42 years. The land is collective inalienable freehold under the *Aboriginal Land Rights Act* 1976 (NT).[14] The 2001 Comalco Cape York Indigenous Land Use Agreement (ILUA) grants native title and other Aboriginal titleholders and 11 language groups across the region $2.5m and $1.5 per annum respectively from Comalco and the Queensland Government.[15]

Marcia Langton describes native title as a "scheme for validating settler titles … and native title sneaks into the interstices."[16] She acknowledges that native title creates a right to negotiate, especially over large resource projects, and nominates the Western Cape York Co-existence Agreement at Weipa as a good example. It is as well to ask, what is a good agreement? Three of the largest and most comprehensive agreements in native title, two of which have partial evaluations and include Western Cape York, may assist in answering the question.

Comalco-Western Cape Communities Trust 2001 – Cape York

The Comalco ILUA at Cape York is extensive. Rio Tinto (owners of Comalco) claim that 25 per cent of their workforce at Weipa is Aboriginal, but it is not known whether these are from Weipa only or the three communities in question.[17] Whether such employment achievements required land rights is moot. In addition to employment and training programs, a Cultural Awareness fund, and transfer of property, a Charitable Trust has been set up to manage funds that accumulate from the annual contributions by Comalco and the Queensland Government.[18] The Trust's investments are projected to be $150m in retained funds by 2022. Once the mining and Queensland Government income streams cease, distributions from these investments and any reinvestment until 2022 will continue to be allocated to the sub-regional trusts for distributions under Charitable Purposes.[19]

Traditional owners, Napranum, Mapoon, and Aurukun Aboriginal Shire Councils, sporting groups, churches, and schools are eligible to apply. Common to each trust are the following:

Household appliances – refrigerators, washing machines, air conditioners
Funeral assistance – $5 400 per grant, $1 000 and for feasting
Community sporting clubs and sponsorships
Cultural festivals, church fetes and Christmas activities
Church activities and church equipment, religious study programs
Educational bursaries – Primary, $500 per child per year; Secondary bursaries capped at $15000, $1200 for the purchase of a computer if 100 per cent attendance; University, $15 000; includes cost for trip home per year, applicants must work with Rio Tinto Alcan on holidays
Outstation establishment – $500 000 for outstations.[20]

Employment opportunities as a result of the Comalco investment are by far the most powerful tool for the betterment of local Aborigines. The trust funds may either enhance or detract from the employment impact. For example, the list is a curious mixture of funds for personal needs, future investment, and escapism. Monies to buy household goods and funeral assistance seem to be charity and risk displacing personal effort. Community expenses are no doubt touted as investments but, in fact, also risk displacing personal effort. The education funds with conditions attached are a sensible investment, although much is already available through the State and Federal governments. The outstations are problematic as they are touted as an escape from town life, when towns are where employment and services are most likely available. The outstations, therefore, are a form of holiday home in the bush.

There is some data available to evaluate the impact, among other programs, of the agreement. For example, The Family Responsibilities Commission,[21] which began operation in July 2008, covers Aurukun, and all three communities are part of the alcohol management regime established following the 2001 Fitzgerald Report.[22] Part of the Fitzgerald plan was to monitor health-related violence and other matters, so that unique data are available for behaviour in these communities. The data indicate that, for communities within the Comalco Agreement area, Mapoon shows statistical evidence of decline in hospital admissions for assault-related conditions from 2002-03 to 2010-11, but Aurukun and Napranum show no statistical trend. Statistical evidence

from Arukun and Napranum shows evidence of decline in all reported offences against the person between 2002-03 and 2010-11. The evidence from Mapoon does not.[23] Trends in Semester 1 student attendance rates for the five years 2007 to 2011 show statistical evidence of an increasing trend in student attendance for students at Aurukun; Napranum shows decline in attendance; and Mapoon no change. Although there is claimed success at the Noel Pearson-inspired Cape York Aboriginal Australian Academy, which commenced in Aurukun in Term 1, 2010, it is too early to assess outcomes.[24]

The sheer size of the trust and the allied programs combined are surely the last chance for place-based solutions to Aboriginal disadvantage. What else could be done to make the place work? Progress appears minimal, but perhaps progress will be slow.

Gulf Communities Agreement 1997 – North Queensland

The Gulf Communities Agreement 1997 was negotiated between Pasminco Century Mine Limited (now Zinifex Century Limited), the Queensland Government and three native title groups: the Waanyi, Mingginda, and Gkuthaarn and Kukatj. Zinifex Century Mine is located 250 kms north-west of Mount Isa, while the Port and Dewatering Facility is located on the coast at Karumba. A 300km underground pipeline connects the two sites. The mine site is a Fly In/Fly Out operation with the workforce commuting from locations ranging from the Gulf communities of Doomadgee, Burketown, Normanton and Mornington Island, to Mount Isa and Townsville.

