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SYSTEMIC INNOVATION
IN NATIVE TITLE

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Centre for
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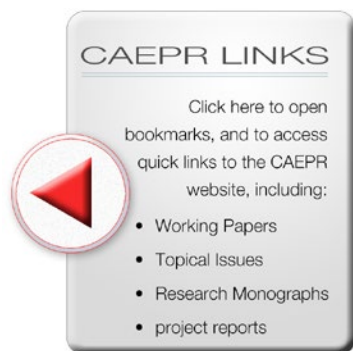
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Systemic innovation in native title

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Abstract

This paper explores the implications which flow from the fact that native title institutions comprise a complex system, or meta-system, and examines the extent and value of innovation within the native title system. It looks backwards to identify and assess a number of key innovations since the Mabo High Court decision, which had whole of system implications. It then looks forward to identify and consider potential future systemic innovations within the native title system. The paper concludes by suggesting that the quality of innovation in the native title system will have a significant impact on the nature and form of the national process of reaching an equitable settlement between mainstream and Indigenous interests in Australia.

Keywords: Native title, innovation, systemic innovation, compensation, taxation, alternative settlements, land management, treaties, demographic change

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Acronyms

AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ALRC	Australian Law Reform Commission
FaHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs
GPS	Global Positioning System
ILUA	Indigenous Land Use Agreement
NT	Northern Territory
ORIC	Office of the Registrar of Indigenous Corporations

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Introduction

Exploring innovation in native title can be addressed from a number of starting points and perspectives.

For present purposes, I have decided to focus on native title as a *system*, rather than on particular components or elements. I do this because there is a tendency to approach native title policy issues with circumscribed or narrow sets of skills, expertise and perspective.¹ Even native title holders and claimants have constrained perspectives in relation to the mainstream systems of laws, institutions, processes and social attitudes which seek to recognise, acknowledge, regulate and in some cases oppose their rights.

Even when we are conscious that native title is in fact a system, we have a tendency to conceptualise it in ways in which we are familiar, and our interactions with the 'system' are circumscribed and partial. Consequently, we can downplay the importance and influence of those parts of the system with which we are less familiar. Collectively, we can talk past each other. Indeed, the complexity of the native title system (Bauman et al. 2013) is such that it seems probable that no one person has the capacity to come close to fully comprehending the extent and impact of native title as a system. The Hindu parable of a group of blind men describing an elephant comes to mind.

A further issue which requires acknowledgment is that native title is a component or subsystem within an even broader notional Indigenous system of governance. While non-Indigenous knowledge systems distinguish between institutions of governance and property rights, Indigenous knowledge systems do not make and may not accept the same distinction. It is incontrovertible that before colonisation, Indigenous peoples both owned their country and operated a system or systems of governance which was largely based on links to country. There is an extensive literature laying out a normative case (that is, how things ought to be) for Indigenous sovereignty and self-government, and which argues that the *Mabo* decision did not go far enough in acknowledging this (e.g. McNeil 2012).

The focus on this paper, however, begins from a non-normative (or positive) analysis, which sets out to describe the native title system as it is, not how one might wish it were. Such a focus reflects the approaches, and importantly the mindsets of the courts, governments, and most interest groups, including many Indigenous groups who (perhaps reluctantly) accept the legal and policy parameters which operate to define and constrain the native title system. Opportunities and likelihood of change

are thus assessed in terms of the actual political and social dynamics in play, not some normative aspiration of how they might or should be. It is in this sense then that the focus here might be described as a public policy frame of reference.²

Native title systems

One obvious source of different conceptualisations of the native title system are professional and academic disciplines, including the informal domains which invariably accompany formal professional domains. For example, in relation to legal approaches to native title litigation, Paul Burke (2010:57) has pointed to the influence of what he terms the 'shadowlands' which shape and frame much of what eventually emerges into the formal judicial processes. Other conceptual frameworks derive from the position of an individual in the native title domain (claimant, title holder, third party landowner, third party resource developer). Yet other sources of conceptualisation relate to regulators, adjudicators and policymakers (public servants, politicians, lawyers, judges, archivists, media) involved either directly or indirectly in native title across eight jurisdictions, each with their own unique ancillary institutional frameworks. These frameworks encompass land tenure administration, environment protection, planning, and local government just to name a few obvious areas. It makes sense to conceptualise the native title 'meta-system' as a complex assemblage of dynamic, hierarchically nested and overlapping subsystems, linked by multiple networks of structured and informal interactions.³ The networks and thus the subsystems change over time in response to external and internal pressures and events.⁴

Moreover, the native title system can be conceptualised as also encompassing (in a negative way) those Indigenous interests that have been or are likely to be denied recognition of native title rights either as a result of the failure to meet the two legislative tests: the continuity of connection benchmark or the prior grant by the Crown of property interests over native title tenure which are inconsistent with the continuation of native title interests.

