Native Title, Aboriginal Self-Government and Economic Participation

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Introduction

The central argument of this chapter is that as currently defined in Australian jurisprudence and public policy, native title is of limited value as a basis for Aboriginal economic participation. This is because native title is understood by Australia’s courts and governments as involving only inherent rights in land and sea country, and not an inherent right to Aboriginal self-government. Recognition of the latter is critical if rights in country are to be fully mobilised in support of Aboriginal economic participation.

I am not arguing that recognition of native title has been of no value in facilitating Aboriginal economic participation. Over the two decades since Mabo v Queensland (No 2) (Mabo) Aboriginal people in many parts of Australia have certainly sought to use recognition of their native title in pursuing economic opportunities, and their efforts have met with some success, particularly in the Pilbara, the Kimberley, the Northern Territory and Cape York. However even in these cases there are major problems in institutionalising gains made in the absence of Aboriginal self-government, and battles for recognition of the right of Aboriginal people to economic participation must be fought over and over again. In many other parts of Australia the limited procedural rights offered by the Native Title Act 1993 (NTA) have not been sufficient, in the absence of an Aboriginal governance framework, to secure substantial opportunities for economic participation. This reflects, in part, the fact that the NTA operates so as to limit the market power potentially associated with native title property rights recognised in the Mabo decision.

Aboriginal self-government is important to economic participation not only because it could help institutionalise and bolster recognition of native title property rights. The ability of Aboriginal people to participate in the economy is shaped to a substantial degree by their access to adequate education, training, health, housing and infrastructure services, access which in many parts of Australia is still seriously inadequate. Denial of an Aboriginal right to self-government deprives Aboriginal people of the capacity to establish government-to-government

1 The focus of my research and professional practice in Australia is on Aboriginal peoples, not on Torres Strait Islanders. Consequently, when referring to the Australian context, the term ‘Aboriginal’ rather than ‘Aboriginal and Torres Strait Islander’ or ‘Indigenous’ is used throughout this chapter.
2 Mabo v Queensland (No 2) (1992) 175 CLR 1.
arrangements that secure the stable, long-term, funding and policy frameworks required for effective public service provision.

The absence of Aboriginal self-government also affects Aboriginal relations with the corporate sector. Given that Australia's current native title system largely prevents Aboriginal people from exercising the market power potentially associated with recognition of their native title, and given the absence of a capacity to regulate corporations which could be associated with self-government, Aboriginal people must rely heavily on discretionary 'corporate social responsibility' policies as a basis for pursuing participation in commercial activity. This leaves them in a vulnerable position, subject to the vagaries of corporate policies and economic fortunes.

The difficulty of achieving an expansion of native title to encompass an inherent right to Aboriginal self-government is obvious, especially in Australia's current political and economic environment. But that difficulty is no reason for not drawing attention to the need for change. Failure to raise the issue will allow a further entrenchment of a status quo which continues to favour industry and the State, and offers Aboriginal people the prospect of unrelenting struggle to hang on the gains they have made over the last 20 years and to further extend their access to economic opportunities.

The next section explores the relationship between native title and Aboriginal self-government, contrasting the approaches of Canada and Australia. The following sections highlight the limits of Australia's existing native title system as a foundation for Aboriginal economic participation; explore the relationship between Aboriginal self-government (or rather its absence) and the design and delivery of government policy and service provision in Australia; and assess existing relationships between Aboriginal and corporate interests. Each step in the analysis highlights the necessity of including an inherent right to self-government in native title if it is to constitute a basis for Aboriginal economic advancement.

**Aboriginal Self-Government and Native Title**

Aboriginal self-government is defined here as the creation of a governance sphere, within the Australian polity, in which Aboriginal people and institutions are empowered to govern their communities, to make authoritative decisions, and have access to the resources required to give effect to these decisions. The term does not imply the creation of an Aboriginal state that is either sovereign or separate from the rest of Australia. Rather it refers to the establishment of an Aboriginal 'sphere of government' whose political and administrative reach, and whose relationship with other 'spheres of government' (Federal and State), has been agreed through a

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negotiation based on recognition by the Australian State of the inherent right of Aboriginal people to be self-governing. My understanding of the term, and the relationship between native title and Aboriginal self-government, can be explored through a brief discussion of how the two are dealt with in Canada and Australia.

