HISTORIC TENURE CERTAINTY PROJECT – A TOOL FOR SHARING THE KNOWLEDGE, SHARING THE FUTURE

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Paper prepared for presentation at the
“2015 WORLD BANK CONFERENCE ON LAND AND POVERTY”
Abstract

In many countries around the world, states and others seeking to promote development need to engage in some way with indigenous land rights and use claims.

The High Court of Australia first recognized the existence of native title in Australia in 1992, many years after it was first acknowledged in some other settled colonies. The slow progress of claims for native title since that time has continued to frustrate native title parties, as well as governments and third parties.

It is well documented that recognition of native title and tenure certainty are essential steps to enable indigenous participation in economic development.

This paper discusses a collaborative project which provides early access to historic tenure and other information relevant to land rights and land use, to allow knowledge to be shared, and assist parties work towards a shared future with benefits for all.

Key Words: access to data, land rights, tenure security, transparency
Disclaimer and acknowledgements

This paper makes reference to a current project of the National Native Title Tribunal (NNTT) which is a pilot mapping project developed in conjunction with a consortium of South Australia Native Title Services (SANTS), relevant agencies of the South Australian government and the NNTT. Except where directly expressed in the context of the project, the views and opinions provided in this paper are mine and not those of the NNTT. In working on this paper I have had the benefit of assistance from staff of the NNTT, and thank in particular Dr Debbie Fletcher, Mark McInerney, Lisa Eaton and Rosalind Hanf. Finally I thank Professor Jon Altman for his generosity in graciously allowing me to draw on his material for inspiration.

Introduction

Tenure security is underpinned by the certainty that a person’s rights in land will be recognized by others and that those rights can be protected. It was not until 1994, over 200 years after European settlement, that legislation was enacted in Australia providing for the recognition and protection of indigenous rights in land. The “recognition” process provided under the Native Title Act 1993 (Cth) also validates and confirms the gradual dispossession of indigenous peoples from their traditional lands as colonial settlement expanded and the Crown granted rights to others.

Tenure security can provide opportunities for investment and the accumulation of wealth and in some cases encourage business development. But security of tenure, through recognition of rights, is about more than just economic assets. Recognition of native title can provide a source of identity, status and political power and serve as a basis for the pursuit of other rights. The Australian Government has repeatedly called for native title to be used as a tool to bring about positive change for social, cultural and economic purposes.

But having belatedly recognized the legal concept of native title and provided for its formal recognition through a statutory claims process, the slow progress of native title claims to completion continues to frustrate and to undermine the political rhetoric in relation to self-determination and economic advancement of indigenous people.

The current process for recognition of native title in Australia requires native title claimants to prove continuity of customs and traditions and uninterrupted connection to the claimed land back to the time of European settlement. It also requires governments to provide tenure information about grants of rights which extinguish or affect native title rights.

A significant barrier to the progression of native title claims is the time it takes for state and territory governments to release and assess land tenure information. It is common for a native title claim group to invest considerable human and financial resources on preparing a claim, to find that historic and extinguishing tenures are disclosed well after the claim is made and quite often towards the end of the
claim process. This can significantly undermine any potential positive outcome for claimants and can lead to the misdirection of resources not only for the claimants but also for the Court and respondent parties. In some cases, knowing the limited extent of the native title which could be determined – once the effect of historic and extinguishing tenure is taken into account – may have led the native title claimants to pursue another outcome, rather than continuing with a litigated approach.

The importance of early disclosure by governments of tenure information is underpinned by the prohibition in the Native Title Act on claiming native title where it has been extinguished. Without access to extinguishment information, the decision making processes of indigenous people concerning their native title claims, and in respect of any prospective development on their traditional lands, are clearly impaired. Other stakeholders dealing with lands overlapped by native title claims, particularly industry, have also repeatedly sought earlier clarity of tenure information to assist in providing project certainty and clarity of process.

The native title claim process, which involves the collection and analysis of tenure material, both indigenous and non-indigenous, has developed over the past 20 years from a then paper based environment to emerge in a time when digital information is prevalent and the use of collaborative geospatial technologies has become the norm. Through geospatial processes, material documenting indigenous connection to land can be collected and displayed by cultural mapping initiatives; non-indigenous tenure information can be similarly analyzed and mapped. Early and transparent holistic tenure mapping will also serve to assist the native title system in Australia to more effectively apply the United Nations principles of indigenous free prior and informed consent in land use dealings.

This paper discusses a collaborative approach based on providing early access to tenure and other information relevant to land rights and use, to allow knowledge to be shared, and assist parties work towards a shared future with benefits for all.

Setting the Scene

Australia is a continent with a land area of about 7.692 million square kilometers, about five per cent of the world’s land mass. It is the sixth largest country after Russia, Canada, China, the United States of America and Brazil. Australia’s land mass is only slightly smaller than the United States, about 50 per cent greater than Europe and 32 times greater than the British Isles.

Australia has three levels of government, each having its own responsibilities, although sometimes these responsibilities overlap. The three levels are:
- Federal Parliament\(^1\) which legislates for the whole of Australia
- six state and two territory parliaments which make laws for their state or territory
- over 560 local councils which make local laws, called by-laws, for their region or district

These levels of government are illustrated graphically at Figure 1.

The three level system of Australian Government was an outcome of federation in 1901, when the six British colonies - New South Wales, Western Australia, Queensland, Victoria, South Australia and Tasmania – united to form the Commonwealth of Australia.

Up until the 1850s each colony was administered by a governor appointed by the British Parliament, but by 1860 all the colonies, apart from Western Australia, had been granted partial self-government by Britain. Western Australia became self-governing in 1890. By the end of the 19\(^{th}\) century, many colonists felt a national government was needed to deal with national issues such as defence, immigration and trade.

The Australian Constitution sets out a legal framework for a federal system of government, with power shared between the federal government and the state governments. Under the Constitution the states kept their own parliaments and most of their existing powers but the Federal Parliament was given responsibility for areas that affected the whole nation. State parliaments, in turn, gave local councils the task of looking after the particular needs of their local communities.

The population of Australia is estimated at 23.7 million people of which three per cent (711,000) identify as Aboriginal or Torres Strait Islanders. There are no accurate estimates of the population of Australia before first European settlement, which occurred in 1788. Smith (1980) estimates the absolute minimum pre-1788 population at 315,000 while other estimates put the figure at over one million people (Butlin, 1983). More recently, archaeological evidence suggests that a population of 750,000 could have been sustained (Australian Bureau of Statistics [ABS], 2010, p. 201).

