



QSNTS

Queensland South Native Title Services
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Native title is forever Need to play the long game



Through Native Title, we drive the achievement of Indigenous self-determination to redress the past, strengthen the present and empower the future



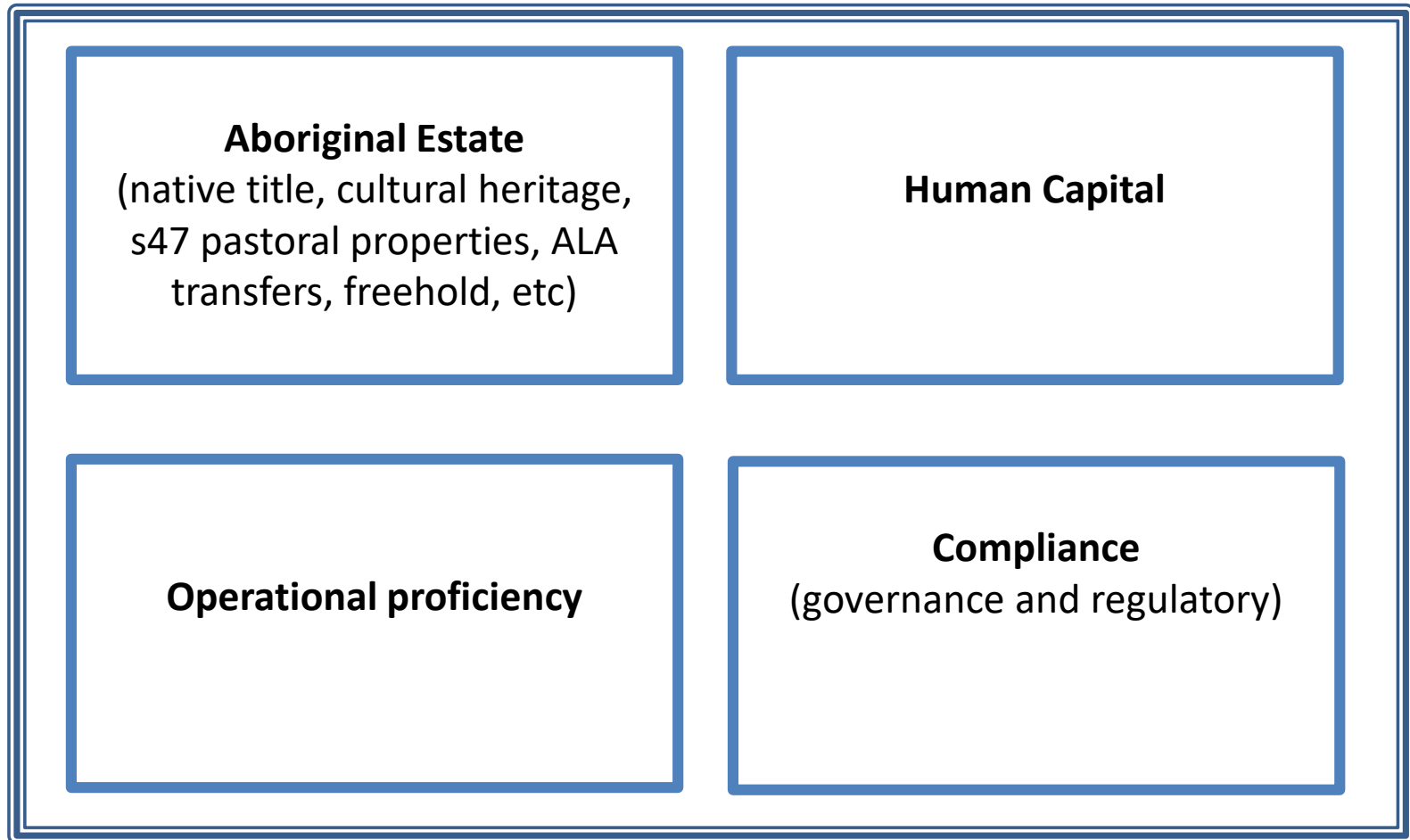
Native Title is forever – need to play the long game (comments)

A native title determination is an *in rem* judgment which means it runs with the land forever and is good against the whole world.

Similarly, claim-resolution ILUAs are generally couched in terms that have no end date so effectively they too last forever.

Hence the need to play the long game but also establish some key foundations early in the claim and post - determination phase that will put the native title group on the right trajectory.

Essentials – know what is inside the box



Essentials – know what is inside the box (comments)

There are four foundation areas that are critical to playing the long game. Native title holders and PBCs will need to seize the opportunities that flow from being legally recognised. A cautionary note is to be mindful of not getting too far ahead without setting solid foundations or exploring opportunities 'outside the box' before understanding what is required 'inside the box'.

Essentials – know what is inside the box (comments cont.) *Aboriginal Estate*

PBCs need to have an expansive view of your Country (or the **Aboriginal Estate**)..

Understanding what is in the estate both tangible and intangible and how the estate intersects with other legislative and administrative regimes projects confidence and control in interactions with third parties. It also strengthens your negotiation position.

