

Boyer Lectures

Lecture 3: Old barriers and new models. The private sector, government and the economic empowerment of Aboriginal Australians

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Part of [2012 Boyer Lectures](#)

In her third lecture, Professor Langton illuminates the experiences of two Aboriginal communities who are leveraging economic advancement through agreements with mining companies, and examines why it is that the private sector is leading the way in forging new working models with Indigenous Australia while government policies lag far behind.

Transcript

Ten years ago, I asked a young Aboriginal man working on a mine site if he enjoyed his job. He was on a team with a 12-hour daily shift, working a cycle of rosters for two weeks on the job, then one week off, and his home was about four hours drive north of the mine. Confronted by a nosy older woman like me, he mumbled his answer: 'Yeah.' 'Why is that?' I asked. 'I'm out of the community for a couple of weeks and I don't have to put up with the fighting.' I asked him if he had saved any money. He had bought a house, he said. He was a member of a team that provided mechanical repair and other services to other units in the operation, and some of the team members were young Aboriginal men in training. His blunt answer reverberated in my mind. I thought about the changes in his life that employment must have wrought. It had given him some financial freedom and freedom from the *Sturm und Drang* of community life where interpersonal, inter-family and inter-clan conflict sweeps up everybody into a never-ending monsoon of suspicion, accusation, abuse and violence. Young men, as much as young women, all too often are the victims.

His matter of fact declaration of his hard won ticket to freedom jolted me out of any sense of complacency about the benefits of jobs at the mine. The ripple effects were visible and important. Others at the mine also saw the extraordinary changes in the lives of young people who stepped into this world, and it motivated them to set bold targets for Aboriginal employment. The employment levels achieved at this site have not been met at all mine projects. There are reasons for this, and in the case I address here, the absence of corporate social responsibility and a long history of blatant

injustice are two of them. Each case is different, however, and not all historical impacts are immutable.

The Argyle Diamond Mine Agreement negotiations took place from about 2001 to 2004, but the project itself had started back in the late 1970s. For three decades, the company's engagement with the local Aboriginal people was founded on a flawed and profoundly unjust 'Good Neighbour Agreement', as it was called. At best, it was implemented with benign incompetence, and at worst, it denied the traditional owners and neighbouring communities of any semblance of fair treatment in impact benefits, employment opportunities, and especially respect for their culture and sacred sites. All this began to change when Leon Davis, then chairman of Rio Tinto Ltd, made a headland speech that shifted the industry's paradigm led as it was then by Hugh Morgan's Western Mining Corporation. Davis's acceptance of native title and tilt towards respect for traditional owners enraged Morgan and other industry leaders, but led to the sophistication in agreement making that we witness today.

Like the Argyle Diamond Mine case, there were other legacy projects that required native title negotiations in order to expand. In the case of Argyle and the Comalco Bauxite negotiations, apologies were given to the traditional owners, by Brendan Hammond at Argyle, and by Premier Peter Beattie in the case of Comalco. These apologies proved to be critical, not least because the traditional owners felt vindication at the acknowledgment of the injustices, but also because they set the benchmark for the relationship of the future.

The Gumatj and Rirratjingu clans of northeast Arnhem Land in the Northern Territory are also owed an apology for the imposition of a bauxite mine on their land, I believe, and as far as I know, none has been forthcoming. In 1973, Nabalco, a Swiss-Australian consortium, started mining and processing a 250 million tonne (one of the world's largest) bauxite deposit and established the new town of Gove, later called Nhulunbuy. Whereas the only signs of incursion in this vast Aboriginal homeland was the Methodist mission at Yirrkala, Dhupuma College and some infrastructure dating from World War 2, now there were a thousand white men building the refinery, port, mine infrastructure, the town and the longest conveyer belt ever in Australian history at that time.

The clan leaders had drafted a petition on bark to the Parliament in Canberra pleading that this should not proceed. The petition, now called, the Bark Petition, was expressed in English and Yolngu Matha and was painted with sacred designs. It was the first and, as far as I know, only petition to Parliament in an Aboriginal language. In 2007, Galarrwuy Yunupingu explained to an audience in Melbourne:

In 1988, with the late Arrernte leader Wenten Rubuntja, I led the Aboriginal people of the Northern Territory to make another bark petition, which is called the Barunga Statement. I presented it to the then prime minister Bob Hawke, who understood our reasoning. He wanted a treaty with us, but he was opposed in Canberra by both sides of politics.