The entire continent was in the possession of indigenous nations until 1788. In their classic book, *The World of the First Australians*, Ronald and Catherine Berndt describe an ancient continent inhabited by around 500 tribes, each having a territory from which they believed they had been created (Berndt & Berndt, 1977, pp. 32-3). In *Mabo v Queensland No 2* (1992) 175 CLR 1 (*Mabo No 2*) at p. 99, Deane and Gaudron JJ observed that in 1788: “The boundaries of their traditional lands were likely to be long-standing and defined.” Norman Tindale’s Map of Tribal Boundaries in Aboriginal Australia published in

\(^1\) In Australia the term ‘parliament’ refers to an assembly of elected representatives, which has one or two ‘houses’, and which makes laws for the country or state/territory.
1974 (Figure 2) shows his understanding of territorial connections of indigenous groups to land across Australia at the time of European contact.

However, in the eyes of British law at the time, all ownership of the lands of the Colonies vested in the Crown upon “settlement”.

Thus, in 1788, when Captain Arthur Phillip “took possession” of the colony of New South Wales (the western boundary of which was defined to be the 135th meridian), in the eyes of the law at that time, all rights in land vested in the Crown. In 1825 the British government moved the western boundary of New South Wales to the 129th meridian and redefined the southern boundary to create the separate colony of Van Diemens Land. In 1829 the British government took possession of the remainder of the continent, west of the 129th meridian, establishing the colony of Western Australia.

After European contact, the indigenous population decreased dramatically with the impact of new diseases, repressive and often brutal treatment, social and cultural disruption, disintegration and sustained dispossession of their lands as settlement of the colony expanded (ABS 2010, p. 210). Dispossession from lands was followed by dispossession from family as governments, Federal and state, implemented an assimilation policy with a strategy of removing children from their indigenous parents. In the face of concerted criticism of the “meagre achievements” of the assimilation policy, the denial of civil rights that it entailed and the poor international image it gave Australia, the Federal Government began to reform the system within its own jurisdiction. In the early 1960s it lifted restrictions on eligibility for benefits, extending the federal franchise, and removed various legal disabilities. The states found themselves under pressure to follow suit and most discriminatory state legislation was soon repealed (Gardiner-Garden 1999, p. 3). In the early 1970s new policies of indigenous “self-determination” and “self-management” began to emerge (Gardiner-Garden 1999, p. 6).

In terms of land ownership, from the late 1960s to the present there has been a period of legal “repossession” of indigenous land, first through land rights legislation which involves the grant of interests in land to indigenous Australians as a means of compensating them for the traditional lands which had been taken from them, and then later through native title which involves the recognition of pre-existing rights and interests land and waters. The dispossession of indigenous Australians from ownership of land and subsequent restoration through statutory grants and legal recognition of native title

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2 See cases such as Attorney General v Brown (1847) 1 Legge 312 (NSW), Cooper v Stuart (1889) App Cas 286, Williams v Attorney-General (NSW) (1913) 16 CLR 404 and Randwick Corporation v Rutledge (1959) 102 CLR 54, discussed under the heading “Australia’s Land Rights/Native Title Journey”.

3 For more detail on the history of the Australian colonies and the creation of land borders, see Carney (2013).
is vividly illustrated, with a “cartographer’s eye”, in a series of maps showing “A snapshot of Indigenous held land 1788-2015”: see Figure 3.  

In his forthcoming chapter on “The Political Ecology and Political Economy of Indigenous Land Rights in Australia”, to be published in French in 2015 (Altman, 2015), Professor Altman expands on his 2014 paper, referring to the two tranches of law which have driven indigenous “repossession” of ancestral land in Australia and documents this “land titling revolution” in a series of cartographic maps based upon official data. In its consideration of indigenous land tenure mapping, this paper draws on much of the work of Professor Altman in this area, and I gratefully acknowledge the assistance I have received from his material.

This paper returns later to the use of the cartographer’s eye as a means of illustrating non-indigenous tenure, both current and historic, and the indigenous “estate” in Australia, including statutory rights and cultural mapping of country. But it is useful first to consider the journey of Australia’s legal recognition of land rights and native title, and to place it in an international context.

**Australia’s Land Rights/Native Title Journey**

The instructions given to Captain Cook in August 1768 when he sailed for the Pacific were as follows:

> With the Consent of the Natives to take possession of Convenient Situations in the country in the Name of the King of Great Britain; or, if you find the Country uninhabited take Possession for his Majesty by setting up Proper Marks and Inscriptions, as first discoverers and possessors. (Bennett & Castles, 1979, p. 254)

On 26 January 1788, settlement of Australia as a British colony began when Captain Arthur Phillip took formal possession, on behalf of the British Crown, of the whole of the eastern part of the Australian Continent and Tasmania. Despite the presence of people already living on the continent, the British Government proceeded to settle the land as though it was “terra nullius”, in the sense of “practically unoccupied”. Before the middle of 1829 the whole territory, now known as the Commonwealth of Australia, had been constituted a dependency of the United Kingdom (ABS 1908, p. 51).

The assumption of the Australian continent as terra nullius, or practically unoccupied, was confirmed in the few cases where indigenous entitlements arose as a peripheral issue. For example, *Attorney General v Brown* (1847) 1 Legge 312 (NSW) confirmed the rhetoric that the “waste lands” of the Australian colonies were in the exclusive possession of the Crown from settlement, and that any rights

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4 This series of maps is based on Altman (2014, p. 3 Figure 1), updated and reproduced here.
in land held in the colonies derived from Crown grant (p. 316). In Cooper v Stuart (1889) App Cas 286 it was stated that at the time of annexation to the Crown, New South Wales was “practically unoccupied without settled inhabitants or settled law” (p.291). The principle from Attorney General v Brown that, upon settlement, ownership of the lands of the Colonies vested in the Crown, was followed in Williams v Attorney-General (NSW) (1913) 16 CLR 404 and in Randwick Corporation v Rutledge (1959) 102 CLR 54. None of these cases were directly concerned with the rights of indigenous peoples.

It was not until 1970 that any legal action was brought in Australia raising indigenous claims to land at common law. In the meantime the Aboriginal Lands Trust Act 1966 (SA) had been passed in South Australia, establishing an Aboriginal Lands Trust to take ownership of Aboriginal reserves in South Australia. This legislation marked the first major recognition of indigenous land rights by an Australian government and was the commencement of the “first tranche” of indigenous repossession of land, generally referred to as “land rights” (Altman, 2015, p. 3). In 1970, Victoria enacted the Aboriginal Lands Act 1970 (Vic) and transferred the deeds of reserve land at Lake Tyers and Framlingham to indigenous communities under Trusts established for this purpose. The Federal Government enacted the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) in 1976, which enabled Aboriginal groups in the Northern Territory to claim title to unalienated Crown land and Aboriginal owned pastoral leases based upon traditional affiliations, with a grant of title made on the recommendation of the Aboriginal Land Commissioner. Existing Aboriginal reserves could be transferred to traditional owners without the need for a claims process. Land rights schemes, recognizing traditional interests in the land and protecting those interests by giving indigenous people legal ownership of land, are now also place in Queensland, New South Wales, South Australia, Victoria and Tasmania.