Given the multiple ways to conceptualise the native title realm, the native title domain is best understood as a complex meta-system comprised of dynamic and changing social, cultural, environmental or economic subsystems, which interact with a multitude of external institutional and political processes in ways which are virtually impossible to fully predict or comprehend. To be more specific, in such a meta-system, native

title holders will experience the native title system differently depending on their chronological position in the recognition/determination process, on whether there are third party interests interacting with their native title rights or their formal title, on whether there are competing claimants (or in the case of a determined title, competing aspirants for recognition as title holders), on whether the boundaries of their claim or determined title are accepted amongst neighbouring Indigenous groups, on the history of their relations to land and neighbouring groups, on whether the internal dynamics of the group are settled or fractious, on the laws and policies, both formal and informal, of the jurisdiction they reside in, and so on.⁵

Similarly, judicial interests will largely experience native title through the prism of relevant statutes and judicial precedents and legal processes, including the informal legal 'shadowlands' and will tend to give less comparative weight to the social implications of the issues facing the native title holder group. Importantly, there will be socially relevant ramifications of native title for native title holders which the courts and judicial officers will not recognise as relevant to their remit. So too, policymakers⁶ will relate to the native title system differently to judicial officers. Similarly, third party interests will experience the native title system in fundamentally different ways to judicial officers, or native title holders, or aspiring native title holders, or regulators, or policymakers.

There are a number of implications of acknowledging this fundamental cross-cultural complexity and inter-relatedness of the native title meta-system. First, it can lead to intellectual or conceptual paralysis: the systems are so complex that we decide it is impossible to seek to fully understand the ramifications or implications of any action relating to them. Second, and related to the first, it becomes unclear just how much (or how little) overlap or commonality exists between the various subsystems, and how much the dynamism within subsystems operates to change the shape of subsystems over time. Third, it obscures the existence and impact of political power differentials between interest groups and stakeholders.

One pragmatic or 'real world' response to the existence of a complex native title meta-system is to treat it as a caveat, a warning that there will always be unintended consequences, that full understanding is never possible. Intellectual humility is a precondition for any deeper understanding of the nature of the native title system, and (in a social science version of Heisenberg's uncertainty principle) even academic scribblers writing about native title, or more accurately promulgating ideas about native title, have the potential to impact and change the operation and even structure of native

title systems, perhaps in ways they never intended. A second pragmatic response to systemic complexity is to close our eyes and revert to a strategy of simplification, focusing only on those aspects of the system which are of relevance or salience to our present interests. This is not only perhaps the most common response to complex systems (particularly by bureaucratic or political actors), but also has much to recommend it. It is after all how we operate and indeed survive in our daily lives, for example, focusing on the cars approaching as we cross the street, and ignoring for that moment all else around us. In such a pragmatic world (many might call it 'the real world'), we thus frame the native title 'system' through a particular lens or lenses (say the law, or anthropology, or economics or a state's planning systems, or environmental systems, or Indigenous cosmology). We trade off analytical completeness for less complexity, hoping that the insights or findings of our analyses and perceptions are not negated by less visible or unforeseen outcomes.

Of course, in the absence of recognition or acknowledgment that multiple interconnected native title systems exist, or less absolutely, where an actor or interest group values a particular systemic 'lens' above alternatives, there is a greater risk that apparent system 'outcomes' will actually be partial and produce unrecognised or unintended outcomes beyond the systemic domain privileged by that particular lens. Moreover, the elision of power relationships allows outcomes which reflect those differentials to emerge, and be maintained, without critical scrutiny.

Innovation in native title systems

Innovation in a particular social or economic domain is generally understood to involve more than mere change and more than the mere facilitation of change.