At one point a few years ago I was so frustrated that I wanted to go and bring home the Barunga Statement from where it hung in Parliament.

It was prepared after great consultation with the traditional owners of the Northern Territory. It calls for Aboriginal self-management, a national system of land rights, compensation for loss of lands, respect for Aboriginal identity, an end to discrimination, and the granting of full civil, economic, social and cultural rights.

I am pleased that the Barunga Statement still hangs in Parliament.

But I had come to feel that its words had been so ignored that the best thing to do would be to get it out of the Parliament and take it home and bury it in a bark coffin.

My cousin, Wali Wunungmurra, who is the last living signatory to the original Bark Petition, told me recently that he wished to go and get that Petition and take it home also.

These are the frustrations that men like Wali and I live with.

There had been an inquiry, but to no avail. They decided to litigate. They brought the question of Aboriginal rights to land and the concept of native title before the courts for the first time in Australian history. The plaintiffs, 'asserted on behalf of the native clans they represented that those clans and no others had in their several ways occupied the areas from time immemorial as of right.' Their case, *Milirrpum v Nabalco Pty Ltd and the Commonwealth*^[1], or the Gove Land Rights Case, in the end was unsuccessful. They asserted their continuing ownership of traditional lands by challenging the validity of the Commonwealth Government's grant of mining leases over their territory. The cast of characters included Mr Justice Blackburn, legal counsel for the Yolngu plaintiffs Mr Justice Woodward, anthropologists WEH Stanner and RM Berndt presenting expert evidence; Shane Stone (later chief minister) as Woodward's associate, and Galarrwuy Yunupingu (later chairman of the Northern Land Council) as interpreter for the Yolngu witnesses. Justice Blackburn found that native title was incapable of recognition at common law.

Blackburn found that, indeed, 'If ever a system could be called "a government of laws, and not of men", it is that shown in the evidence before me'[ii]. He found, however, that this system of laws was not one that the Court could recognise.

He upheld the decisions of previous courts that the Crown was the source of all title to land, maintaining the status of Australia under the doctrine of *terra nullius*, and concluded that indigenous interests in land had not survived the acquisition of sovereignty and did not form any part of the law of Australia. The decision was made despite the fact that many other common law jurisdictions, particularly Canada and the United States, had in various ways recognised the existence of indigenous rights and interests[iii].

The decision was a tragedy, just as much a tragedy as the destruction of landscapes and sacred sites that followed, because it denigrated Yolngu laws and traditions.

This insult has never been forgotten.

The bauxite mine and its voracious culture in the territory of these clans poisoned relations between the Aboriginal people and each successive company that has owned it. The Yolngu people were marginalized in their own country. The impacts of the Australian mining culture of the last century went below the surface and caused anguish among the Yolngu men and women who witnessed these changes in the 1960s to their landscapes, beaches, waters, and ultimately their lifestyles. The parents of that period were shocked when many of their children became debilitated by alcohol, drugs, unemployment, and a new phenomenon, poverty. The elders rued the injustice and the impacts, especially the psychological impacts, with a growing sense of frustration and alienation, as each company that owned the mine refused to negotiate with them.

This changed five years ago when Rio Tinto Ltd acquired the Canadian company Alcan, that itself had acquired it from another company. The Rio Tinto Alcan agreement, or Gove Mining Agreement, was signed on 13 May 2011.

The agreement with Rio Tinto Alcan encompasses outstanding long term financial terms and opportunities to tap in to the regional economy created by the mine. Now operated by Pacific Aluminium, the downturn in bauxite prices globally has engendered caution among the parties and a sense of urgency. The Yolngu at last have an agreement governing the operation that gives them an economic stake in the region. No opportunity can be lost in this precarious situation.

For thirteen years, this clan has welcomed thousands of visitors at the annual Garma Festival of Traditional Culture, and engaged leaders from around Australia and the globe with their traditional hospitality and robust religious life. More than their cultural wealth has grown with each Festival. The clan leaders have been developing an economic strategy for some years, assisted by legal firms committed to Aboriginal people. They are transforming their traditional economy, culture and ceremonial life with the leverage that strong land rights have provided. They are reinstating the work ethic that underpinned their ancient and resilient society and building a diversified regional economy to free their members from the drudgery of poverty and indignity of welfare dependence.