The Century Mine workforce employs a large proportion of Aborigines. And various pastoral leases have been transferred to owners. Gulf Aboriginal Development Corporation manages the direct compensation payment to the native title eligible bodies, which amounts to $10m over 20 years. Century Employment and Training Committee administers Century Mine's annual expenditure of $2.5m on local Aboriginal employment and training. Aboriginal Development Benefits Trust manages $20m over 20 years for local Gulf Aboriginal business development, contributed by Century Mine at a rate of approximately $1m per annum. The Trust's current strategy is to invest one-third of the contributed funds in long-term investments, with the remainder of the funds available for business development loans.[25]

A ten-year review into the GCA was conducted in 2008. The review called for "increased government effort" in relation to the GCA, stating "a renewed commitment to the GCA was required over the remaining life of the mine . . . to ensure that employment and enterprise development benefits to native title groups [were] maximized." The review recommended release of $5.7m by the Queensland Government for a social impact assessment, and initiatives in governance and leadership training for signatory native title groups. In other words, throw in more money. A paper written in 2008 on the implications of the completion of the Century Mine on Gulf communities due in 2017 found that while Century Mine had increased income and job opportunities in the region and transferred pastoral leases to Aborigines, it had low levels of conversion of mining income into savings or long-term assets and overcrowded, low-quality housing, relatively poor health and education outcomes.[26]

These two case studies leave open the conclusion that even the best agreements may not "restore" Aborigines to some better place. Perhaps the third large agreement will have better news.

Browse LNG Precinct Agreement 2011 – Kimberley

The Browse LNG Precinct Project Agreement of June 2011 between the State of Western Australia, the Goolarabooloo Jabirr Jabirr Peoples, Woodside Energy Limited (and others) is massive. The benefits package includes:

$30m towards an economic development and housing funds
$28m in payments, additional $5m for more than three LNG trains
$4m in annual payments, additional $2m for more than three LNG trains
$3m annual payments – business development, employment and training
$5 million a year in contracts and job preferences
$8m for Reading Recovery Program throughout the Kimberley
$10m for the Goolarabooloo Jabirr Jabirr Rangers, and
2900 hectares of freehold land on country, and the LNG precinct to be handed back as freehold land at end of the life of the precinct.

In addition there are benefits to the wider Kimberley region including:

$186m towards economic development, housing, education, cultural preservation funds and for social programs
300 construction jobs, 15 per cent of the project workforce, and
600 hectares of freehold land to Dampier Peninsula Traditional Owners and a commitment to reform land tenure on ALT land on the Peninsula.[27]

Native title was not necessarily central to this agreement, but, assuming that it is, the offer for Aborigines does not get any better than this. This is a lottery win; if this agreement at James Price Point does not succeed, then the dreams that land rights, not to mention native title offers, are not achievable. The reason for commencing with these large agreements is to point out that they are rare and are only possible because the mine resources are so vast.

The remainder of the paper will concentrate on more common cases where these three elements do not always apply.

Evaluating native title

Some native title and land rights supporters argue that native title parties do not gain full benefits from their title because they "are under pressure to agree with mining companies" and that a company can, after six months, approach the National Native Title Tribunal to gain access to land.[28] They may be unaware that Chris Sumner, Deputy President of the Tribunal and a former Labor Attorney-General for South Australia who, while at pains to assure all that "[t]his is not to incorporate a general right of veto over mining projects", nevertheless determined that Weld Range Metals' proposal for a chromium, iron and nickel mine near Meekatharra in Western Australia should be stopped at the wishes of the traditional owners. The proposed mine has a construction workforce of around 1 000 contractors and permanent employment for 225 people generating approximately $2 billion in taxes and royalties. Knowing that leases were first granted in 1997, and that the tribunal commenced to determine the matter in 2010, Sumner found that the Wajarri Yamatji were "prepared to negotiate about acceptable agreements with grantee parties."[29] Clearly, the six-month constraint did not apply.

Others argue that native title is too difficult to attain.[30] They need not worry. Since 1998 the system has been, in some senses, bypassed using ILUAs whether native title has been determined or even claimed.[31] As the Noongar Native Title Representative Body argues, "we are now not really trying to 'win native title', but trying to 'win out of native title'." We are trying to move from "remnant title to social justice."[32] In Victoria, where there was never much hope of proving enduring connection to land, the Labor Government passed the *Traditional Owner Settlement Act* 2010. It provides an out-of-court settlement regime,[33] the core of which is the hand back of parks and reserves of significance to the traditional owner group to be jointly managed with the State.

When governments observed that native title appeared to lack the hoped for boost to land rights, they tried to nurse it along with tax breaks. But favourable taxation of native title payments[34] only reinforces the fact that "native title does not have inherent economic value or benefits."[35] A recent survey of those involved in ILUA negotiations suggested that native title parties were not "adequately compensated for land use".[36] And yet, the expectation is that native title and other land rights will act as a base for livelihood. This begs the question, "what value is communal native title and how is value assessed?"[37]

Perhaps the simplest means of assessing the value of native title is to assume that those who hold or claim native title derive satisfaction sufficient to make the claim. In addition, however, they hope to derive income. All owners and claimants (or those fortunate to be named in an agreement) share at least one of four means of deriving income. The first is where employment is established through ownership of business, or employment directly related to the native title right. Alas, there are few examples of direct employment arising from native title; the Rio Tinto example cited below is one. Indeed, almost all income is derived either from employment programs used to boost employment on native title land, or through the proponent, not the native title holder, or from rent.