As with native title determinations in Australia, land claim settlements in Canada involve recognition of interests in land, water and resources. However, they also involve recognition of an Aboriginal right to self-government, within the Canadian political system. This approach is based on the Canadian Government’s acceptance of an inherent right to Aboriginal self-government, expressed in the following terms:

The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right … based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources … The inherent right of self-government does not include a right of sovereignty in the international law sense, and will not result in sovereign independent Aboriginal nation states.\(^5\)

Typically, negotiations on land claim settlements occur along two parallel tracks. One deals with identification of sub-surface and surface lands that will be held by Aboriginal claimants in fee simple. The other deals with devolution of responsibility for political and administrative functions (including land management) and public service delivery, and access to revenue streams to allow Aboriginal governments to deliver these. The latter generally consist of an untied capital sum payable according to an agreed schedule, and long-term funding agreements for the delivery of education, health, housing, police and other services, which build in minimum service standards and afford Aboriginal governments wide latitude in how these are achieved.\(^6\) Arrangements of this sort avoid the need for constant negotiations over short-term funding for specific purposes. They also leave Aboriginal people free to establish their own priorities and design appropriate institutional and service delivery mechanisms in areas for which they are responsible.

Self-government is not only a component of land claim settlements in remote, sparsely populated regions of Northern Canada. It is also central to land claim negotiations, for example, in heavily populated areas of British Columbia where Aboriginal people constitute a minority of the population. Here also land claim negotiations include the question of ‘what self-government


\(^6\) Ibid.
powers the [Aboriginal] First Nation will have and how this will be harmonized with the powers of other governments’. The content of Aboriginal governance may vary with the context; the principle that Aboriginal people will enjoy a measure of self-government does not.

Importantly, in the context of negotiations between Aboriginal peoples and commercial developers, an issue discussed in detail below, Aboriginal self-government can remove issues within the administrative authority of Aboriginal governments from the negotiation table. Aboriginal people do not have to constantly negotiate with individual developers over the full range of issues that may arise between them; on a defined set of issues, Aboriginal governments, like other governments, simply tell industry the ‘rules of the game’. Self-government agreements in Canada typically provide for Aboriginal governments to take responsibility for:

- land management, including zoning; service fees; land tenure and access; and expropriation of Aboriginal land by Aboriginal governments for their own public purposes;
- natural resources management;
- management of public works and infrastructure;
- licensing, regulation and operation of businesses located on Aboriginal lands. Industry may of course decide not to accept the ‘rules of the game’ specified by Aboriginal governments. But if those governments have determined that development is only acceptable under those ‘rules’, this will not concern them.

More generally, self-government creates a political space within which Aboriginal peoples can engage in autonomous decision-making, without the need to constantly negotiate acceptance of their decisions with state or corporate actors. My experience of decision-making in Australian Aboriginal communities or organisations is that as soon as a ‘decision’ is taken, discussion shifts to whether it will prove acceptable to a mining company or state agency and to how their acquiescence can be achieved. In other words there is great difficulty in taking decisions that are authoritative relative to other actors in mainstream society, a situation that can be demoralising and alienating. This point was recently brought home to me in a different context, that of Bougainville in Papua New Guinea. The Autonomous Bougainville Government (ABG) was established as a self-governing entity within Papua New Guinea as a result of the Peace Agreement that ended the Bougainville conflict in 2001. The ABG exercises a defined range of legislative powers and develops policies and administrative procedures to give effect to them. While there are many issues that remain within the jurisdiction of, or require agreement

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8 AANDC 2014a, above n 5.
with, the Government of Papua New Guinea, the ABG can, within its own often sphere, make authoritative decisions that cannot be questioned or overturned by other actors. It will for example shortly pass a Bougainville Mining Bill which, among other matters, will set the royalty rate that will apply to mining operations. The Bill has been the subject of much debate, but once the royalty rate is set, this will be the end of the matter. Such finality is rarely available to Aboriginal people in Australia.

Canada’s approach to Aboriginal self-government reflects in part its colonial history, and in particular the conflict between the British and French colonists and all that flows from it in terms of the history of settler-Aboriginal relations in Canada, including the signing of treaties, and the Royal Proclamation of 1763. But the underlying foundation for current practice is that Canadian jurisprudence and Federal land claims policy recognise an inherent right to Aboriginal government based on the fact that at the time of settlement Aboriginal peoples were self-governing.