The philosopher Daniel Little in a post on his blog *Understanding Society* on the topic of 'creativity, convention and tradition' defines innovation, in contrast to the conventions that define the production of a work of art, as 'breaking or stretching the rules' which determine the conventions of artistic practise at any point in time. He notes as well that convention and innovation operate in a dialectical relationship, such that novelty which makes no reference to the frame of tradition is incomprehensible and meaningless.⁷ Although the discussion relates to performative artistic action, he notes that the topic is relevant to understanding society more generally 'because this dialectic of convention, innovation and meaning making is virtually pervasive in everyday life' (Little 2009).

Just as artistic or performative innovation involves change to convention and is directed to the creation of artistic value, in social systems more generally, innovation involves *an element of deliberate action involving change which is aimed at the production or extraction of some greater social value*.⁸ This definition seems broadly synonymous with the notion of ‘reform’ used by governments and policymakers to describe the changes they seek to initiate.⁹ Yet systemic innovation is broader than policy reform insofar as it is not owned or the sole province of policymakers and potentially extends beyond change initiated by policymakers to changes initiated by other interests involved in the system. This mirrors the reality that in any complex system, there will be no single ‘owner’ or ‘controller’ guiding the system.

The production of greater social value is not necessarily economic or commercial in nature. The locus of value assessment is also important as different interest groups may value the same change differently, and indeed what is a (subjectively assessed) benefit for one interest group may be a cost to another. Just as not all change is unequivocally beneficial to all interest groups involved, similarly not all innovation is unequivocally beneficial to all. Where an interest group considers that a particular innovation or change will not on balance be beneficial, they have an incentive to oppose it or otherwise undermine it. Moreover, where an interest group considers that in relation to a particular innovation it will not be able to appropriate or control the substantial majority of the benefits arising, it may decide not to pursue the innovation even though it would deliver benefits to the interest group and notwithstanding that a wide array of interests would benefit.¹⁰ The creation of public value may still be opposed by those who are absolute beneficiaries but whose relative position vis-à-vis other interest groups is negatively affected.

A further element of innovation as generally understood, and which does not align with policy reform as usually articulated, is the focus on experimentation and risk-taking. This notion emerges from market contexts, where innovators (often entrepreneurs) generally have substantial autonomy (within legal and regulatory parameters) and take on financial risks individually.¹¹ Whether scope exists to introduce experimental approaches and activity into non-market contexts such as the native title system seems more challenging.¹² While the native title system encompasses elements of the market, it is likely that the native title system will more often act as an ancillary constraint or, in some perspectives, impediment to market activities (Kelleher 2013). Even so, there will be opportunities for experimentation and risk taking, albeit relevant actors such as native title holders will often bring

a range of non-market issues to the process of developing their attitudes to risk.

In the native title domain, the existing systemic complexity is coupled with the deep uncertainty regarding the likely outcome (whether absolute or relative) of any change to the system for particular interests, and the reluctance of interest groups to pursue changes which might lead to loss of benefits or influence. This suggests an endogenous institutional predisposition towards stasis or gradual evolution rather than towards innovation at the system-wide level.¹³ To the extent that systemic complexity drives pragmatic simplification (or over-simplification) by key interest groups, such a predisposition against innovation will not necessarily grant the system immunity from innovation and sudden change.

At a systemic level, the major potential sources of innovation in the native title system appear to be Indigenous advocacy, academia, the courts, business interests, and government policymakers. Importantly, the five identified potential sources of innovation operate within particular constraints:

- Indigenous policy advocacy is structurally weak, chronically underfunded and tends to be locally focused rather than focused on systemic reform (Dillon 2017).
- Academic engagement with the native title system is largely limited to anthropology, legal studies and, to a lesser extent, history. Each of these disciplines extend from time to time beyond independent analysis to the provision of contracted assistance to other interests. When academics are working independently, they are constrained by the comparative powerlessness of ideas when competing with vested interests.¹⁴ When they work as contracted experts, they are implicitly constrained by the agendas of the interests for whom they work (notwithstanding their formal status as independent experts assisting the court). Cowlshaw (2015:8) hints at a different and more radical point, suggesting that native title anthropology is too close to the state.¹⁵
- The courts vacillate between their roles as enunciators of the law as it stands, and progressive interpreters of the potential embedded within current legal institutional frameworks¹⁶ – but in each case they are reactive actors, dealing with essentially random disputes and issues on a case by case basis.
- Business interests engage with the native title system most intensely in relation to negotiations over claims (where commercial activities may be affected) and