The ongoing “legal fiction” of terra nullius remained problematic for common law recognition of native title. In the case of Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141, the Aboriginal inhabitants of Gove Peninsula in Arnhem Land argued that mining leases granted by the Crown were invalid, and that their rights held under traditional law and custom had survived the acquisition of sovereignty, unless terminated by the Crown. The action was dismissed on the basis that the doctrine of communal title did not form part of Australian law (pp. 244-5), and if it did, that title was extinguished by opening the land to grant to colonial settlers (p. 253), relying on the line of cases commencing with Attorney General v Brown, outlined above. The High Court of Australia expressed reservations about

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5 South Australia has since enacted the Pitjantjatjara Land Rights Act 1981 (SA) and the Maralinga Tjarutja Land Rights Act 1984 (SA), also providing for indigenous ownership of identified areas.
the Milirrpum decision in Coe v Commonwealth [1979] HCA 68 referring to the question of whether aboriginal people had rights and interests in land which were recognized by the common law as “an arguable question if properly raised” (para 15).

Tindale’s Map of Tribal Boundaries as at European contact (Figure 2), published in 1974, is an important record of indigenous cultural history, contradicting the legal view of the time that the continent of Australia was practically unoccupied at 1788.

It was not until 1992 that the misconception that Australia was unoccupied in 1788 was finally disproved by the High Court in the case of Mabo No 2. By a majority of six to one, the High Court ruled that native title to land is recognized by the common law of Australia, throwing out forever the legal fiction that when Australia was “settled” in 1788 it was terra nullius, in the sense of being practically unoccupied.

In Mabo No2, Justice Brennan had this to say about the doctrine of exclusive Crown ownership of all land in the Australian colonies:

The proposition that, when the Crown assumed sovereignty over an Australian colony, it became the universal and absolute beneficial owner of all the land therein, invites critical examination. If the conclusion at which Stephen C.J. arrived in Attorney-General (NSW) v. Brown be right, the interests of indigenous inhabitants in colonial land were extinguished so soon as British subjects settled in a colony, though the indigenous inhabitants had neither ceded their lands to the Crown nor suffered them to be taken as the spoils of conquest. According to the cases, the common law itself took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land exclusively in the control of the Imperial authorities without any right to compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live. Judged by any civilized standard, such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned...(para 28)

Even though the High Court confirmed that native title existed at the time Australia was settled and that native title rights persisted after the assumption of sovereignty, the gradual dispossession of indigenous people from their land by expanding settlement of the Australian continent was confirmed. As Justice Brennan explained:

The dispossession of the indigenous inhabitants of Australia was not worked by a transfer of beneficial ownership when sovereignty was acquired by the Crown, but by the recurrent
exercise of a paramount power to exclude the indigenous inhabitants from their traditional lands as colonial settlement expanded and land was granted to the colonists. Dispossession is attributable not to a failure of native title to survive the acquisition of sovereignty, but to its subsequent extinction by a paramount power. (para 63)

And further:

As the Governments of the Australian Colonies and, latterly, the Governments of the Commonwealth, States and Territories have alienated or appropriated to their own purposes most of the land in this country during the last 200 years, the Australian Aboriginal peoples have been substantially dispossessed of their traditional lands. They were dispossessed by the Crown's exercise of its sovereign powers to grant land to whom it chose and to appropriate to itself the beneficial ownership of parcels of land for the Crown's purposes. Aboriginal rights and interests were not stripped away by operation of the common law on first settlement by British colonists, but by the exercise of a sovereign authority over land exercised recurrently by Governments. To treat the dispossession of the Australian Aborigines as the working out of the Crown's acquisition of ownership of all land on first settlement is contrary to history. Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. Their dispossession underwrote the development of the nation. (para 82)

Australia’s slow journey to recognition of native title can be contrasted with the experience of related common law jurisdictions. The existence of land rights of indigenous people which persisted after the assumption of sovereignty under settler colonialism was first acknowledged in the United States in the foundational decision of Chief Justice Marshall, *Johnson v M’Intosh*, 21 US 543 (Supreme Court 1823). New Zealand was the second jurisdiction in the world to recognize aboriginal title in *R v Symonds* (1847) NZPCC 387 (Supreme Court), based upon the common law and the Treaty of Waitangi (1840). As early as 1888, aboriginal title was recognized as subsisting in Canada by the Privy Council in *St Catherine's Milling and Lumber Co v The Queen* (1888) 14 App Cas 46 (Privy Council). Interestingly, Aboriginal title was recognized in Papua New Guinea by the High Court of Australia in *Geita Sebea v Territory of Papua* (1941) 67 CLR 544 decades before native title was recognized as existing in Australia in *Mabo No 2*.

Following *Mabo No 2*, the Federal Parliament passed the *Native Title Act*. This is the “second tranche” of law said by Professor Altman to be driving indigenous repossession of ancestral lands in Australia (Altman, 2015, p. 3). The *Native Title Act* was passed with the purpose of recognizing and protecting native title, which had existed for thousands of years and was not necessarily lost when the Australian colonies were established. It also confirms the dispossession of indigenous land “parcel by
parcel”, by providing for extinguishment of native title by the granting of interests in land inconsistent with native title, or the appropriation of land to the use of the Crown. The Act then provides a process for native title to be claimed and determined where it has not been extinguished.

By contrast with native title, land rights legislation (the first tranche of indigenous repossession) gives to indigenous Australians certain rights to obtain statutory title to land as a means of compensating them for the traditional lands which have been taken from them.

**Recognition of Native Title under the Native Title Act**

Native title is the recognition in Australian law that some indigenous people continue to hold rights to their land and waters, which come from their traditional laws and customs.

Section 223 of the *Native Title Act* defines the native title rights and interests that are the subject of a determination of native title under section 225 of the Act. In section 223(1), the term “native title or native title rights and interests” means:

the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
(c) the rights and interests are recognised by the common law of Australia.

This definition gives rise to two key legal questions. One question is to ask whether, under the traditional laws and customs of the group of indigenous people claiming native title, are their claimed rights and interests based on their traditional connection to the claimed area? The other question is whether “recognition” is refused because of actions the government has taken, or allowed others to do, over a particular areas that are inconsistent with native title. “Extinguishment” means to not recognise native title rights and interest because of actions taken which are inconsistent with native title continuing to exist. For example, a grant of exclusive possession (e.g., freehold) would be totally inconsistent with the ongoing exercise of any native title right or interest so that native title would be extinguished in its entirety. By contrast, the grant of a lesser interest, such as a pastoral lease, which permits use of the land for a particular purpose but allows for co-existing interests, would extinguish any “exclusive” aspect of native title but would still allow native title rights and interests to co-exist.
with the pastoralist’s interests. The question of extinguishment therefore relies upon tenure information going back to the first grants made in the relevant area.