There are three forms of rent. First, one or many proponent users of the land want to "solve" the entanglement of multiple claims present and future, they may pay in cash and/or in kind to satisfy the claimants or owners through an all encompassing agreement such as at Comalco Cape York. Second, monies may be paid to owners for "Future Act Activity", which is for disturbances to native title rights.[38] As at April 2012, some 2663 Agreements had been lodged with the National Native Title Tribunal. The negotiating parties have made only 68 public.[39] Some have suggested a register of agreements so that comparisons may be made or benchmarks of best practice or best outcomes established, but there is caution in publication at what are mostly private negotiations between interested parties.[40]

The overwhelming number of future act agreements available is for access for mining, exploration, gas pipelines, and infrastructures as varied as an airport, shooting range, shire infrastructure, and an attempt to gain perpetual pastoral lease over native title claims. For example, in 2010-11 the Carpentaria Land Council Aboriginal Corporation received a total of 92 future act notifications. Most commonly, these were for exploration permits, works programs and fishing permits.[41]

The Northern Land Council reports mining future acts are the largest driver of NLC's native title work program.[42] Examples of payment for compensation for such acts are difficult to find but one is traditional owners for the proposed Wunara phosphate mine

who received $150 000 of exploration compensation money, which they used to renovate five houses at the Wunara outstation.[43] Another is for exploration access fees paid to the Dja Dja Wurrung People of central Victoria at $1 500 per year per drill hole, and cultural heritage payments for inspections at $300 per day.[44] The 2002 MaMu Canopy Walk Heads of Agreement,[45] for example, provides $1 to the MaMu people for each entry fee paid by visitors to Wooroonooran National Park, Innisfail. The magnificent view of the north Johnstone River from the canopy walk, which displays some references to early MaMu habits and customs, earns the MaMu about $150 000 a year.[46] The MaMu also have the right to participate in the management of the National Park.

The third means of making money is by way of extinguishment compensation claims. These are uncommon. In 1997 and 2010 the Dunghutti Elders Council in the Kempsey region was paid $738 000 and $6.1 million respectively by the New South Wales Government as compensation for extinguishment of Dunghutti native title at Crescent Head in New South Wales.[47]

Possibly the largest payment is the 2003 Burrup and Maitland Industrial Estates Agreement Implementation Deed,[48] where the State of Western Australia acquired land for construction of heavy industrial estates on the Burrup Peninsula and adjacent Maitland area, along with any native title rights and interests that the native title parties may have had. The Agreement provided that in exchange for permanent extinguishment of native title on the Burrup and Maitland Estates industrial land and residential/commercial land in Karratha, the native title parties receive freehold title of Burrup land, a cultural centre on the land worth $5.5m and infrastructure funding on the land worth $2.5m. Five per cent of developed lots of Karratha commercial/residential land were to be transferred to an Approved Body Corporate, including $5.8m in compensation payments. The State also implemented the $3.5m Roebourne Enhancement Scheme to improve housing, transport, agency co-ordination and asbestos removal.

The question of how compensation for loss of native title rights and interests will be calculated has not been settled. For example, Central Desert Native Title Services has lodged a compensation claim over the Gibson Desert Nature Reserve, a remote and rarely visited conservation area via Kalgoorlie. The traditional owners, with the Western Australian Government, are attempting to legislate recognition of title and the existence of the nature reserve. In the event that agreement cannot be reached, the claim will likely be regarded as a "test case."[49] The most likely outcome, however, is that no money will change hands and claimants will "assist" in management of the reserve.

It is becoming clear that the value of native title is determined by those who create wealth and not by some innate value attributed by Aboriginal people. The reasons are that those who have successfully claimed native title have derived monetary benefit only when another potential occupant has presented them with a bankable proposition – usually a mining company,[50] a neighbouring pastoralist,[51] or a government keen to preserve land in a national park.[52] While traditional owners may enjoy native title, it may not put bread on the table. It may also lock owners into long-term arrangements adverse to their best interests. For example, there is solid evidence that one reason many traditional owners in the Pilbara have "surged ahead"[53] in establishing business is because, unlike their contemporaries in Cape York and

elsewhere, they no longer live on their traditional land. The Rio Tinto experience has been that many owners live in regional centres and visit their traditional lands. Traditional owners fly to Rio Tinto's newer mine sites from places such a Geraldton, Carnarvon, Broome and Derby.[54]

Native title system

Registered determinations, registered claims, and registered indigenous land use agreements,[55] each of which allows the right to negotiate, cover perhaps 80 per cent of the Australian landmass.[56] In addition, 36 per cent of the Northern Territory is inalienable freehold under the *Aboriginal Land Rights Act* 1976 (NT) or other Aboriginal land,[57] and 21 percent of South Australia is inalienable freehold under the *Aboriginal Lands Trust of South Australia Act* 1966 (SA) and later legislation.[58] Measured by coverage, native title and previous land rights legislation is an extraordinary success. In 2006, 93 000 of Australia's estimated 517 000 Aboriginal and Torres Strait Islanders lived in a discrete indigenous community. The majority, 80 500, lived in remote or very remote area communities; the remaining 12 500 in non-remote discrete communities in communities such as Redfern in Sydney and Framlingham in western Victoria.