land use (where proposed commercial activities are proposed), thus bringing a case specific focus to their interactions. However, it is clear that a number of the major resource development corporations have deep and ongoing engagement with the native title system and thus have an incentive to ensure the system overall operates in alignment with their corporate interests. Moreover, over time, the approaches adopted by the major corporations flow through to negotiations between second order business interests and native title interests, thus potentially driving systemic change.

- Governments are largely focused on mainstream policy agendas, and tend to see Indigenous issues as marginal and potentially risky. Even where they decide to engage with Indigenous issues it is often at a largely symbolic level (e.g. constitutional recognition; closing the gap) or in reaction to the emergence of a political problem rather than proactively addressing emerging challenges and issues. In such circumstances, the highly complex and technical nature of native title legislation and policy leads governments to avoid proactive initiatives until circumstances arise which require action. The policy response to the *McGlade* case demonstrate this dynamic perfectly.

In other words, in addition to the institutional predisposition to gradual evolution in the native title system, there are also structural impediments to innovation within each of the potential sources of innovation activity in the native title system which tends to reinforce the institutional status quo.

Notwithstanding the 'default' of low innovation and systemic stasis, the dynamism, openness, extent and complexity of the native title meta-system guarantees that pressures emerge and change occurs, most often incremental in nature, and not always designed or intended by any particular actor. Such change will likely lead to changes in the incentives for innovation, but it seems unlikely that predictive models are possible. In this respect, the native title system operates as an emergent system rather than one where predetermined outcomes are the norm (Kania & Kramer 2013).

Those pressures for or sources of ongoing or routine change in the native title system can be either exogenous or endogenous to the native title system (or a combination of both). Examples of endogenous pressures include the use of the judicial system to determine and legitimise native title claims which then drives conflict between competing native title claimant groups, often extending beyond the claims process itself; or the transformation of traditional notions of 'responsibility for country' into

formal property rights within a settler legal system which then drives changes in social relations within native title groups¹⁷; and so on. Potential exogenous pressures come in all shapes and sizes: globalisation, climate change, the rise of new political movements nationally and within particular state or territory jurisdictions, through to local pressures such as the election of a new Shire Council, a change in political power within the indigenous community in a region, or the arrival of new technology (e.g. mobile phones, GPS, the internet), and so on.

Systemic change (almost by definition) changes the incentive structures facing at least some interests operating within the native title system, and in particular, may change the incentives for innovation at some or all levels of the system.¹⁸ It is not clear whether the nature of the change (e.g. exogenous vs. endogenous; short term vs. long term; random vs. sustained) can be used to develop particular hypotheses or models regarding the nature of the impact on incentives for innovation. The absence of an accepted theoretical model of the native title system, due to the social complexity of the native title system and the fundamental uncertainty implicit in systemic change, ensures that developing general hypotheses based on the nature of change impacting on the system will likely be unproductive. Instead, those attempting to understand the systemic implications of change within the native title system will need to focus on tracing the implications of particular changes, at least for the foreseeable future.

Nevertheless, it is clear that we should consider innovation to be both one of the potential drivers of systemic change, but also acknowledge that it can emerge as a product of, or response to, systemic change in native title. This rather conceptual overview makes clear that innovation is a process within the native title system and not an outcome with an independent value. Moreover, it is a process which can be used to support continuity of the native title system or change to that system; it can be used to shape system operations and outcomes to support the aspirations of all interests involved, or only some interests; and because it drives change, innovation in one part of the system can lead to innovation elsewhere in the system again with a wide range of potential results.

It follows that the existence or non-existence of innovation *per se* is secondary to the potential impact, quality or nature of the underlying change being sought by innovators. And any assessment of these impacts will be highly subjective, and will be heavily influenced by the current shape of the distribution of outcomes and benefits from the native title system for relevant interests.