Like their compatriots in Western Australia, the Yolngu have also turned to the resource industry as a springboard for business development. In 2007, the Gumatj clan established and became majority owners in a mining and exploration company, Dhupuma Resources Pty Ltd, and other corporations that conduct commercial and social enterprises. This year, at the Garma Festival, Gumatj executives signed an agreement with Geodynamics with the goal of establishing a geothermal project on Gumatj land to provide a much-needed source of energy for local industry.

With their own corporations operating, they are developing mining and other ventures on their own land.

Yet despite this drive to engage working age people in the workforce, very few Yolngu people work for the mine. Only a handful have ever worked there in the more than 40 years of its operation, and this refusal, I believe, is attributable to the sadness, grief and anger of the elders whose world changed with a sharp shock, an emotive or affective burden that has been passed down the generations, along with all the cultural wealth they have to offer.

Galarrwuy Yunupingu, whose presence throughout this history has been decisive, is like many of our generation: old school in his attitudes and habits. He is disciplined and stern. He has borne the mantle of conferred leadership with dignity and perseverance, taking his responsibilities seriously and working diligently. In a series of speeches, he has rejected the protectionist, welfarist approach in Aboriginal policy and demanded a sensible approach to economic development, and parity in education and employment.

The solution he devised to the sense of alienation and the discrimination of the white workers that excluded two generations of Yolngu from employment at the mine was to create Yolngu enterprises to create jobs. There are currently 40 men and women employed in clan projects that would not otherwise be in work. One involves harvesting the timber removed from the mine site and

elsewhere, and mobile sawmills are in operation producing timber for construction of houses, buildings and fine hand-crafted furniture. These have been developed with assistance from Forestry Tasmania.

Also, under the terms of the agreement, they will use the mine's batch plant and concrete casting moulds for the production of concrete, the Old Brickworks, and will purchase aggregate and cement at cost price. They have rights to scrap metal and construction steel for the purpose of house construction.

Gumatj have a preferential right to the waste management of the mine site and intend to establish a long term contracting agreement.

The opposition of green or environmental campaign groups to the timber business was a slap in the face for the Yolngu, who have run the most successful biodiversity and environmental conservation program through their Dhimurru Aboriginal Corporation for more than a quarter of a century. The media in Darwin covered with gusto the ludicrous complaints and assertions from the green campaigners and vilified Galarrwuy Yunupingu in an appalling way. This was a return to Jabiluka Camp tactics that involved years of bitterness and little result. But Galarrwuy's steady hand and approach won out, and all the claims were proved wrong.

The Gumatj projects are an example of diversification and coexistence: custom and cultural traditions of kinship are accommodated in their workplaces, with cousins working together and teams harmonised by having men and women in the correct customary and moiety relationships. They enter the Gumatj workforce without sacrificing their cultural selves. The obligation to attend ceremonies is no longer an excuse not to work, and the leaders, although not always heeded, demand a full workday. During ceremonies, the workers start early in the morning, work until 3.00 in the afternoon and arrive at the ceremony at 4.00 when the yidarki, or didgeridoo announces its commencement.

The success of this model lies in the affirmation by leaders of their commitment to land, culture and ceremony, a work ethic, and economic drive; all these values coexist and strengthen the group. But this renewal has come after 40 years of disappointment, anger and frustration. Galarrwuy and his fellow clan leaders have finally seized control of their destiny with a powerful vision of the future. Some might call this self-determination, but I have witnessed these leaders grow in intellectual understanding of their predicament, in their determination to solve problems, and to be their own agents, to join with committed people offering their expertise, and develop new institutions and

cultural innovations. The change is radical but incremental, and with each success, more challenges to face.

With the establishment of a new school at Gunyangara for their children this year, they are rapidly realising their vision. Yet, there is much more to be done in educating Yolngu youth. Work readiness is an industry term used to describe the necessary skills for employment: literacy and numeracy, a drivers license, safety training, and discipline. Galarrwuy Yunupingu, like all those people involved in the challenge of Aboriginal economic development, understands that education is the key. He is developing an education institution for the youth and adults of the region to give them the capabilities to make choices about their futures. He said in 2007, 'These children must have a future, which means economic development.'