In 2006, 26 per cent of people in remote indigenous communities lived in one of the 14 communities with one thousand or more people such as Yuendumu in the Northern Territory and Hope Vale in Queensland. A further 41 per cent lived in communities with between 200 and one thousand residents and 20 per cent were in communities with between 50 and 199 residents. Nearly 13 per cent of people lived in the 838 communities with a population of less than 50 people.[59]

There have been 185 determinations of Native Title, 141 that it exists and 44 that it does not.[60] The number of findings that it does not exist has been increasing since about 2000. Of 443 current claimant applications, 25 per cent were lodged after 2006, but 47 per cent have been in the system for between 10 and 17 years.[61] The findings ratio and the large number unresolved after lengthy periods suggest that diminishing returns have set in. Perhaps these have spurred governments to undertake Indigenous Land Use Agreements, which have the advantage of applying to multiple interests and multiple aspects of land use and management, including future uses. Once registered, an ILUA is a contract legally binding on all native titleholders in the area covered by the agreement, whether or not they are signatories to the agreement. There are 649 registered ILUAs.

Once agreement is reached, the negotiating parties are required to lodge a copy of the agreement with the NNTT. In a majority of cases, however, parties will, for reasons of confidentiality, give very few details of the contents of that agreement or its subject matter. For example, payment details will rarely be included. There are also agreements, like the Gove agreement, outside of the native title regime.

Yarrabah, Cape York

Unfortunately, few details of the ILUAs are available from the register. A random sample of 24 (of 649) ILUAs suggests that the vast majority were for mineral, oil and gas exploration access.[62] Some required access for infrastructure for electricity utilities and others from shires for housing and other infrastructure. One was for the management of a national park.

An example is at Yarrabah, located 37 km south of Cairns, a 45-minute drive on good roads. It has up to 3 000 residents. The houses are in poor repair, there is one school, one church, one other public hall and some minor shops. There is very little employment in Yarrabah.[63] Local officials have written that "issues of concern are similar to those of other Aboriginal & Torres Strait Island Communities with unemployment, health, housing and education and no historical opportunities for economic development."[64]

Yarrabah was established by missionaries in 1892. There were three major clan groups – GuruBanna, GuruGulu and Yarraburra. The mission closed in the late 1960s and came under control of the Queensland Government. Yarrabah received its Deed of Grant in Trust in 1986 and the Yarrabah Aboriginal Shire Council became self-governing. Native title was granted in December 2011 and Gunggandji Prescribed Body Corporate has been established and an office opened. Local officials suggest that their "successful determination has created opportunities for our people for the future."[65] The PBC will manage ILUAs and is "looking for and resourcing economic opportunities – ecotourism … preserve Bush Fruit Trees, rehabilitate and clean up their land & sea areas, prevent wild or uncontrolled fires", and "work with appropriate agencies to secure funding for Traditional Owner rangers so we can manage our country."[66] The prospects for development at Yarrabah seem bleak. And yet, Cairns beckons, just as it has at least since 1986.

Native title industry

A pre-Mabo Department of Education and Employment report, *Rural Development Skills on Aboriginal Land: can we meet the challenge?*, found that the majority of pastoral operations on Aboriginal title were not being run in a commercially sustainable manner and required continuing government grants. The report concluded:

> Aboriginal know how has enabled the development of political and negotiating/manipulative skills as a significant modus operandi for survival within the non-aboriginal world (skill in gaining access to resources rather than skills in generating them through European-style productive activities).[67]

The conclusion was an acute and courageous observation. In the twenty years since, land councils continue to excel at sourcing grants and maintaining a strong presence. To these, however, have been added a host of other players – Native Title Representative Bodies, Prescribed Bodies Corporate and Trusts.[68] These bodies, in addition to grants received, hold the moneys from native title or programs to buttress native title.

The native title method of extracting and distributing "rent" differs from the *Aboriginal Land Rights (Northern Territory) Act* 1976 where, for example, mining royalties are, in effect, tipped into the Aboriginal Benefit Account and distributed to supplicants on application via Land Councils. Under the ALRA in the Northern Territory and in other land systems in the States, land councils have been dominant. Under native title, traditional owners negotiate a deal with proponents. Nevertheless, Native Title Representative Bodies (NTRBs), which are primarily responsible for servicing the needs of native title-holders in their area, have become central players.[69] In some cases land councils have taken on the native title role; in other cases, new bodies have been formed.