Systemic innovation in native title to date

Given the numerous possibilities for innovation in the native title system, any discussion must necessarily be selective. In particular, a focus on system wide change suggests a focus on issues which have relatively wide-ranging implications and impact. The approach I have chosen is to first look backwards to selectively examine the systemic innovations we have seen over the past 25 years, and then look forward to identify potential areas for future systemic innovation. My aim is both to contextualise the nature of innovation to date in the native title system, and to foreshadow some opportunities for the future, albeit heavily influenced and framed by my own background as a former policymaker and currently as an interested observer.

The Mabo decision

Clearly, the *Mabo* High Court decision can be seen as an innovative intervention by the courts to resolve the political gridlock which had emerged in Australia in the 1980s over land justice for First Australians. In terms of the discussion above, it is clear that the *Mabo* decision was a case of responsive innovation to changed circumstances, rather than the High Court unilaterally deciding to pursue a new experiment in the Australian land tenure system. In particular, political gridlock over land rights in Australia was increasingly at odds with broader societal values (Barker 2013; Dillon 2017:1–2) and the political stasis created an opportunity for judicial policymaking.

The *Mabo* decision was inevitably designed (but not necessarily articulated) as a compromise on a number of levels: between erstwhile dispossessed native title holders and existing non-Indigenous title holders; between Indigenous political aspirations for the recognition of prior sovereignty and the settler state; and between those dispossessed before the enactment of the *Racial Discrimination Act 1975* and those dispossessed after its enactment. Importantly, this compromise was imposed, not negotiated, and it reflected the court's assessment of what might be done to acknowledge Indigenous rights without upending the overarching political settlement which underpins Australia's constitutional system of government. The fact that Indigenous interests comprise a demographic minority and exercise much less political influence than mainstream interests inevitably shaped the High Court's thinking in designing the 'compromise' it did.

The decision was innovative in a number of respects.

First, the status of native title as part of the common law which is recognised as having always existed independent of the Crown, turned Australian property law on its head.

Second, notwithstanding its radical implications for Australian property law, and arguably for the constitution of the nation itself, at each key point of friction between the interests of the settler community and the first Australians, the decision prioritised the settlers. Those dispossessed by the Crown had no inherent right to resist or to obtain compensation. Thus native title is an inherently weak and vulnerable title, which is diminished or extinguished by inconsistent Crown actions. The key innovation of the High Court was its decision to effectively constrain the capacity of governments and others to take advantage of that inherent weakness by relying on the existence and operation of the *Racial Discrimination Act 1975* as a key factor in assessing all dealings in relation to native title. This counter-balances the weakness of native title, but only in relation to discriminatory actions since 1975.

Finally, perhaps the most innovative element of the decision was the way the court amalgamated new legal and historical interpretations of the settlement process with longstanding (and thus widely accepted) principles of the Australian legal system to frame what amounted to a major readjustment to institutional arrangements governing land tenure in Australia, as essentially an incremental and almost natural development of the common law¹⁹.

The consequence was to successfully transform, and lock in, systemic changes to the pre-existing political equilibrium and settlement in Australia.

The Native Title Act

The subsequent *Native Title Act 1993* sought to translate the High Court's recognition of the existence of a common law title into a framework which provided for a process to recognise and/or determine the existence of such titles (including their extent, and the owners), and then to establish a process which facilitated the exercise of native title rights vis-a-vis other systems of land administration and property rights. Its challenging remit was to incorporate the newly acknowledged existence of native title into Australia's broader land tenure management systems. This entailed a process, compressed into two years of legislative development, which duplicated in relation to native title the development of Australia's land tenure system over

hundreds of years (stretching back into its common law beginnings in the United Kingdom).

The architects of the legislation sought to facilitate this task through the use of a number of innovative arrangements. For example, the Act originally provided for a strong focus on mediation by the National Native Title Tribunal in the claim determination process (subsequently overturned as a result of the decision in *Brandy*²⁰). Following amendments in 2009, the Act now allows the Federal Court to manage litigation processes including through the use of alternative dispute resolution processes (Bauman 2010:134). Confronted by the challenge of dealing with contingent property rights which, once determined, will be acknowledged to have always existed, the architects of the Native Title Act devised the innovative future acts scheme which allows putative native title holders to be involved in decision making in relation to the use of land not yet determined as native title.²¹ And the Act included a new and innovative ‘right to negotiate’ process to deal with mining on native title land which extended the normal rights of landholders vis-a-vis resource developers.²² Importantly, each of these innovations were compromises crafted in the crucible of explicit and intense political conflict, as various interest groups brought substantial pressure to bear on the design of the legislation.

