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Native Title: A window of opportunity for Indigenous Australia

by Christian Gergis | November 5, 2015

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Christian Gergis from the Financial Services Council explores the new phase of post-recognition native title and explains why the key question is now about how Aboriginal and Torres Strait Islanders protect and grow the native title monies they have fought long and hard for.



It's now over twenty years since the landmark **Mabo decision of the High Court dismissed the concept of terra nullius (that Australia belonged to nobody at the time of British settlement), paving the way for the 1993 Native Title Act.** Today, according to **Reconciliation Australia**, native title has been recognised over around 15 per cent of Australia, or more than one million square kilometres.

Having struggled through the courts for the recognition of their rights to land and waterways over the last two decades, Indigenous communities have negotiated agreements with governments and resource companies whereby communities receive payments or royalties for access to their country.

Typically, charitable trust structures have been created to manage the money that has flowed through. Today, there are hundreds of native title trusts across the country, with billions of dollars under management.

In 2015, we are in a new phase of native title: post recognition of native title, and following agreements having been concluded with miners and governments. The key question now is how Aboriginal and Torres Strait Islander peoples use the native title monies they have fought long and hard for.

The Financial Services Council's licensed trustee company members are playing an important role in this next phase, helping communities to protect and grow these trust monies. Trustees manage the money in partnership with traditional owners to ensure it can benefit communities both today and for generations to come.

Working closely with Indigenous communities, trustees create the trusts, manage financial investments, and distribute funds to community beneficiaries. They are accountable and report to communities including through advisory councils comprised of respected local Elders.

Prudent management of native title monies is of course critical to the socio-economic development of Indigenous Australia – offering an opportunity to address entrenched disadvantage and bring down poverty within communities. Indeed with the lifespan of resource projects being limited – often only a few decades – it is imperative that the royalties received are carefully managed by the current generations and their advisers. Failing to do so will mean future generations will suffer.

Over a year ago, recognising this window of opportunity for communities and the need for trustees to build close working relationships with them, the Financial Services Council (FSC) and its community partner, the First Nations Foundation (FNF), decided to develop an industry standard around how native title services are delivered.

On 28 May 2015, during National Reconciliation Week, the **FSC Standard**, 'Cultural Capability in Native Title Services', was publicly launched at Parliament House, Canberra, with strong bipartisan support. The then Assistant Treasurer, **the Hon Josh Frydenberg MP**, and his shadow counterpart, **the Hon Dr Andrew Leigh MP**, spoke in favour of the Standard, recognising it as a good example of business and communities working together to raise the bar for corporate practice, without the need for government involvement.

At the National Native Title Conference in June, the Minister for Indigenous Affairs, Senator Nigel Scullion, stated that, **"the new [FSC] Standard will help communities make informed decisions about the best use of**

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the benefits they receive from development on their land and will set a benchmark in the financial services sector”.

While these political plaudits have been welcome, more importantly, the FSC Standard has attracted community endorsement and was developed with strong buy-in from Indigenous stakeholders. In particular, the Standard was drafted thanks to a working group comprised of FSC trustee members (including Perpetual and Equity Trustees), the FNF, Indigenous Business Australia, the National Congress of Australia's First Peoples, the Australian Indigenous Governance Institute, and Nyamba Buru Yawuru (being the traditional owners of the land around Broome, Western Australia).

By having representation from across the spectrum of Indigenous advocacy, business, governance and native title organisations, the Standard brought together representatives with the necessary blend of skills and experience. Requiring trustees and traditional owners to work collaboratively towards clear goals, the Standard encourages tailored, culturally appropriate financial services.

So what does the Standard actually do? It requires FSC trustee members to transparently disclose the services they provide, including fees charged, in a manner tailored to community needs and to recognise that English is not always Indigenous Australians' first language. FSC trustees must also support Aboriginal and Torres Strait Islander governance structures and communities, for example, through delivering appropriate financial literacy and governance training, noting that building capacity is crucial to their futures.

The Standard also helps with skills and knowledge gaps on the trustee side. It mandates that their employees complete cultural competency training, recognising that special training is needed to build sustainable, respectful relationships with the Indigenous communities they service. As part of this, trustees must partner with communities and take the time to understand their cultural values, histories and aspirations.

Further, trustees must work towards establishing a formal strategy to develop cultural capability, such as through the development of a Reconciliation Action Plan.

The Standard also requires trustees to adopt inclusive decision-making behaviour and values when managing native title trusts, including incorporating non-financial considerations, where they are able. This obligation recognises that since time immemorial, traditional owners have had unique relationships with their country, as well as with governance structures.

These principles are more than aspirational statements, as they bind FSC trustee members and require their annual sign-off at board level. We hope that other professional advisers who work with native title groups will look to the FSC Standard as representing a benchmark of good practice.

While we are proud that this Standard has been developed, we know it is just one small piece of the puzzle that is closing the yawning gap between Indigenous and non-Indigenous Australia. By arming traditional owners with sound professional advice and support, we hope that the opportunities which leaders like Eddie Koiki Mabo campaigned for can be realised. The next generation of Aboriginal & Torres Strait Islander peoples must reap the rewards of their struggle.



Christian Gergis is Senior Policy Manager & Legal Counsel for the peak representative body of the Australian wealth management industry, the Financial Services Council (FSC). Christian's primary focus is leading the FSC's policy agenda and advocacy to governments on issues affecting professional trustees. Prior to FSC, Christian worked at the Department of Foreign Affairs & Trade in Canberra and served as an Australian diplomat overseas, reporting on political and economic issues. Before DFAT, Christian was a commercial lawyer at Freehills in Sydney. Christian has also provided policy advice at the Department of Attorney General & Justice, NSW Government.

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