Table 1. Funds for Native Title Representative Bodies and Service Providers

Native Title Representative Bodies and Service Providers	Government funding: 2010-11
Torres Strait Regional Authority	$2.1m ($70m total income, 108 employees)
Cape York Land Council	$4.8m ($5.6m total income, 28 employees)
Carpentaria Land Council Aboriginal Corporation	$1.6m ($5.1m total income, 37 employees)
North Queensland Land Council Native Title Representative Body Aboriginal Corporation	$2.5m (last reported 2005-06)
Queensland South Native Title Services	$11.2m (same total income, 49 employees)
NTSCorp (New South Wales)	$4.5m (same total income, not reported)
Native Title Services Victoria	$4.7m (same total income, 28 employees)
South Australian Native Title Services	$6.3m (same total income, 29 employees)
Goldfields Land and Sea Council Aboriginal Corporation (Representative Body)	$5.4m (same total income, 27 employees)
Kimberley Land Council	$7.7m* ($29.3m total income, 113 employees)
Central Desert Native Title Services	$5m (same total income, 57 employees)
South West Aboriginal Land and Sea Council	$3.3m ($5.6m total income, 37 employees)
Yamatji Marlpa Aboriginal Corporation	$11.2m ($28m total income, 103 employees)
Central Land Council	$3.3m ($21m total income, 200 employees)
Northern Land Council	$3.4m ($38m, 205 staff)

Source: Annual Reports of NTRBs. * estimate

The NTRBs are mostly land councils in a new role, with some new bodies established for native title. Table 1 indicates the distribution of funds among councils, which they use to assist claimants and owners in native title matters. The land councils have taken on the extra role of NTRBs, adding these funds to others grants.

Table 2. Northern Land Council Income 2011

Source of income	Annual grant in dollars
Native title program	$3.4m
Aboriginal Benefits Account (NT ALRA)	$26m
Department of Sustainability	$4m
Indigenous Land Corporation	$2.7m
Northern Australia Indigenous Land and Sea Management Alliance	$0.7m (expenses for Rangers $3.5m)
Territory Natural Resource Management	$0.3m
Others	$2.3m
Total	$40m

Source: Northern Land Council, *Annual Report 2010-11*, pp 189 and 206.

Table 2 suggests that the Northern Land Council, like all other land councils, is still good at "gaining access to resources." Native title is a lesser element in the Northern Territory because of the presence of the ALRA and the grants system associated with it.

Native title-holders must establish a Prescribed Body Corporate (PBC) to represent them as a group and manage their native title rights and interests. There are, so far, 93

prescribed bodies corporate. Funding for PBC administrative costs comes from the NTRB for the area in which the PBC is located.[70] PBCs have sought a new pool of funds, separate from the NTRBs, with whom some PBCs are in conflict.[71] The PBCs are able to undertake negotiations directly with others over their claim or future uses of native title. The new arrangements may signal a dispersal of council power. One estimate is the PBCs represent 50 000 traditional owners,[72] although the count in Table 3 suggests far fewer.

In the latest corporate returns, 86 of 93 PBCs indicated their activities as land management or did not specify. This usually means being paid to watch miners drill a hole, or assist a national parks official. Only 27 PBCs reported an income. Of those, seven reported a loss in 2011, one being a major loss. The Dunghutti Elders Council in Kempsey, for example, was paid all up $6.8m by the NSW Government in 1997 and 2010 as compensation for extinguishment of native title at Crescent Head. The corporation reported $5m in its account in 2010 and a loss of more than $1m in 2011. The Registrar of Indigenous Corporations has taken action to place the council in administration.[73]

Table 3. Characteristics of Prescribed Bodies Corporate

Purpose	Employees	Members	Income
Land management 51	No employees 70	0-9 members 1	$0 46
Health 1	1-6 employees 5	10-49 members 37	$1-249,999 14
Housing and other 2	12–22 employees 5	50-99 members 18	$250 000- $1m 6
Employment and training 4		100+ members 29	$1m + 7
Did not specify 35	Did not specify 13	Did not specify 9	Did not specify 20

Source: various documents from the *Office of the Registrar of Indigenous Corporations* for 93 PBCs registered from 1997 to 2012.