Consequently, in making choices about the institutional structures to embed in legislation, the architects of the Native Title Act chose not to pursue alternatives, such as stronger recognition of Indigenous self-government which went beyond the political influence able to be exercised by Indigenous interests. The choices made reflected real political constraints which derive from the political power differentials between Indigenous citizens and mainstream interest groups.

In a further iteration to the legislation, following the *Wik* decision, a further series of amendments to the legislation made a series of adjustments to the legislation, most of which were adverse to Indigenous interests. However, these amendments included provisions for making Indigenous Land Use Agreements (generally known as ILUAs) in relation to land either under claim or determined as native title, as the pre-existing agreement provisions were too cumbersome.²³

So while the Native Title Act was initiated and engendered by the High Court’s decision in *Mabo*, and was thus a responsive initiative, its architects deliberately set out to proactively explore new approaches within the parameters of both the High Court decision and the broader land tenure system. This was a case of exogenous change

driving legislative innovation. The extent to which the Act’s architects were successful is still an issue of contention, although it is clear that consistent with most policy reform the innovation process within the legislative drafting process can be seen in retrospect to have facilitated the orderly and incremental recognition of native title rights across the nation. The paradoxical result is that innovation delivered stability and continuity, not disruption (or worse, legal and political chaos). In structural terms, the Native Title Act is the institutional embodiment of the changed equilibrium or political settlement. The innovations included within the Native Title Act allowed the institutionalisation of the new equilibrium to substantially withstand the countervailing pressure of those interests opposed to the new equilibrium.²⁴

A further deeply ironic paradox has been that the innovations in the *Mabo* decision and the Native Title Act laid down the preconditions for judicial decisions requiring proof of continuity of connection which effectively rejected or ignored the notion that Indigenous landowners’ relationships to country were themselves the product of accumulated and continuing innovation over millennia.

Notwithstanding the apparent conservatism of the Native Title Act (especially following the *Wik* amendments), it laid down a foundation for further policy innovation in the future. While the innovative elements of the *Mabo* decision and the development of the Native Title Act are clearly systemic in nature, there have been numerous other examples of innovation within the native title system which are more constrained in impact, but are of such significance that they can still be described as systemic in nature. I don’t propose to develop a comprehensive list, but will selectively point to four subsequent innovations (and one non-innovative change) which have impacted the native title system in different ways.

The NT Parks case

The 2002 High Court decision in *Ward* found that as a result of the way in which the *Territory Parks and Wildlife Conservation Act (Northern Territory)* was drafted, that a park declaration affected by the claim was invalid. The Northern Territory (NT) Government subsequently obtained legal advice that up to 49 NT parks had potentially been invalidly declared between 1978 and 1998 in the event that native title rights and interests existed in the lands in question.

In 2005–06, the then NT Government responded by developing a proposal for the lease of relevant parks to the Territory for 99 years by native title holders in exchange

for joint management of the parks and various other provisions. The three policy alternatives were a politically unacceptable acceptance of a diminution in the parks estate in the NT, potentially expensive moves to extinguish native title interests within the relevant parks, or decades of park-by-park litigation to resolve the uncertainty.

The approach of the NT Government was innovative on a number of fronts: it sought to resolve the issues affecting all 49 parks in one comprehensive settlement negotiation; it adopted a transparent approach and certainty in relation to its settlement offer, guaranteeing the offer to Indigenous interests by legislating it; and determined a finite time frame for negotiations by including 'sunset' provisions in the legislation. The leaseback proposal was highly innovative in policy terms and both confirmed underlying Indigenous ownership of many parks under a range of tenures (none of which were native title) and strengthened Indigenous joint management of NT parks generally. At the same time it maintained and strengthened Indigenous rights to pursue cultural and economic activities within parks. It also minimised potential economic and social costs of protracted litigation for both government and Aboriginal interests, and insulated the NT parks estate from the potential economic costs of prolonged conflict and uncertainty. Importantly it resolved potentially divisive issues revolving around the alleged threat of Aboriginal land rights to the NT tourism industry, economy and political system generally. See Dillon and Westbury (2007: 84–119) for a more detailed discussion and analysis.