A practice has developed where the two legal questions are asked in sequence, with native title claimants being asked first to prove connection, before the court turns to consider extinguishment.

However, this approach is complicated, and perhaps compromised, by the prohibition in section 61A of the *Native Title Act* on claiming native title over areas where it has been totally extinguished, or claiming exclusive native title over areas where any exclusive aspect of native title has been extinguished. Leaving the question of extinguishment until after connection has been established arguably turns the process contemplated by the *Native Title Act* on its head, as it leaves the question of the actual area claimed until near the conclusion of the claim, and may result in significant delays in resolving matters.

It should be noted here that although the *Native Title Act* is a Federal Act, it is the states who are the primary government respondents in native title claims, and as land administrators hold the tenure information which is relied upon to establish extinguishment. There may be some tension between the rhetoric of the Federal Government, albeit supported by states and territories, calling for earlier resolution of native title claims, and the “on the ground” actions of state governments who have the onerous task of preparing complete tenure histories for claimed areas.

**Tenure and Economic Development**

The recognition of native title is an integral first step in enabling native title parties to actively participate in economic opportunities.

There is ongoing acknowledgement by Federal and state governments of the importance of resolving native title, and a commitment to improving the native title process. This has evolved in conjunction with a maturing native title system, and a shift to see native title in a broader social and economic context rather than just a legal process for achieving specific outcomes.

In her 2008 Mabo Lecture (Macklin, 2008) the then Federal Minister for Families, Housing, Community Services and Indigenous Affairs recognized native title as being critical to economic development, with properly structured property rights to land being a key component in expanding commercial and economic opportunities.

The Federal Government 2009-10 budget committed additional funding of $50.1 million over four years to “improve the operation of the native title system and realize the potential of native title to contribute to closing the gap in Indigenous disadvantage and improving economic outcomes” stating that “[t]he faster
and more efficient resolution of native title claims will provide certainty to all stakeholders and remove barriers to investment and the building of infrastructure on Indigenous land” (Australian Government, 2009).

The same policy imperative was evident at the meeting on 18 July 2008 of Federal, state and territory native title ministers who discussed progress toward national reforms to the native title system. According to a communiqué issued at the conclusion of that meeting (Ripper, 2008), this reform agenda includes “the development of innovative policy approaches to native title agreement-making to deliver broader, more practical outcomes to Indigenous Australians”. Ministers committed their governments to taking “a more flexible view of the ways to achieve the broad range of practical outcomes possible from native title processes — achieving real outcomes for Indigenous people and providing certainty for other land users”

In her speech made in the House of Representatives in May 2012, on the 20th anniversary of the Mabo native title decision (Roxon, 2012), the then Federal Attorney-General said:  

The government’s vision for the native title system is for faster, better outcomes, with a focus on economic development for Indigenous communities and sustainable agreement-making. We need to keep working to meet those objectives so that, 20 years hence, we can see the continuing development of the system; a system where native title rights can be appropriately leveraged by native title holders to support Indigenous communities on an intergenerational basis while maintaining the flexibility to accommodate others with an interest in land and its uses. (p. 6460)

At a meeting in December 2014, Federal, state and territory ministers responsible for native title confirmed their commitment to work cooperatively to improve the efficiency and effectiveness of the native title system to the benefit of native title holders, indigenous people, land owners, local communities and other stakeholders. Ministers discussed opportunities to improve the efficiency and effectiveness of the native title system (Attorney-General’s Department [AGD], 2014).

Just as the recognition of native title is a key component in economic advancement, so too is tenure certainty (whether from an indigenous or non-indigenous perspective) for potential investors in land.

Industry in Australia has been actively involved in commentary on the native title process and legislative changes, with the focus being on certainty of tenure and process. Illustrating the importance of tenure security in relation to economic development in Australia, a Western Australian Industry Working Group (IWG) report (Department of Mines and Petroleum [DMP], 2009) stated that “the effective and efficient administration of processes contemplated by the Native Title Act…is critical for the development of
projects in remote and regional Western Australia” and recommended “there be a renewed focus on resolving native title claims” (p. 5).

The importance industry places on tenure certainty is further illustrated by submissions provided by the Western Australian Chamber of Minerals and Energy (CME) (2013) and the national Association of Mining and Exploration Companies (AMEC) (2013) to a parliamentary inquiry into proposed amendments to the Native Title Act. Both organizations strongly opposed proposed changes on the basis that they would undermine “one of the stated objectives” of the Act, which was “to deliver certainty to all parties through the resolution of native title” (CME, 2013). AMEC observed that their members’ “strategic objective is to secure an environment that provides clarity and certainty for mineral exploration and mining in Australia” (AMEC, 2013).

A clear picture of the tenure position early in land use dealings would go a long way to providing this certainty and would greatly assist in narrowing the issues for discussion between the interested parties.

**Progressing native title claims**

The need for tenure certainty is a driver for earlier resolution of native title claims. The preferred approach embedded in the Native Title Act is resolution by agreement, although the process provided for determination is litigious and hence inherently adversarial.

Just as Australia was frustratingly slow to recognize native title; the slow progress of native title claims to completion has continued to frustrate. The statistics tell the story.

As at 31 December 2014, 263 determinations have been made in relation to claimant applications. Of those determined, 33 have been litigated, while the remaining 230 have been resolved by consent between parties.

**Figure 4** shows the cumulative rate of determinations and reflects the rise in determinations made over recent years due to the concerted effort by the Federal Court. However as at 31 December 2014, there remained 328 current claimant applications. Of these 328 applications:

- 115 (or 35%) were lodged within the past five years
- 40 (or 12%) were lodged between five to ten years
- 105 (or 32%) were lodged between 10 to 15 years
- 68 (or 21%) were lodged earlier (i.e., 15 years plus)

**Figure 5** shows the geographic extent of native title claims and determinations as at January 2015.

A significant barrier to the progression of native title claims is the time it takes for states and territories to access, analyze and release land tenure information. The question of extinguishment of native title is
made more complex by not only the inclusion of current tenure, but the requirement under the *Native Title Act* to consider previous acts in relation to dealings on land, and particularly “previous exclusive possession acts” under section 23 of the *Native Title Act*. The detail of these acts is often buried within archived documents held by state and territory governments and predating any digital systems, or not yet included in digitization programs. The complexity of identifying and accessing these archival documents which record “historical tenure”, digitizing them and analyzing the extinguishing effect on native title is significant. Governments have been reluctant to expend extensive resources on historical tenure research until there is certainty that a native title claim will proceed to a determination. As a result, it is common for a native title claim group to invest considerable human and financial resources on preparing a claim, to find that historic and extinguishing tenures are disclosed well after the claim is made, and often towards the end of the claim process, which significantly undermines any potential positive outcome for claimants.