Ngarluma Aboriginal Corporation has the largest income by far at $7.8m in 2011, which was the result of an ILUA with Robe River Mining Co Pty Ltd in 2011. The ILUA Area covers about 7 000 square kilometres in the vicinity of Karratha. Native Title was granted to the Ngarluma and Yindjibarndi people in May 2005 and the NAC was set up in June 2005 and is the PBC for Ngarluma. There is also a housing estate development commenced in 2010, the Yaburriji Estate in Roebourne. There is also hope for the Mt Welcome Pastoral Station. The Station hopes to employ all local people and to run a successful beef business. The NASH plan is to develop a new housing community on approximately 50 hectares of land next to Roebourne, for up to 400 housing lots and to provide land for educational, community and commercial facilities to enhance the opportunities for all Indigenous people in Roebourne. There has been $11m in State government funding.[74]

Trusts may be used where native title is not established or no body corporate is

available as a vehicle to receive monies. In 2006 there were two regional ILUAs written between the Dja Dja Wurrung People and the Minerals Council of Australia as well as the Wamba Wamba Barapa Barapa and Wadi Wadi People and the MCA to satisfy the future act provisions of the *Native Title Act*. A trust was established for each. Both agreements covered disturbance from low level exploration and specified work and pay rates associated with the exploration.[75]

Larger agreements, Comalco and Gove for example, establish a trust for monies. The 2001 Comalco ILUA established a Charitable Trust controlled by a majority of traditional owners to manage funds and annual contributions made by Comalco and the Queensland Government.[76] The Browse LNG Precinct Project Agreement of June 2011 between the State of Western Australia, the Goolarabooloo Jabirr Jabirr Peoples, Woodside Energy Limited established an administrative body, Administrative Body and Corporate Trustee, at a cost of $5m.[77]

Trusts are well recognised under the ALRA system. Monies, for example, received on behalf of the Associations of Aboriginal people are held in the Land Use Trust Account and disbursed in accordance with the terms of the trust.[78] The trusts administered by a land council, however, suggest not only an intimate relationship between land council and traditional owners, but one where land councils are in control.

> A land trust can only deal with the land in ways that the Land Council directs it to, but land councils can only direct land trusts to deal in land in ways that the traditional owners have determined.[79]

The native title system encourages direct dealing between traditional owners and other users. In practice, there are often competing claimants, which look to others to sort their differences. In addition, large developments with a long life usually require an enduring instrument for disbursements and other arrangements such as promises of employment, where a trust is most effective.

Where trust and ILUAs have not been used, the prospects for cooperation between competing claims is diminished. Body corporate politics can be most unpleasant. Joint ownership and control of properties and monies can lead to considerable disharmony. In circumstances where an individual owns property and is, as a result, part of the body corporate for the purposes of managing joint matters of maintenance and such, at least the option of selling exists. Aboriginal collective ownership does not allow for disposal of property, so body corporate politics is enduring and inescapable, at least not without giving up rights to land and proceeds.

These matters are intensified where native title is claimed over other Aboriginal lands and claimants are not the same as the owners of those properties. In 1997, for example native title was granted over an area almost the same size as the Hopevale Deed Of Grant In Trust. The determination recognised the existence of native title held by 13 separate clans in their respective clan estate areas.[80] The Hopevale ILUA is a body corporate ILUA. The parties to it are Hopevale Congress RNTBC, Dhubbiwarra Aboriginal Corporation RNTBC and three individual blockholders who have been offered residential leases.[81] The Hopevale DOGIT was transferred to Congress in 2011. Both before and since that date, there has been litigation before the courts on four occasions concerning the transfer. The native title-holders, the subject of this determination, do not all hold native title to the entire determination area. Each clan holds native title only within its own clan estate area. Other litigation concerns

breaches of trust, mainly contractual arrangements proposed for the disbursement of money in the form of an ex gratia payment to be obtained by Congress from the State and future royalties in relation to mining on Aboriginal land.

The system is bust – patch-ups do not work

Native title and land rights have two deep problems. First, the collective nature of the title disallows the capture of improved value.[82] Australian governments have invested extensively in the belief that the best prospect for Aborigines lies in collective access to tribal lands. This, notwithstanding that at the time of earlier land rights legislation, the *Aboriginal Land Rights (Northern Territory) Act* 1976, traditional owners took exception to their collectivisation and having their lands managed by land councils.

> Every group of traditional Aboriginal landowners in Central Australia to whom the Aboriginal Land Rights Bill (Northern Territory) 1976 was verbally translated was surprised and angered to find that it did not meet their expectations.[83]

Second, peer group pressure placed on individuals in those communities is so great as to stifle effort and reward, which encourages owners to receive passive rents.[84] Indeed, the latter, which creates such a strong culture of compliance in poor behaviour, may be the most powerful barrier to success.[85] Peer pressure, so often excused as "culture" in these communities, creates such low expectations and entrenches such bad behavior that few can escape its clutches. Programs that seek to normalize abnormal environments found in these communities almost always fail. The Community Development Employment Projects program (CDEP) has historically carried the burden of training Aborigines, but apart from some successes among Aboriginal groups that deliver CDEP and other employment programs,[86] after 40 years it has failed to produce a job-ready workforce.[87]

The Indigenous Land Corporation has long reported "ILC-operated businesses have experienced people refusing seasonal, casual and full-time employment and/or withdrawing from traineeships and employment and returning to CDEP or income support with immunity."[88]

The new generation job creation programs – Indigenous Pastoral Program, Land/Sea Management Program, Fire Management and Abatement, Parks and Reserves, National Water Commission and so on – hire employees because of their race rather than their value. As a consequence, results are often poor.