Native title compensation developments

The 2016 decision of Mansfield J in *Griffiths* and the subsequent 2017 Full Court decision on appeal which substantially endorsed his approach, dealt with the assessment of compensation for extinguishment of native title.²⁵ The Courts' decisions were innovative insofar as they went beyond euro-centric notions of utility in assessing the value of the native title to native title holders, but were firmly located within the parameters set by legislation and framed within the established legal principle of *solatium*²⁶. Here is an example of judicial innovation which confirms new terms of debate and thinking generally about the nature of loss to native title holders arising from extinguishment; it is notable however that the anthropological and cross cultural issues involved had been foreshadowed for some 15 years (Smith 2001). Notwithstanding the judicial innovation involved in *Griffiths*, it can be argued that Mansfield did not go far enough in recognising the potential inherent in native title (e.g. in terms of commercial opportunities, see

McCabe 2015), and thus (at least in conceptual terms) underestimated the compensation required.²⁷

Alternative settlements regimes

For over two decades Indigenous interests have seen potential in regional agreements as a means of addressing Indigenous aspirations. In turn, a considerable academic literature emerged outlining aspects of the potential, processes and opportunities (see for example Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) 2010; Edmunds 1999; McCann 1999). Notwithstanding this focus, the results in terms of operational regional agreements have been rather desultory, as governments have not been prepared to sustain commitments to those regional agreements which did not have a legal or contractual basis. Apart from some limited and short term experimentation, governments have not been prepared to share decision making with Indigenous regional groups.

In particular, in order to adopt an innovative power-sharing structure such as a regional agreement, governments need to see the agreement as a solution to a specific issue or problem. This benchmark is rarely met. The lack of broad progress in negotiating and sustaining regional agreements increases the profile of those few agreements which have delivered tangible benefits. Among the limited successful agreements to date are two Kimberley agreements, the Ord Stage Two agreement in the East Kimberley, and the Yawuru agreement in Broome, both of which are native title agreements (Guest 2009). In addition, the Noongar settlement in south west Western Australia appears reasonably close to finalisation, but is still the subject of intense internal dissension from a small minority of Noongar people.

Perhaps the most innovative progress to date nationally has been in Victoria where the Victorian *Traditional Owner Settlement Act 2010* provides an alternative framework for addressing the aspirations of Aboriginal traditional owners whose native title has largely been extinguished and who may face difficulty in meeting the strict criteria in the Native Title Act. The Act provides for agreements between Aboriginal traditional owners and the government which recognise their traditional rights and provide certain rights on Crown land. The Victorian framework is unique insofar as it is the only alternative framework to native title established in a state jurisdiction, and offers the prospect of tangible and constructive negotiated benefits in place of potentially unproductive or uncertain native title litigation. There have been two successful framework agreements (the Dja Dja Warrung

and the Gunaikurnai) and others (including the Eastern Maar and Taungurung) are under active negotiation.

Taxation of native title payments

Penultimately, it is worth mentioning an innovative policy response by the Commonwealth in relation to the taxation of native title payments. There were a range of concerns in play relating to the utility and regulation of native title payments amongst a range of stakeholders including the Minerals Council of Australia, Indigenous groups and policymakers from Attorney General's Department, Treasury, the Indigenous affairs portfolio (in FaHCSIA) and the Office of the Registrar of Indigenous Corporations (ORIC – the Indigenous corporate regulator). These policy concerns included that funds may be being misused by third parties; that funds may be allocated to immediate consumption and not saving; that the agreements being negotiated were excessively complex and directed to tax minimisation rather than effectively reflecting the concerns and aspirations of local communities; and that taxation of benefits acted as a disincentive to commercial investments by native title holders.

The Minerals Council of Australia and some key Indigenous leaders co-sponsored a proposal to provide for the creation of a mechanism or vehicle which would allow for tax deductibility of payments to native title holders where they were utilised for commercial purposes. This proposal was clearly innovative in its design and conception.