Native title law, native title determinations, and government policy in Australia do not reflect this recognition. There is no historical or logical basis for this difference. In 1788, Aboriginal Australians were not only in possession of Australia, they were self-governing in exactly the same way as their Canadian counterparts at the time of British and French settlement. Across a vast continent they exercised ‘constant and purposeful’ management of their ancestral estates and displayed a high degree of economic organisation, which in turn required the exercise of self-government. Against this background there is no logical basis on which to define native title so that it recognises inherent Aboriginal rights in land on the basis that they existed prior to European settlement in 1788, but denies recognition of an inherent Aboriginal right to self-government. Yet this is what Australia (in contrast to Canada) continues to do.

For reasons explained in the following sections, the economic potential offered by legal recognition of native title to a large and growing part of the Australian continent will not be realised unless a fundamental shift occurs in the conceptualisation and practice of native title.

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9 See, for example, Tag Archives: Mining Act, Papua New Guinea Mine Watch (4 June 2014) <https://ramumine.wordpress.com/tag/mining-act/>.
10 Peter H Russell, Recognising Native Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism (University of Toronto Press, 2005), 45–50.
12 Richard H Bartlett, Native Title in Australia (LexisNexis/Butterworths, 2nd ed, 2004); Attorney-General’s Department, ‘Exposure Draft: Proposed amendments to the Native Title Act 1993 (Cth)’ (Attorney-General’s Department, Canberra, 2012).
The current artificial and destructive divide between recognition of native title in land and sea country, on the one hand, and Aboriginal self-government, on the other, must end. Rather they need to be understood as two sides of the same coin, both in the historical and contemporary contexts.

**Institutionalising and Strengthening Economic Participation Rights**

In much of northern and central Australia, government and industry now generally recognise that they cannot ignore Aboriginal interests when pursuing their own economic agendas, and this is a great advance. The comprehensive agreements signed recently in relation to the proposed Kimberley LNG Precinct represent a case in point. But even in these regions battles must constantly be re-fought, native title holders and their representative organisations must use the courts and apply their political resources to insist that bureaucrats and companies take heed of Aboriginal interests. There is huge difficulty in institutionalising gains achieved in one struggle, so that they do not have to be fought for all over again in the next. This has been brought home to me recently, as I have become involved in re-negotiating an agreement between an Aboriginal community and a company in Cape York I originally helped to negotiate in the early 1990s. There is a depressing sense of déjà vu, of facing the same issues and the same conflicts all over again, rather than building on a platform that was achieved in hard-fought struggles twenty years ago.

This difficulty in institutionalising recognition of Aboriginal interests is due in substantial measure to the fact that native title does not include an inherent right to self-government. If that right was recognised, gains achieved through the exercise of property and procedural rights in specific cases could be incorporated into administrative practices, into policy and, ultimately, into legislation and regulation, so that the issues involved do not have to be renegotiated anew every time. The necessity to do this is, in my view, a destructive and exhausting feature of Aboriginal public life in Australia.

Outside northern Australia, the promise of substantial Aboriginal economic participation offered by native title agreements has generally not been realised, and native title has certainly not delivered a fundamental shift in relations between Aboriginal people, developers and the State. Governments and companies work through the relevant

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administrative procedures and offer what are generally tokenistic economic benefits in return for native title consents, and have recourse to the National Native Title Tribunal (NNTT) if these small inducements prove insufficient. Many native title agreements in these regions offer little net benefit to their Aboriginal signatories, and indeed in some cases there are questions as to whether Aboriginal peoples would not be better off refusing to sign agreements and using alternative legal and political avenues to pursue their interests.\textsuperscript{15}

As I have argued in detail elsewhere,\textsuperscript{16} this situation reflects the fact that the native title system in Australia operates to deny native title holders the market power that is normally attached to ownership of property. This is because the \textit{NTA} creates, by virtue of its ‘no royalty’ provision and its arbitral provisions, especially as applied by the NNTT, an uneven playing field where native title parties are under duress to enter agreements and resource developers are not.\textsuperscript{17} This inequality of bargaining power is reinforced by the fact that the Commonwealth does not fund Native Title Representative Bodies (NTRBs) to perform their statutory functions, with the result that they are not in a position to challenge many ‘expedited provision’ applications under the \textit{NTA}, and that exploration is allowed to proceed in the absence of any opportunity for native title holders to exercise their procedural rights or negotiate economic participation opportunities. Reliance on company funding of negotiations further undermines Aboriginal bargaining positions.