Uluru rent money project 2005 – Northern Territory

The ILC concern is illustrated well by Uluru rent money. The earnest desire to have Aborigines work on country creates perverse incentives. Traditional owners of Uluru-Kata Tjuta National Park allocate rent from the national park to community development projects. This is called the Uluru Rent Money project.[89] The Central Land Council, however, manages the whole operation. Activities include meetings of the Mutitjulu Working Group, and projects such as dialysis services, the construction and operation of a swimming pool and the renovation of the recreation hall and basketball court at Mutitjulu. "Independent" research undertaken in the community suggests that, "overall, community members . . . are positive about the things that had been achieved with the rent money." Unfortunately, "service providers, who are generally supportive of this service, point out that the hall has already experienced problems in terms of maintenance and appropriate equipment."[90] There are also outstation upgrades at New

Well outstation (SA) and Kulpitjara Outstation.[91] These communities are in disarray; the rent keeps them there.[92]

At the same time the ILC purchased Ayers Rock Resort in May 2011 "in collaboration with"[93] Wana Ungkunytja Pty Ltd representing the communities of Kaltukatjara (Docker River), Mutitjulu and Imanpa for $300m. The ILC has established the National Indigenous Training Academy at Yulara to take on 50 Indigenous trainees in 2011-12 and 100 in 2012-13. "Recruitment partners" have been engaged throughout Australia to recruit Aboriginal job seekers.[94] Meanwhile, the local inhabitants at Mutitjulu sit idle. The purchase covers failure. Conditions appear to have remained the same despite title, rent and land purchases and the explicit desire to train and employ Aborigines.

Ooratippra Aboriginal Corporation – Northern Territory

Other examples indicate not only conflict but also the sheer pointlessness of some ventures. Ooratippra pastoral lease is situated 300 kms northwest of Alice Springs and covers 4 292 square kms. In 1999, the Indigenous Land Corporation purchased Ooratippra Perpetual Pastoral Lease for $2.55m and transferred title to the Ooratippra Aboriginal Corporation. During 2000-02 the ILC spent $327, 592 on Ooratippra and there was an "inspection" of Ooratippra in 2010.[95] The Ooratippra Aboriginal Corporation has reported an income of $65 000 in 2006 for lease of the station to Mt Riddock Pastoral Company, a neighbouring landowner.[96] The only other reported income was $72 300 in 2009 and $19 000 in 2011.[97]

In 2001, the Central Land Council lodged the Ooratippra native title application on behalf of various estate groups of the Alyawarr language group. A native title consent determination for exclusive possession of Ooratippra pastoral lease was handed down in 2011. The application covered the whole of the station, which includes the Irretety Community Living Area held by the Irretety Aboriginal Corporation. As Ooratippra Perpetual Pastoral Lease and Irretety Communal Living Area are owned by native title holders, they were able to claim exclusive possession which includes the right to negotiate over any future acts like mining.

In 2003, the Irretety ILUA allowed a section of land on the Ooratippra pastoral lease to be purchased by the Northern Territory Government for the purpose of creating an Aboriginal community living area. Without the ILUA, the transaction in the land may have been subject to the future act and right to negotiate provisions of the *Native Title Act* 1993 (Cth). The parties also agree that any action taken under the agreement in order for the land transaction to occur will not extinguish any native title rights and interests that may exist in the area. The entire area is now exclusively native title.

A Prescribed Body Corporate has to be established to look after the interests of the native title holders. There are 37 members of the Ooratippra Aboriginal Corporation, three of whom are members of the Ampilatwatja Community (population 360) and the remainder of the Alpurrurulam Community (Lake Nash, population 740). These communities are 340 kms apart. The relationship between the Ooratippra Aboriginal Corporation, which owns the pastoral lease, and is a native title holder, and the Irretety Aboriginal Corporation (which is located 400 kms north of the other communities), which is also a native title holder, may be a difficult negotiation. The Central Land Council recently reported that it has "provided mediation assistance in an ongoing dispute between two groups of traditional owners affecting the development."[98]

The owner of Mt Riddock indicated that the leasing arrangement had ceased in 2009, and that the station "is in a hell of a mess now".[99] Fences are broken, bores broken down, few cattle on the property, no-one is working it. Houses, including a new house, are wrecked and abandoned. The interviewee rated the property as one of the top ten in the Alice Springs area. The payments for lease were from $60 000 up to $100 000 in the last year, although these amounts do not appear in the PBC record. The Land Council had wanted $250 000 a year rent, but was unable to achieve this.

The Alcoota property adjacent to Ooratippra is, by contrast, well managed, by a non-Aboriginal manager with the Aboriginal owners (ALRA title) working well. This suggests it is not the title but the attitude: native title encourages rent, not work.

Conclusion

Paul Keating's hopes for native title may have proved somewhat of a burden to the original occupants. As the Northern Land Council indicates, native title can gum up existing title and administration. The Indigenous Land Council concludes that land can be a liability. It has also disappointed those who have missed out on title, or on the spoils of title. The Rio Tinto experience suggests that a surer road to happiness has been to leave the burdens of collective title and gain employment in the wider market. Many claimants want "social justice" so claims go on long after native title has been granted.