The present sequential, non collaborative approach to questions of native title is contributing to delays in the resolution of claims. As a result of lack of access to complete tenure information in relation to a claim area, including historical tenure, native title claimants and other parties expend significant time and resources considering large “boundary” claims where extinguishing tenure results in only small portions of land being able to be claimed. An example of this is at Figure 6, showing the Kooma People #4 Part A determination, where native title was determined in respect of only 9.29% of the area within the external boundaries of the claim because of extinguishment.

If native title claimants have ready access to extinguishment information at an early stage, it would inform their decision making, including whether to pursue the option of resolving their native title claims through an “alternative settlement” process.

Indeed, the knowledge of extensive extinguishment in the area of six native title claims in the south west of Western Australia, up to 95% in some of the regions, led to the native title claimants seeking an alternative settlement with the Western Australia state government. Figure 7 graphically illustrates the extent of the extinguishment over the claimed areas. The alternative settlement requires native title claimants to agree that no native title exists in the area of the claims, in return for a comprehensive package of benefits which includes recognition of traditional ownership, land, a significant “future fund” and a range of other commitments from government. Kelly and Bradfield (2012) explain the basis for pursuing the “Noongar Native Title Settlement”. After four years of negotiation, agreement in principle

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6 Previous exclusive possession acts include the grant of freehold estates of the grant of certain leases that confer rights of exclusive possession over particular land or waters (for example, a commercial lease, an exclusive agricultural lease or a residential lease). A previous exclusive possession act must take place before 23 December 1996.
has been reached, and the native title claim groups are now being asked to decide whether to authorize the making of the agreement. In this case, the decision to enter into negotiations for an alternative settlement came after lengthy litigation on “connection” and with the prospect of relitigating that aspect of native title. It was at that stage that the Western Australian government and the South West Aboriginal Land and Sea Council entered into negotiations about the options open to the Noongar people, including consideration of the impact of the extent of extinguishment in the claim areas. This consideration, “coupled with the estimated decade or so it would take to work through the tens of thousands of land parcels in the area to figure out if the extinguishment event did happen after 1975” so that compensation might be payable (Kelly & Bradfield 2012, p. 15), contributed to the decision to enter into negotiations towards a non-native title outcome.

Having recognized the difficulty of proving native title in Victoria, and acknowledging the extent of extinguishment in developed areas, the Victorian government worked with indigenous groups to develop a state-based means of settling the native title claims, as an alternative to the litigious processes provided by the Federal Native Title Act. As a result the Victorian Traditional Owner Settlement Act 2010 was enacted, providing for an out-of-court settlement of native title. The Act allows the Victorian Government to recognize traditional owners and certain rights in Crown land. In return for entering into a settlement, traditional owners must agree to withdraw any native title claim made pursuant to the Native Title Act and not to make any future native title claims. Since the Traditional Owner Settlement Act came into effect, a number of native title claims in Victoria have been resolved by agreement:

- In October 2010, the GunaiKurnai were recognized as native title holders over lands in Gippsland in Victoria’s south-east under the Federal Native Title Act, and they also signed the first agreements under the Victorian Traditional Owner Settlement Act. In this case the Victorian government agreed that a formal determination of native title by the court was appropriate because of the years of work that had gone into recognizing the rights of the GunaiKurnai people since their native title claim was first made in 1997.

- On 27 July 2011, the Gunditjmara and Eastern Maar peoples’ native title rights and interests were recognized for an area of their traditional country in south-west Victoria by a consent determination made under the Federal Native Title Act.

- On 28 March 2013 the Dja Dja Wurrung and the Victorian Government reached a landmark native title settlement over lands in central Victoria by entering into a Recognition and Settlement Agreement under the Victorian Traditional Owner Settlement Act.
Knowledge that there is little or no extinguishing tenure is similarly important to native title claimants in deciding whether to pursue their claims, with the potential for an “exclusive possession” outcome. Figure 8 shows the determined Pilki claim which was made over land with no underlying tenure with the result of exclusive possession native title.

It is worth noting that there are limited exceptions in the Native Title Act where prior extinguishment can be disregarded so that exclusive possession native title can be claimed, despite underlying historic tenure. These exceptions apply pastoral leases held by native title claimants (section 47), reserves and areas held for the benefit of Aboriginal peoples or Torres Strait Islanders (section 47A) and areas of vacant Crown land where one or more member of the native title claim group occupied the area at the time the claim was lodged (section 47B). If the complete tenure picture was available to native title claimants at an early stage, specific evidence required in order to meet the requirements to claim exclusive possession could be dealt with in the initial connection material. In practice this work is often not done until claimants know they are able to make a claim for exclusive possession in relation to an area, having regard to the historical tenure. Indeed, considerable delays are often caused by claimants’ representatives having to go back “on country” to collect evidence specifically to address the sections 47, 47A or 47B requirements.

Early provision of historical tenure information would also assist with the unnecessary filing of “#2#” claims - for example, the Badimia Peoples claim was first made in 1998, but because the process towards determination uncovered a parcel of “unallocated crown land” late in the proceedings, the Badimia Peoples #2 claim was filed late and separately in 2012 over that available area - some 14 years after the initial claim was made. There are many such examples across the country.

The key point is the need for decision making in native title to be based on having as much information as possible available to all parties early in the process, rather than the staggered approach that exists now. Just as government parties are assisted in their decision making by having information on connection provided by native title claimants, claimants are assisted in their decision making by having information on tenure provided to them. As the native title process presently operates, in most cases the information exchange is skewed in favor of the state’s decision making to the detriment of all parties.

The Aboriginal and Torres Strait Islander Commissioner, in his 2009 Native Title Report (Calma, 2009), called for a change in the “culture of native title”, highlighting the importance of the principle of free, prior and informed consent (FPIC) being reflected throughout the native title system (p. 61). He provided guidelines for effective engagement and consultation processes that promote FPIC (Calma 2009, Appendix 3). Subsequent Native Title Reports have continued to urge the adoption of FPIC principles in

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7 “Vacant crown land” is land held by the Crown which is “vacant” or not reserved for any purpose.
The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) promotes the right of indigenous peoples to give or deny their FPIC for projects that affect them, their land and their natural resources. The UNDRIP is an important human rights instrument even though it is not legally binding. It represents the commitment of governments to abide by certain principles and standards, and is based on human rights enshrined in other legally binding instruments. The UNDRIP was passed in September 2007 and was signed and adopted by all but four state members for adoption of the principles within their own jurisdictions. Australia did not sign off on the UNDRIP in 2007 but subsequently supported it in April 2009, thus expressing its wish to recognize and respect the rights of indigenous people in Australia as a foundation for getting better outcomes which benefit all Australians.