The result is a profound inequality in the outcomes achieved in different parts of Australia in commercial negotiations on native title land. In effect, a two tier system of agreements has developed, with those in regions where NTRBs can exercise political leverage to supplement the limited legal rights of native title holders offering the potential for substantial

\textsuperscript{15} Ciaran O'Faircheallaigh, ‘Aborigines, Mining Companies and the State in Contemporary Australia: A New Political Economy or “Business as Usual”?’ (2006) 41 \textit{Australian Journal of Political Science} 1; O'Faircheallaigh, above n 3.
\textsuperscript{17} The ‘no royalty’ provision states that payments related to the value of minerals or profits earned from their extraction cannot be made to native title holders where the negotiating parties do not reach agreement and the matter is referred for arbitration by the NNTT. This places pressure on the native title holders to reach agreement. In virtually all cases where matters have gone to arbitration by the NNTT, the company is granted a mining lease, with the result that mining companies are not under comparable pressure to reach agreement. In any negotiation where one party is under pressure to reach agreement and the other is not, the former (in this case the native title holder) is at a serious disadvantage. For a thorough discussion of these points see Tony Corbett and Ciaran O'Faircheallaigh, ‘Unmasking the Politics of Native Title: The National Native Title Tribunal’s Application of the \textit{NTA}’s Arbitration Provisions’ (2006) 33 \textit{University of Western Australia Law Review} 153.
economic participation, and agreements in other areas offering little while at the same time closing off alternative courses of action such as litigation and direct action.\footnote{18 O’Faircheallaigh, above n 14.}

For this situation to change, substantial amendments to the NTA are required, including the removal of the ‘no royalty’ clause and the removal of arbitral functions from the NNTT, along with a complete overhaul of the system for funding NTRBs and native title agreement negotiations. In combination with such changes, recognition of an inherent right to self-government would place Aboriginal peoples in a much stronger position to insist on substantial participation in economic activity on their ancestral lands.

A related and broader issue involves the effective ‘writing down’ of the content or substance of native title property rights in Australia. As Kimberley native title holders have discovered, their entitlement ‘as against the whole world to possession, occupation, use and enjoyment’ of their lands and waters can mean little when it encounters Australia’s administrative and judicial systems. When a number of native title holders have tried to assert their right to protect their property from damage by trespassers, let alone their right to its exclusive use and enjoyment, they have fallen foul of the courts: see, for example, the recent decision in \textit{Vale v Hopiga}.\footnote{19 Peter Norman Vale v Lenny Hopiga and John Hopiga (Unreported, Magistrates Court of Western Australia, RC, 19 April 2011).} Recognition of Aboriginal self-government as a component of native title would place native title holders in a much stronger position to regulate the activities of non-native title holders as these affect native title land. It would help ensure that the promise apparently offered by ‘exclusive possession’ does not prove hollow, and strengthen the capacity of native title holders to mobilise their property rights in support of their aspirations for economic participation.

**Aboriginal Self-Government, ’Aboriginal Policy’ and Service Delivery**

The ability of Aboriginal people to convert their native title rights into economic participation, and more generally their capacity to grasp available economic opportunities, requires the adequate provision of social services and infrastructure in areas such as health, education and housing. For example, there is a critical need for youth support services given the young profile of the Aboriginal population and the need to keep young people at school and socially engaged if they are to become economically productive. Similarly, regardless of the efforts of native title groups to negotiate ambitious training and employment programs as part of native title agreements, Aboriginal participation in the mining workforce will be limited, and focused on lower-skilled and lower-paid jobs, in the absence of positive education and training outcomes.
Current poor outcomes in areas such as education and health seriously undermine the prospects for Aboriginal economic participation. In summarising what Indigenous statistical indicators reveal in relation to the period 2002–2011, the Productivity Commission states:

Many indicators show that outcomes are not improving, or are even deteriorating ... There has been little change in literacy and numeracy, most health indicators and housing overcrowding for Indigenous people.  

This general picture does hide important differences between different regions and components of the Aboriginal population, but this does not change the fundamental problem. Indeed the fact that some Aboriginal people are enjoying substantially improved social outcomes, while overall trends are not improving or are worsening, indicates that the life experiences of some other Aboriginal people must be deteriorating significantly.