Just as surely as welfare has been poison, land rights have been no guarantee of success for Aboriginal people. Although land rights created great expectations among Aboriginal leaders, claimants and policy-makers, the evidence suggests that land rights, and native title, have failed to deliver on these expectations. No matter the particular device to administer native title and other land rights, whether ILUA, trust, PBC or through a land council, the "success" or otherwise depends on the wealth generated by the land user, not the native title landlord. Even where there are prospects, the scope for poor outcomes and passive non-state welfare remains great.

The benefits are a lottery. They mostly accumulate to those who administer programs designed to make land rights work. Alas, they almost always fail. The reason they fail is that collectivisation is no basis for commerce, and it reinforces poor habits and bad behaviour. The land rights era was based on an assumption that Aboriginal people were so different from others that economic institutions and peer group behaviour would somehow not apply. Collective living and reinforcement of bad habits is a major problem.

Endnotes

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3. Northern Land Council, *Annual Report 2010-2011*, 2011, 143.

4. Natasha Robinson, "Indigenous rise from boom," *The Australian*, 1 August 2012.

5. Liz Jackson, "Judgement day," *ABC Four Corners*, 10 May 2012.

6. Redfern Speech (Year for the World's Indigenous People) – Delivered in Redfern Park by Prime Minister Paul Keating, 10 December 1992.

7. See Amy Wax, *Race, Wrongs and Remedies: group justice in the 21st century*, Rowman and Littlefield, 2009.

8. Lisa Strelein, "Land, Rights, Laws: issues of native title," *Australian Institute of Aboriginal and Torres Strait Islander Studies,* Issue Paper No. 23, 1998, 6.

9. Indigenous Land Corporation, *Annual Reports* 2001, 2002, 2010.

10. The mining boom, particularly in Western Australia and Queensland is providing significant economic opportunities … and many are taking advantage of the deals on offer. Brian Wyatt, "Strategic Issues in Native Title 2012-13," *Native Title Conference 2012: Echoes of Mabo: honour and determination*, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2012, 6.

11. The Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs, *Leading Practice Agreements: Maximising Outcomes from Native Title Benefit*, July 2010. The paper called for a possible package of reforms to promote "better practice" in native title agreements and the governance of native title payments. No new policy has been announced.

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13. Family Responsibilities Commission, *Annual Report 2010-11.*

14. This will be paid primarily to the Gumatj Future Fund and the Rirratjingu Aboriginal Corporation construction projects, including medical, retail and residential developments; employment opportunities for Yolngu people; and opportunities for indigenous owned companies to act as contractors for construction. *Agreements, Treaties and Negotiated Settlements Project.*

15. The period is not specified. National Native Title Tribunal, *Register of Indigenous Land Use Agreements.*

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18. National Native Title Tribunal, *Register of Indigenous Land Use Agreements.*

19. http://www.westerncape.com.au/ (12 August 2012).

20. Western Cape Communities Trust, *The Central Sub-Regional Trust 2011–2012 Grant Funding Guidelines.*

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26. Centre for Social Responsibility in Mining, "Completion of Mining at Oz Minerals Century Mine: implications for Gulf communities," University of Queensland, 2008, iv-v.

27. *Browse LNG Precinct Project Agreement*, State of Western Australia, Goolarabooloo Jabirr Jabirr Peoples, Woodside Energy Limited, Broome Port Authority, LandCorp, June 2011.

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29. Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of Wajarri Yamatji (2011) 172 NNTTA 343.

30. Paul Finn, "Mabo Into The Future," in *Native Title Conference 2012: Echoes of Mabo: honour and determination*, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2012, 3.

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32. Stuart Bradfield, "The Noongar Native Title Settlement," *Native Title Conference 2012: Echoes of Mabo: honour and determination*, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2012, 1.

33. Department of Environment, Land, Water and Planning Victoria, http://www.depi.vic.gov.au/forestry-and-land-use/managing-land/indigenous-land-management/the-traditional-owner-settlement-act-2010.

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35. Graeme Neate, "Using Native Title to Increase Indigenous Economic Opportunities," *5th Indigenous Recruitment and Training Summit*, 2010, 19.

36. Deirdre Howard-Wagner, "Scrutinising ILUAs in the Context of Agreement Making as a Panacea for Poverty and Welfare Dependency in Indigenous Communities," *Australian Indigenous Law Review*, vol 14(2), 2010, 100.

37. Pat Keane, "Opportunity and Responsibility," *Australian Institute of Aboriginal and Torres Strait Islander Studies Native Title Conference*, Brisbane, 3 June 2011, 4.

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66. Prove, *op. cit*., 30.

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77. *Browse LNG Precinct Project Agreement*, State of Western Australia, Goolarabooloo Jabirr Jabirr Peoples, Woodside Energy Limited, Broome Port Authority, LandCorp, June 2011, 49.

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