Two components of the FPIC convention that are particularly relevant to native title are “prior” and “informed”. Applying FPIC to native title means that native title parties have the right to be fully informed at an early stage of the progression of their claim in order to make informed choices about the manner in which they might resolve their claim, including by settlement. In relation to tenure, this means providing the relevant tenure information at an early stage prior to the native title party expending resources or making decisions in relation to the disposition of their claim. According to Goodland (2014) “fully informed” means that affected people know and understand as much about their own rights and the implication of the proposed project as do the proponents, so that both sides can negotiate with equality of information. Goodland explains that the need for information is so that “the weaker and more vulnerable of the two sides … understand their rights, specifically historic territorial rights: their rights to lands on which they have been living for generations, and their rights of access to the natural resources on which they depend” (p. 67). This highlights not only the necessity for earlier resolution of native title claims, but also the importance of providing tenure information at the earliest possible opportunity.

Federal government statements over many years have acknowledged the importance of early resolution of native title claims. In 2009, the then Attorney General wrote to the Aboriginal and Torres Strait Islander Justice Commissioner (Calma, 2009), recognizing that:

Real change in native title will only come through adjusting the behavior and attitudes of all parties in the native title system and how they engage with the opportunities native title can present. (p. 58)

State and territory governments also express a preference to mediation/negotiation over litigation and improved relationships between government and native title parties.

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8 The right to FPIC is also articulated in ILO Indigenous and Tribal Peoples Convention 169 (ILO 169) which deals with the rights of indigenous and tribal peoples. Australia is currently considering ratification of ILO 169.
Unfortunately, despite various initiatives for alternative settlements, already discussed, there are still a large number of undetermined native title claims where native title claimants remain “in the dark” about the extent of extinguishment over their traditional lands, which may be relied upon by states to defeat their native title claims. As a result, many claims, which may otherwise be ripe for resolution by agreement, remain unresolved in a litigious environment.

Figure 9 is a map showing potential native title extinguishment across Australia based on current tenure. Without the effect of historical tenure this map is indicative only and is not sufficient to meet the requirements for a determination of native title under section 225 of the Native Title Act, in particular the extent to which native title does or does not exist. Given the in rem\(^9\) nature of a determination of native title, it is necessary to record the position accurately for the benefit of native title holders, governments and third parties into the future.

**The Historic Tenure Capture Project – a Practical Approach to Progressing Native Title**

Positive partnerships between governments and indigenous groups are integral to developing new approaches to the resolution, preferably by settlement, of native title claims in a timely manner. This requires innovative approaches which optimize results through coordinated efforts. In this case, the principal focus is overcoming the present “blockage” arising from the need to access, analyze and release tenure information, particularly historic tenure, in order to progress native title claims.

An innovative and practical approach, which picks up the call for FPIC principles to be applied in the native title context, is to promote a transparent approach to responsible accessing, analyzing and sharing tenure information at an early stage. This approach reinforces the concept of government information as a “public good” (Wainwright, 1997). In discussing the importance of government information being accessible in a democratic society the Australian Law Reform Commission (ALRC) (1995) referred to government information as a “national resource”, its availability and dissemination being “important for the economic and social well-being of society generally” (ALRC, 1995, Ch. 2).

A small pilot project is being developed with a consortium of South Australia Native Title Services (SANTS), relevant agencies of the South Australian government, and the NNTT, working on a joint initiative that will provide a data collection and enablement activity to support:

- its work with the State of South Australia in progressing native title outcomes;
- Aboriginal people to exercise and protect their native title rights and interests;
- the ability of all people wanting to do works to determine what processes they need to go through to deal with native title issues; and

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9 A judgment in rem binds the whole world as opposed to rights and judgments between the parties.
• the participation of Aboriginal people in economic activities.

In short, this project will capture, digitize and index all historical tenure in the relevant areas of South Australia so that access for tenure analysis is easy and quick.

The project aims to markedly reduce the time taken to access historical tenure documents for current and future native title claims, thus speeding up resolution of native title claims. It will also result in the establishment of a native title tenure database which will be made available to indigenous people and others, populated by information and documents which are not readily available to them. In the future this foundation database may be customized and populated with information relevant to the particular indigenous groups and native title parties.

In practical terms, relevant tenure history will be accessible, in a useable database, to enable parties to determine where native title might exist and in what terms, or to determine where it might not exist and hence to negotiate access and use. Importantly it will enable parties to identify land which may be available as part of compensation for past acts affecting native title and which can then be used to generate economic and social benefits for Aboriginal people.

This is not simply a data sharing exercise. An important aspect of this collaboration is that the team acquiring, digitizing and indexing historical tenure will engage indigenous project team members and provide employment opportunities and training.

Other qualitative benefits include:

• increased understanding by indigenous people and other parties of land use by non-indigenous people
• a better understanding by indigenous people and other parties of relevant property rights
• an ability for interest holders to know precisely where native title exists and when they need to apply the processes of the Native Title Act for future developments
• easily accessible information that is relevant to decision making of indigenous people about their traditional country, in terms of exercising and protecting recognized native title rights and interests and in terms of knowledgeable participation in negotiations for economic outcomes benefiting indigenous people

Where a proposed activity or development affects native title by extinguishing it or by creating interests that are inconsistent with the existence or exercise of native title, it will be invalid to the extent it affects native title unless it complies with certain procedures set out in the Native Title Act. These procedures vary depending upon the nature of the activity, but generally give effect to the principle that, in appropriate cases, these activities should only be done after every reasonable effort has been made to secure the agreement of the native title holders.
An online interactive web portal will be set up to provide a faster and more timely service as a request for tenure discovery and provision of materials would be available online day and night with enhanced search tools. This will reposition native title parties from being recipients of information to being direct users, with the ability to search and analyze information online. The portal also provides a practical resource supporting legal representatives of native title parties to prepare, and mediate, native title claims. A benefit to all parties is that they can progress the analysis and resolution of tenure information during any negotiation phase. The portal will assist in identifying areas of dispute and allow all parties to be involved at an early stage. Including other respondent parties at an early stage will also, in many cases, serve to limit their involvement when their land interests are dealt with openly and inclusive. In terms of the native title claim process, it will also enable all parties to address at an early stage any specific requirements highlighted through a complete tenure picture. This will allow native title parties to address the exceptions to past extinguishment in sections 47, 47A and 47B, and include the research for the relevant information in their research program.

Beyond determination, the portal will also be a resource for future generations not involved in claims resolution to identify land over which native title rights and interests have been recognized or other access and use arrangements have been negotiated.

Although this pilot project is being developed in South Australia, it is intended that, on successful completion, the project could be rolled out to other Australian jurisdictions (depending on their tenure systems) to bring similar benefits there. Conceptually, it may well have application in other areas of the world to enable governments, indigenous people and other parties to working towards a more secure future for all in respect of land rights and use.