Essentials – know what is inside the box (comments cont.) *Human Capital*

Native title is about people and place; “place” concerns the estate and “people” is about harnessing the power of your **human capital**, wherever the people live and regardless of their ages.

Harnessing the **human capital** of the Mob itself is key to protecting and sustaining native title for future generations to ensure native title last forever but also strengthening the individuals, families and communities that comprise the group.

Essentials – know what is inside the box (comments cont.) *Compliance*

Compliance should never be a 'dirty word' because missing or misunderstanding the boring, technical stuff can be the beginning of the end.

Understand the various legislative, regulatory and contractual regimes that must be complied with – all the exciting, creative and positive opportunities amount to nothing if we fail on compliance.

Essentials – know what is inside the box (comments cont.) *Operational Proficiency*

The biggest challenge for any new PBC will be securing a level of **operational proficiency** concerning both the **aboriginal** estate and **compliance** so you have the choice to undertake your own work or feel confident when engaging external consultants about your work.

Know the future act regime and the ability to charge fees under the PBC Regulations.

Understand the contractual benefits in the various ILUAs, s31 agreements and ancillary agreements. Operational proficiency enables PBCs to engage with, and strengthen the group's **human capital**.

Tools

- **Strategic Plan** – road map
- **PBC policies and procedures**
- Managing native title is largely about **managing agreements**
- **Negotiating better agreements** by leveraging existing relationships, tapping into grants, co-opting experience/capital through partnerships, JVs, etc

Tools – Comments

There are some helpful tools to assist PBCs and native title holders to secure what is 'inside the box'.

Tools – Comments *Strategic Plan*

A **Strategic Plan** is both a road map and a filter to keep focussed on agreed priorities and objectives.

The saying, 'fail to plan, plan to fail' is particularly important for PBCs because of the complexity, importance and consequences of the matters they must contend with.

PBCs can struggle with the lack of opportunities but, sometimes, there can be an over-abundance of opportunities. Either way, a clear strategic plan helps PBCs navigate this complexity and prioritise effort.

Tools – Comments *Policies and Procedures*

Policies and procedures help PBCs navigate the operational and compliance challenges as well as provide consistency in organisational decision-making regardless of the changes in PBC Boards.

Tools – Comments *Managing your Agreements*

Whilst the Native Title Act spells out rights, responsibilities and powers in a general way, your native title agreements will deal with the specifics; hence, managing your native title is really about managing your agreements.

Tools that assist with **managing your agreements** will make you **operationally proficient**. QSNTS has an electronic agreements database called TraKS that can assist with this important task.

Tools – Comments *Better Agreements*

Native title holders have developed considerable negotiation experience and skills in the claim phase and with future act agreement-making.

Better agreements will be negotiated when that experience is applied and enhanced but also leveraged by drawing upon key stakeholder relationships and maximizing diverse resource streams (grants, future act monies, in-kind support, etc).

Short Term Challenges

- **‘Settling the ground’** – managing Board/Member/Native Title Holder relationships; reflect upon the claim journey
- **Consolidating the Estate** – gap areas, shared country or contested overlaps, trans-border claims
- **Building appropriate structures** – re-think the PBC structure (is it fit for purpose), utilise subsidiary companies, do claim-phase entities need to be looked at
- **Compensation** – understand the concept, know the risks, devise a plan

‘Settling the ground’- Comments

PBCs have an additional challenge to other corporations in that they have to manage the complex three-way relationships that exist between the PBC Board, PBC members and native title holders.

Understanding the **Compliance** regime that regulates these relationships is critical to discharging the obligations.

It also helps PBC’s to positively draw upon their **Human Capital** and reducing (or at least managing) the negative impacts of disputes within those relationships.

Consolidating the Estate - Comments

For strategic legal reasons 'core country' claims may have been pursued first and other areas 'parked' due to potential overlap issues. Whilst it is important to manage the recognised determination it is important to also consolidate the **Aboriginal Estate** as soon as possible after the determination.

Resolving the remaining claim areas will not be smooth or easy. Native title holders (and their PBCs) need to start these discussions as soon as possible to understand the evidence, the implications and the challenges.

Building Appropriate Structures – Comments

Building appropriate structures is important. There is no 'one size fits all' model when it comes to PBC structures and related entities. A balance must be struck between protecting the native title which is the primary responsibility of an agent or trustee PBC, but also putting in the right corporate structures that protect the PBC from the risks associated with commercial activities so the native title group can be economically independent.

This balance needs to take into account the relevance of the PBC rulebook and the structure of related entities. It also means having an objective look at the administrative burden and transaction costs associated with having too many entities or entities that were incorporated during the claim-phase that are no longer appropriate after the determination.

Compensation – Comments

Compensation, is what is commonly known as a 'second generation' native title issue.

QSNTS would urge PBCs and native title holders to hasten slowly because everyone is waiting for the outcome of the High Court appeal in the first compensation case (known as the 'Timber Creek' case) and there is likely to be follow-up cases and appeals that will modify the law. Compensation cases have risks so understand the compensation judgments, know how those principles apply to your specific circumstances, develop a strategy that does not erode the negotiation position (particularly if the costs of pursuing a compensation claim exceeds the compensation awarded) and know the implications that adverse findings in compensation trials might have on existing native title determinations.