The challenges posed by poor social outcomes for Aboriginal economic participation are very evident in Australia's resource-rich regions and are well illustrated, for example, by the Aboriginal Social Impact Assessment (ASIA) conducted as part of the Strategic Assessment of the proposed industrial precinct for processing offshore gas into LNG at James Price Point, north of Broome. Baseline data collected for the ASIA showed that Aboriginal people in the immediate area of the Precinct site (Broome and the Dampier Peninsula) face social disadvantage so serious as to fundamentally threaten their ability to participate in economic activity associated with the construction and operation of an LNG Precinct. For example, school attendance is poor, in some schools averaging only 75 per cent in Year 10 (students missing one in every four days). School achievement levels are low, for instance in one school in Year 5, 46 per cent of students were Below National Average for writing and 62 per cent Below National Average for numeracy. Only one in four people in Broome and one in five in the Dampier Peninsula communities had completed high school, and only 16 per cent of Broome Indigenous residents and only nine per cent of Dampier Peninsula residents have any post-school qualification. In 2008–2009 people 19 years or younger accounted for 44 per cent of all Indigenous criminal convictions in Broome/Dampier Peninsula, and while Indigenous people generally accounted for about 30 per cent of the population in Broome and the Dampier Peninsula, they accounted for 85 per cent of

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21 Langton, above n 1, 135.
criminal offences. Of 64 houses in one Dampier Peninsula community, only seven were in good repair.\textsuperscript{22}

The failure of social outcomes to improve in response to a range of recent policy initiatives\textsuperscript{23} indicate that existing approaches to public service provision are in need of fundamental reform. But despite the severity of the situation, Aboriginal policy in Australia tends to be dominated by debates about how best to fund and deliver policies within an unchanged governance framework where core policies and priorities are established in Canberra and State capitals. Discussion focuses on specific policy mechanisms, the way in which particular services are delivered, the role of Aboriginal service delivery organisations, and the manner in which these organisations are held accountable. This results in a situation in which policy changes in regular cycles, but the changes often make little sense to people on the ground and often result in the resurrection of approaches discarded as part of an earlier ‘policy cycle’. Illustrating this point, participants in the ASIA for the Kimberley LNG Precinct

expressed great frustration at frequent and, to them, unexplained changes in government policies. They saw frequent policy change as a major obstacle in addressing serious structural issues such as poor education outcomes and entrenched unemployment, and believe the impact of policy change is compounded because government does not explain to recipients of services exactly what the changes mean or imply for them.\textsuperscript{24}

Another problem is that current approaches tend to be dominated by short term funding arrangements, creating major problems for effective service delivery, another issue documented by the ASIA Report:

Due to the short-term nature of some government funding, certain services can cease or their provision can be interrupted, which can have significant impacts on clients and communities … Youth issues and the lack of youth services have been widely reported as a major concern for communities on the Dampier Peninsula for some time. However, it was only in late 2009 after a long wait that Garnduwa [Kimberley Youth, Sport and Recreation] received funds to appoint


\textsuperscript{24} Kimberley Land Council, above n 21, 314–15.
part-time recreational officers for One Arm Point and Djarindjin, and the funding is only for a period of three years.\textsuperscript{25}

This situation may deteriorate further with funding cycles in some cases getting shorter and shorter, with some programs now being funded only on a twelve-month basis. This is in contrast to the situation in Canada where Federal policy is based on 'the need for reasonably stable, predictable and flexible funding arrangements for Aboriginal governments and institutions'.\textsuperscript{26}

The reasons for poor Aboriginal service delivery and social outcomes are complex, and I am not suggesting that recognition of a right to Aboriginal self-government in itself would address all of them. But it would at least provide a starting point. It could create a more stable policy environment, and give Aboriginal people who have an intimate understanding of current problems and of how to deal with them the power to establish priorities in allocating public resources. It could also result in long-term government to (Aboriginal) government funding arrangements that would greatly increase the likelihood that public funds allocated for Aboriginal people would actually end up being spent on them rather than on non-Aboriginal citizens or on bureaucrats and consultants.\textsuperscript{27}