**Looking Beyond Recognition of Native Title**

It is also envisaged that the database will be available to others, both indigenous and non-indigenous, subject to appropriate protocols to address issues of privacy, security and ownership. This will allow the precise native title position in any particular area to be accessed and viewed, to allow for better management and planning decisions in a post-determination environment\(^\text{11}\). It will also be a tool for indigenous people to identify opportunities for economic activities.

Further, there is the potential for indigenous people to add additional layers of information for their own use: for example, identifying land that comes into the ownership of the group or its members other than by native title; identifying land that is subject to mining or other agreements with the group; and identifying land that has special significance for the group, whether on an existing register or not.

\(^{11}\)“Post-determination” refers to the period after there has been formal recognition of native title through a determination of the Federal Court.
Depending on the sensitivity of the information, different levels of access will be built into the portal. This aspect is discussed further in this paper.

At present, information gathered for the purposes of native title claims is used specifically for the purposes of achieving a positive determination in a particular native title claim. This information, however, is equally useful to support the ongoing management of lands beyond the determination which formally recognizes the existence of native title. Any process designed to progress resolution of native should also consider the ongoing use of that information in the context of the management of that land, and decision making by governments, native title holders and developers.

In essence, the ability for indigenous peoples to go from the identification of country for native title purposes to the use of that country for economic activity should be supported by open transparent access to information, and tools developed for re-use of the information as part of empowering indigenous people.

As an example of collaboratively moving from recognition of boundaries to supporting economic decision making, Landcare Research, a New Zealand Crown Research Institute, has developed a prototype tool called Visualizing Maori Land (http://whenuaviz.landcareresearch.co.nz/) which allows the viewing of Maori Lands along with geospatial information layers that provide information on land resource characteristics, land suitability and sustainable land use recommendations.

**Mapping and Map Portal Models**

Tenure mapping, including indigenous land mapping, using geo-spatial technology is not a new concept. Since the early 1970s tenure maps of historical indigenous presence in their land have played a significant role in legal and political campaigns to obtain legal recognition of ancestral territories or prior access to traditional resources (Poole, 2003). Such mapping models have been criticized for the potential to produce fixed “boundaries” conducive of conflict. No doubt this may be the case in situations where two different tenure systems, namely state tenure and customary tenure, are interposed without consultation. Conflicts within an indigenous community, and with other neighboring indigenous groups, may also arise during the mapping exercise (Hodgson & Schroeder, 2002).

The Universitat Autonoma de Barcelona through its TAPS Bolivian Study Team conducted a randomized experimental evaluation in the Bolivian Amazon between 2007 and 2009 looking at whether participatory mapping in fact increased conflict (TAPS study) and found such participation had virtually no effect (Reyes-Garcia et al, 2012, p. 1) noting other studies have concluded otherwise. The TAPS study acknowledged three explanations offered by political ecologists for the existence of some increase in conflict (Reyes- Garcia et al, 2012, p. 4):
the mapping brings to light overlapping uses without necessarily addressing power relations
the very process of delineating indigenous territories changes the desired outcomes
while empowering communities, the information brings to a head conflictive land tenure issues that may involve encroachment or overlapping group issues

Although these studies did not focus on indigenous Australians (but Amazonian and African tribes), in my experience the difficulties acknowledged are similar.

Cultural mapping\(^{12}\) is emerging in Australia as seen in the Ngarluma Ngurra Form project in the Pilbara region, the Yawuru Ecotrust project in the Kimberley region, and the Murray Lower Darling Rivers Indigenous Nations (MLDRIN) project in Yorta Yorta country and Ngarrindjeri country. As well as the portal, Visualizing Maori Land (referred to above), around the world we find various other mapping portal models including:

- Living Atlas (http://livingatlas.org/)
- Atlas of Living Australia (http://www.ala.org.au)
- Maori Land Online (http://www.maorilandonline.govt.nz/gis/home.htm)

The adoption and endorsement of any system is dependent upon acceptance of the role it plays in traditional processes. A useful practice is to describe the information system in the context of traditional practices.

In traditional terms the overarching focus of the project is to gather stories related to country, to go to meeting places to have conversations about these stories, and to use the knowledge to make informed decisions and agreements. Figure 10 provides a “systems view” of the historical tenure project.

“Stories” in the context of an information system relate to discrete datasets or layers of information. Each of these, whether they are derived from government sources or other forms of information are then “translated” to be useable in meeting places. In an information system this relates to the use of agreed system standards. For the purposes of this project, the historical tenure information tells the story of post settlement non-indigenous ownership.

A “meeting place” refers to the information portal where all stories can be placed. Part of this project includes the ability for the tenure story for both indigenous and non-indigenous people to be placed in a meeting place; in this case a web based geospatial information system. It is important that the system design also allow other parties to develop their own meeting places in the context of their own

\(^{12}\) In terms of content, there is little substantial difference between indigenous cultural mapping and tenure mapping, but they differ in intent. They both focus on the same kind of information, but tenure mapping is intended to provide tenure security; cultural mapping support cultural revitalisation (Poole, 2003).
requirements. This is achieved by using agreed technology standards to describe the ways in which stories can be accessed, acknowledging and respecting cultural and other sensitivities.

“Conversations” relates to the viewing of individual stories in context with other stories of country. For this project, this particularly relates to the post settlement cadastral and tenure system and the area contained within the claim of country.

This can be achieved either by simple overlaying of information, or by the inclusion of scripting and tools that can provide input to, or answer, commonly asked questions. For example: What is the state’s position on extinguishment for this parcel of land? What is the native title party’s position in respect of connection on the same parcel of land? If the state asserts “extinguishment” and the native title party relies on “connection” over the same parcel of land, then the scope of the conversations to reach agreement are defined.

These types of conversations lead us to towards the desired end, to reach agreement. Put another way, it generates the points of agreement and disagreement at an early stage and allows parties to concentrate on resolving those issues that are contested, rather than developing materials and expending resources in respect of areas which are not contested.

As already discussed above, this collaborative land tenure portal model, highlighting both historical and cultural tenure, is not just of benefit to the holders of the traditional knowledge being preserved, but also to the various other stakeholders with interests in the mapping areas such as various government bodies and industry (particularly mining). The model is also scalable to meet other needs, with additional stories (information) able to be added, opening up new conversations with the addition of those stories.

A further development is to incorporate “use and occupancy” mapping to allow Aboriginal people describe and present their contemporary land and water management objectives in a manner that builds on their traditional knowledge and perspectives and clearly expresses their future association with their country.