This bauxite mine in northeast Arnhem Land, the bauxite mine in western Cape York and the Argyle Diamond Mine in the Kimberley region are referred to as 'legacy' projects. The meaning is a technical, legal one. After 1993 they required native title agreements to expand their operations or to renew leases. Their social and historical legacy before the advent of Aboriginal rights was a disgrace, and a long list of grievances were required to be addressed when native title rights enabled the traditional owners to bargain for a better deal. The native title agreements have achieved a measure of justice, and importantly, economic justice.

Seven years ago, the Minister for Indigenous Affairs, the Hon. Jenny Macklin, in a Mabo Day address, raised the issue of converting mining agreement payments to public funds to close the gap. A taxation regime to achieve this end was eventually outlined in a White Paper or Ministerial Discussion Paper. Only this year, after years of lobbying did the Commonwealth concede that these funds were not assessable for taxation purposes until they were distributed to native title holders. For almost five years, the taxation issues have been in question, making it difficult for many groups to plan and implement their strategies with a sense of security.

As we have seen, some native title groups have developed innovative schemes for investing the financial benefits of their agreements with mining companies in long term community and economic development. The poorest people in Australia, the first peoples, from whom all hereditary assets – land, waters, even stone tools – were confiscated, are investing the first payments ever in lieu of compensation in an economic future. Meanwhile, government policies and programs are rarely helpful in these situations. Only corporations and philanthropic bodies offer sensible financial and economic advice to these groups to give them the knowledge to operate in the market system effectively. These developments are in their infancy.

The native title regime has reached the crossroads where the 'market' and 'non-market' pathways of human social development have intersected. The effective native title negotiators arrived at this junction some time ago, while governments and sections of the native title industry are trailing behind them, these few canny lawyers from private firms and some Native Title Representative Bodies working with the traditional owners.

So what *are* the economic development policies at work in this arena?

Mining companies pay financial benefits in these settlements in lieu of the Crown obligation to compensate for extinguishment of native title. Because state governments have rarely honoured this constitutional and legal obligation, companies bear the cost. Why isn't there a 100 per cent exemption for all the costs of negotiated settlements with Aboriginal people, the costs of Aboriginal employment and training in the mining industry and the establishment of viable Aboriginal institutions to govern these arrangements? Instead of incentives to assist in this enterprise, there remain obstacles and disincentives in tax policy and practice, and corporate law and governance for this highly specialised area of Aboriginal development.

Taxation income collected by the governments ought to be allocated to the very regions and communal lands where the wealth was generated. While this would be the most intelligent policy response for a number of reasons, and accelerate Aboriginal employment, it would not by itself solve the fundamental problem.

In developing countries, natural resource account – a good example is the one established by the Timor Leste government – are regarded as best practice and designed to avoid 'resource curse' impacts and to secure a proportion of the profits from extracting mineral resources to enhance their living standards and to secure a worthwhile lifestyle for future generations. This is indeed one of the principal purposes of the Aboriginal trusts that receive native title payments. While the transaction costs remain high, the flow of payments will be reduced or nullified if the projects are unsustainable. Some, including the Nhulunbuy mine, are marginal because of commodity prices, debt structures, rising costs of labour and other factors.

The latest government reforms proposed for the not-for-profit sector, including charities, trusts and some of the entities typically operating in the Aboriginal domain, may be important. But the constant shadow of doubt over the policy and legislative arrangements in this area place already fragile Aboriginal governance and management initiatives in difficulty. Governments experiment far too much in the Aboriginal world. The change is constant and unsettling. A simple saying is

appropriate here: less is more. And while attempts are made to be less opaque, there is room for improvement in the involvement of Aboriginal people in the development of policies and laws.

Taxation incentives and a reduction in the extraordinary government regulation and surveillance of Aboriginal endeavours urgently require reform. The ability of small, and often geographically remote, Aboriginal groups to innovate and diversify as the Yolngu have is in jeopardy while governments and their agencies are sluggish, traditional and heavy-handed in their responses. How can these critical matters be improved? In another lecture, I address some of these issues.

[i] (1971) 17 FLR 141

[ii] (Blackburn 1971, FLR Vol 17, 10: 267)

[iii] See, for instance, *Johnson v McIntosh* (1823) 21 US 54.; *Worcester v Georgia* (1832) 31 US 515; *Mitchell v United States* (1935 34 US 711; *Calder v Attorney-General (British Columbia)* (1973) 34 DLR (3d) 145; *Re Southern Rhodesia* [1919] AC 211; *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 at 407.