However Australian governments lack any serious interest in pursuing the issue of Aboriginal self-government as one potential mechanism for addressing poor service delivery and social outcomes. For example, when proposals for regional governance structures emanate from Aboriginal Australians, government side-tracks them into bureaucratic committee activities which fail to result in substantive outcomes.\textsuperscript{28} This reflects a wider government agenda designed to maintain, essentially unchanged, the existing governance arrangements for development of policy towards, and delivery of services to, Aboriginal peoples and communities. Even critics of existing policy and institutional arrangements fail to identify or explore the possibilities offered by linking native title and Aboriginal self-government.\textsuperscript{29} Any serious discussion of Aboriginal self-government is also largely absent from wider political debates regarding Aboriginal policy in Australia.\textsuperscript{30} One way to place the issue squarely on the

\textsuperscript{25} Ibid, 131. For other examples, see ibid, 147–8, 150, 155, 226, 234, 237.

\textsuperscript{26} AANDC 2014a, above n 5.

\textsuperscript{27} On this last point see Marcia Langton, ‘How the Aboriginal Vote Won the NT election’, The Monthly, October 2012, 83.

\textsuperscript{28} This was certainly the experience when Kimberley Aboriginal regional organisations attempted to engage the Commonwealth and Western Australia governments on the establishment of a regional governance framework in the context of LNG development in the Kimberley.

\textsuperscript{29} See for example Michael Dillon and Neil Westbury, Beyond Humbug: Transforming Government Engagement with Indigenous Australia (Seaview, 2007), 207–17.

\textsuperscript{30} See, for example, Sanders, above n 23.
political agenda is to push for recognition of an inherent Aboriginal right to self-government as a component of native title.

**Dealing with the Corporate Sector**

Large-scale resource development in Australia is dominated by corporations which have access to substantial financial, human and technical resources and, as a result, are in a position to wield significant political leverage. In order to ensure that the corporate sector operates in a way that maximises opportunities for Indigenous economic participation, Aboriginal Australians need either a capacity to regulate relevant aspects of the corporate activities, or the ability to maximise exercise of the market power represented by recognition of native title, or a combination of the two.

It could be argued that corporate social responsibility (CSR) policies constitute a third potential plank on which to build Indigenous economic participation. Most major mining and oil and gas companies in Australia have stated policies that commit them to enhancing the economic benefits that Indigenous people and communities derive from their operations. The content of those policies and commitment to them in practice vary considerably from company to company.\(^3\) In some cases they are general in nature and offer little by way of specific commitments or resources, while in others they are detailed, substantive and well-resourced. This variability is in itself a significant problem because for Aboriginal people it introduces a ‘luck of the draw’ element into their economic participation equation. In addition, in my experience, most corporate negotiators play hard ball when negotiations with Indigenous communities reach a critical stage, and will tend to ‘read down’ company policies so as to part with as small a share of project revenues as possible. Such behaviour can be seen as unavoidable and indeed as a laudable pursuit of shareholder interests, but given the institutional framework within which native title negotiations occur (see above), it often results in bruising experiences and poor outcomes for Aboriginal people.

A broader and fundamental problem is that unless they have found expression in contractually binding agreements, companies may abandon policies favourable to Aboriginal economic participation as a result of changes in company ownership, the changing priorities of a new CEO, or shifts in economic conditions.\(^3\) For example a number of companies in Australia have severely curtailed their community engagement activity as a result of the recent deterioration in commodity prices. Aboriginal communities have no mechanisms at their disposal that would allow them to prevent such changes and the negative consequences they

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\(^3\) Robert Goodland, ‘Responsible Mining: The Key to Profitable Resource Development’ (Institute for Environmental Diplomacy and Security, University of Vermont, April 2012).
bring. There can be consequences for companies if they fail to honour existing commitments or dilute CSR policies, in terms of ‘community backlash’ and negative publicity. Yet at their core CSR commitments are essentially voluntary, and as such can offer Aboriginal people little assurance that their interests will be protected, particularly over the longer term.

Reliance on CSR policies can constitute a particular problem in the area of contracting and business development, where even under buoyant economic conditions there may be an unwillingness on the part of company managers to ‘bite the bullet’ and undertake the changes to standard business procedures required to allow Aboriginal businesses to establish themselves in highly-competitive markets. A downturn in the economy can justify maintenance of an approach that focuses on short-term cost minimisation, including an insistence on using lowest-cost suppliers without any allowance for the need to build Aboriginal business capacity.