**Cultural Considerations**

Effective mapping creates a visual record of an indigenous group’s relationship with their traditional land and waters. However, the sensitivity surrounding indigenous sharing of use and occupancy tenure data cannot be ignored. Sharing information about cultural heritage can be problematic for Aboriginal people and may contravene cultural protocols as well as disempowering them. Gender restricted evidence provides its own source of tension (DMP, 2004).
The mining industry acknowledges that “many Aboriginal people and groups are reluctant to provide sensitive cultural information to third parties. Often, they are concerned that this information can be divulged to inappropriate persons or used in an inappropriate manner” (DMP, 2004). As O’Faircheallaigh (2008) notes “the public release of information that is supposed to be secret causes great anguish, and thus people are reluctant to release it unless a site is in imminent danger. However if they do not initially reveal the existence or importance of a site and later to do in an attempt to prevent damage, they are in danger of being accuse of ‘inventing’ the site” (p. 32). This has been affirmed by Aboriginal parties. The Dharriwaa Elders Group (2014) noted that the reluctance of local Aboriginal people to provide site location information to be held on government databases is “because there have been instances, which are remembered by [Aboriginal people] where places have been destroyed once they have been identified” (p. 16). This group suggested reforms needed to ensure confidentiality and security of such information. Further, they argued that “information provided by local Aboriginal committees must not be managed by a government agency, but an independent body with expertise, policies and values trusted by Aboriginal communities” (p. 16).

Ritter (2003) talks about the complexities of the Western Australian Aboriginal Sites Register. As Ritter puts it “[t]he bargain enshrined in the Aboriginal Heritage Act then, is that in exchange for surrender of the power/knowledge of Aboriginal culture, the colonial authority provides a contingent degree of protection” (p. 206). Indeed heritage registers contain an inherent tension in the suggestion that Aboriginal cultural heritage can be demarcated, identified whereas, it is far more complex and nuanced than this.

By learning from the criticisms of Aboriginal heritage legislation in Australia surrounding cultural sensitivity and ownership issues, use and occupancy mapping portals can better manage these tensions.

Culturally appropriate technology developments must complement existing oral traditions, and must engage with specific cultural practices, for example, naming taboos which prohibit the use of a person’s name after death (Turk and Trees, 1998, p. 266).

Harmsworth (1998) looks at a framework for geographic information systems (GIS) designed to accommodate restricted, confidential or sensitive cultural information in the context recording traditional Maori knowledge in culturally sensitive ways. Khan (2014) reviews the literature on approaches to integrating indigenous knowledge in GIS, and draws on Harmsworth’s work). He explains (p. 69) that collected information is classified and stored in a framework, where it is spatially represented in the form of layers, illustrated in Figure 11. Each layer is characterized by different levels of detail, sensitivity and confidentiality, which together determine the degree of access at each level. Information too sensitive or
confidential to store in a GIS can be linked via a database directory to an individual person, allowing additional information to be obtained from an alternative knowledge source.

It is anticipated that similar frameworks could be adapted in Australia to ensure that culturally appropriate mechanisms are put in place to ensure that cultural sensitivities and protocols are fully respected.

**Conclusion**

The historic tenure project captures Justice Brennan’s words in *Mabo No 2* explaining: “Dispossession is attributable not to a failure of native title to survive the acquisition of sovereignty, but to its subsequent extinction by a paramount power” (para 63). The project not only provides the tools for an accurate tenure analysis highlighting dispossession by extinguishment, but goes further and also records pre-sovereignty knowledge, laws and customs of the original occupiers of Australia, much of which has survived to this day as native title, but is yet to be formally recognized by a determination made under the *Native Title Act*.

Moving towards a collaborative approach to early sharing of information relevant to the determination of native title in a manner easily accessible to interested parties also provides the opportunity for meaningful (and early) consultation between governments and indigenous groups over land management and use, and can be a powerful tool to avoid conflict. Involving indigenous project team members in acquiring, digitizing and indexing historical tenure takes the project beyond collaborative sharing of data to active collaboration which engages all participants in the native title process to achieve better outcomes and provides indigenous people with some direct ownership in the process.

The early sharing of information enables better decision making by indigenous groups, as well as governments and developers, including in relation to proposed projects that may be of economic benefit and present future opportunities for indigenous people. It also supports the principles of indigenous free prior and informed consent in native title and land use dealings and breaks down the indigenous/non-indigenous demarcation of knowledge which the current system maintains.

In short, the project helps deliver on the Federal Government’s vision of a native title system with faster, better outcomes, a focus on economic development for indigenous communities and sustainable agreement-making (Roxon, 2012). In addition to accelerating the native title determination process, and encouraging agreement making, it will provide the “attitudinal change” necessary to revitalize the “potential for economic empowerment through native title” (Brennan, 2012).

When considering ways to build on the Yawuru determination of native title in and around Broome, Western Australia, Yu (2013) says:
As Aboriginal groups, governments and industry explore ways to build workable relationships in post-native-title Australia, cultural mapping methodologies are emerging as a vital tool to assist negotiations and apply the United Nations principles of “free prior and informed consent” regarding development proposals on indigenous lands.

This approach would see traditional owners interfacing with governments, land users and local authorities who aim to map their country using geospatial technology. A series of maps based on traditional indigenous knowledge, Western science and official data would be overlaid as comprehensive database of cultural, social, historical and environmental evidence that could form an important element of a postcolonial relationship. These maps should be fundamental to future regional planning and development methodologies. (p 26)

The historic tenure certainty project takes this approach back to the current native title environment, predetermination, so that it can truly be a map for the future by:

- building collaborative relationships;
- sharing knowledge;
- allowing for better decisions made on a fully informed basis; and
- empowering indigenous groups to participate in economic activities.

The project enables governments, indigenous people and other land users to work collaboratively towards a shared future with benefits for all Australians.
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FIGURES

Figure 1: Three levels of government in Australia
Source: Parliamentary Education Office Image Library
Figure 2: Tribal boundaries of Aboriginal Australia, Norman Tindale 1974

Figure 3: A snapshot of Indigenous held land 1788-2015

Source: Adapted by NNTT Geospatial Services from Altman 2014, p. 3 Figure 1.
Figure 4: Cumulative claimant determinations (also depicts cumulative determinations – native title exists)

Source: Prepared by NNTT from data held in NNTT Registers.
Figure 5: Geographic extent of indigenous estates, claims and determinations as at January 2015
Source: Prepared by NNTT Geospatial Services.
Figure 6: Native title determination, showing significant extinguishment (Kooma People #4 Part A)

Source: Prepared by NNTT Geospatial Services.
Figure 7: Potential native title extinguishment South Western Australia Native Title Claim Areas by tenure type (not including historical tenure)

Source: Prepared by NNTT Geospatial Services.
Figure 8: Native title determination, no extinguishment. (Pilki People)

Source: Prepared by NNTT Geospatial Services.
Figure 9: Potential native title extinguishment by tenure type (not including historical tenure)

Source: Prepared by NNTT Geospatial Services.
Figure 10: Historical tenure project systems view.

Source: Prepared by NNTT Geospatial Services.
Figure 11: GIS layers and confidential sub-layers