This discussion highlights again the importance of Aboriginal self-government, of placing Aboriginal peoples in a position where they are engaging with corporate actors from a position of (albeit constrained) political power, and not simply as the objects of corporate initiatives or as holders of limited legal rights. Recognising an inherent Indigenous right to self-government could help achieve greater consistency in Indigenous access to the economic benefits associated with major resource projects both across companies and over time.

Where corporate commitments are enshrined in legally binding agreements, then in principle the road to Aboriginal economic participation should be more certain. However there is often a wide gap between promise and performance. The factors behind this gap have been canvassed in the literature and need not be discussed in detail here. They include a lack of relevant detail, of implementation resources and of incentives for implementation embedded in agreements; turnover and a consequent lack of commitment to agreements among mining company and Aboriginal community personnel; limited capacity to pursue implementation among native title groups and NTRBs; and limited education and business skills among potential beneficiaries. In relation to the last two points, development of Aboriginal governing institutions could play an important positive role, by developing general governance and institutional capacity that could be applied to the specific area of agreement implementation and by building education, training and business development infrastructure.


Aboriginal self-government could also assist in developing a more strategic approach to the pursuit of business opportunities, an approach which, with some exceptions, is often lacking in Australia. Such an approach can involve, for example, agreement between different Aboriginal groups to specialise in particular lines of business, such as catering, security services, cleaning, labour hire, transport, earth moving and contract mining; and creation of consortia of Aboriginal businesses to pursue major contracting opportunities such as site preparation and mine closure. Aboriginal self-government can play a critical role in allowing implementation of such strategies as it has done, for example, in Canada’s Northwest Territories.

Conclusion
Despite the challenges they face, Aboriginal people in some of Australia’s resource-rich regions are grasping economic opportunities created by recognition of their native title rights. But progress in this regard is highly uneven, both between companies, projects and native title groups within regions, and across different parts of Australia. More even, more rapid and more sustained progress in unlocking the economic potential of native title can only be achieved if the inherent rights of Aboriginal people not only to their ancestral land and sea country, but also to govern themselves, are recognised.

This does not mean that Aboriginal people should remove themselves from Australia’s economy and social ‘mainstream’, it does not mean secession, it does not mean a separate ‘black state’. It means the negotiation of autonomy within the Australian state, in the same way as Canada’s Aboriginal peoples are negotiating autonomy within Canada, or Bougainville has negotiated autonomy within Papua New Guinea. The political challenges involved in getting the issue of Aboriginal self-government onto the political agenda are formidable, and the challenge of winning acceptance for the need for Aboriginal political autonomy even more so. But until this happens, Aboriginal people will be involved in an endless struggle not only to extend the progress they have made, but also to hold on to existing gains.

Recognition of the inherent right of Aboriginal peoples to self-government within the Australian state would provide a basis for redefining relations with Federal and State governments and help address the current malaise in Aboriginal affairs policies in Australia. It would also provide a much firmer basis on which Aboriginal people could engage with the private sector, helping to address the highly variable and short-term nature of corporate commitments to Aboriginal economic participation. In particular it would allow Aboriginal people to consolidate and build on the gains they make in negotiations with individual developers, and help avoid the current relentless struggle to reaffirm their right to economic participation in successive project negotiations. Change on this scale will not happen quickly, but it must be pursued if economic participation is to be widely available within Aboriginal
Australia. In the short term, major changes to the NTA and to funding mechanisms for negotiation of native title agreements are essential if recent positive developments in some of Australia’s resource regions are to be consolidated and replicated more widely.

There is an urgent need to place Aboriginal self-government squarely on the table as an issue that must be addressed in the context of native title. Only then can Aboriginal people start to develop and apply coherent, consistent long-term policy and implementation frameworks that can allow them to use native title as a basis for their full economic participation. Such an outcome is not achievable as long as almost every decision by Aboriginal political authorities can be second-guessed or undermined by private industry or the State.

In the late 1990s debates regarding native title settlements, especially in the context of regional agreements, highlighted the importance of linking native title, self-government and economic participation.35 Patrick Sullivan, for example, saw regional agreements as being not just about establishing ‘a clear framework concerning access to and use of land and resources’, but also about defining new political relationships with government and about enabling ‘indigenous societies to develop self-governing institutions and an economic base’.36 We need to reignite these debates.