Following consideration by a working group of officials and experts (Treasury 2013) Treasury decided to close down what it perceived to be a potential vulnerability to the tax revenue base by determining that payments which were part of a native title agreement were tax free, on the basis that they were compensatory in nature.²⁸ On its face, this innovative solution removed the need to consider establishing a tax free mechanism, and simultaneously benefitted Indigenous interests and resource developers insofar as it makes the negotiation of resource agreements easier. It is arguable however that these payments are not strictly compensation, but rather are essentially the result of a commercial negotiation. Moreover, the decision effectively removes one of the few incentive mechanisms available to government policymakers and resource developers negotiating agreements to seek to shape the allocative decisions of native title holders, since once the payments became non-taxable, the use of selective tax concessions linked to particular organisational structures as proposed by the Minerals Council and their Indigenous partners became

redundant. This occurred in a context where governments have few policy levers yet retain significant (albeit rarely articulated) concerns.

This is an example of innovation which trades off potential benefits to resource developers and policymakers focused on Indigenous development in favour of benefits to Treasury policymakers focused on minimising threats to the overall government revenue base. Treasury were being driven by concerns that the creation of a new category of tax-exempt vehicle might be open to abuse particularly by financial engineers from outside the Indigenous sector. There was no public debate or internal discussion, since Treasury framed the decision as one of interpretation of taxation legislation.²⁹

*The policy response to *McGlade**

A recent counter-example demonstrates that not all change involves innovation. The recent Federal Court decision in *McGlade* found that the Native Title Act required unanimous consent to area ILUAs³⁰ with the consequence that miniscule minorities of native title holders would be able to veto a wide range of agreements to allow future acts including both the Adani coal project in Queensland and the proposed Noongar settlement in south west Western Australia. The Commonwealth moved quickly to address the issue, and decided to amend the *Native Title Act 1993* to allow a simple majority of relevant native title holders to approve ILUAs. This was in my view the antithesis of innovation, blindly adopting euro-centric concepts of simple majority-based decision making rather than alternative formulations around 'group consent' which are more common in Indigenous societies and have statutory precedent in the *Aboriginal Land Rights (Northern Territory) Act 1976*.³¹

Experience to date across the native title system suggests that innovation has been quite common and can emanate from a range of sources.³² While the native title meta-system is beginning to stabilise overall, at the level of key sub-components, there is still systemic pressure for change and when responded to, the solutions produced generally appear innovative at least to some degree simply because they are dealing with new or different issues. It may also be that while pressure for change is necessary, it is not of itself sufficient; actual change is driven by individuals and individual agency. Whether a change is innovative and beneficial is largely determined by the approach adopted by those individuals driving the change.

Potential systemic innovation in native title

Innovation is a process, or in systemic terms an input. It is usually a positive input, expanding the set of opportunities available to achieve the objectives of those seeking or driving change. It can be particularly valuable in the native title system, because the system is complex and permeated with conflicting or potentially conflicting interests. Accommodation and trade-offs, whether consensual or imposed, are endemic and a fact of life within the native title system. Power differentials between the multiple interests involved are invariably crucial in determining outcomes. In such a world, innovation is particularly valuable in expanding the options for players and stakeholders to find mutually acceptable outcomes and compromises

However, as noted above, innovation is not an end in itself, and can at times be used to push or drive detrimental or deleterious outcomes for some or most stakeholders. In a complex system, all interest groups will seek to obtain either tactical or strategic benefits from any change. There is also a more amorphous, and ultimately subjective and potentially contentious assessment of the public interest arising from a change.³³ The public interest is likely to be advanced when the outcomes achieved are beneficial to more than one interest group, and to the public at large. Acknowledging the inherent philosophical and definitional challenges in determining the 'public interest', innovation is particularly valuable if it can assist in devising and driving solutions which are widely seen to be in the public interest as well as being aligned with individual interest group agendas.

The rest of this section seeks to identify potential opportunities for innovation in the native title system which would, in my assessment at least, contribute to the public interest.

Radical revision of the Native Title Act

Notwithstanding the comments above which point out the innovative elements of the *Mabo* decision and the Native Title Act, it is clear that the native title framework is a product of the innovative yet in many respects deeply conservative framework embedded in the *Mabo* decision. As Wootten (1995:129–30) has noted:

In this and other respects *Mabo* was a conservative decision. But for the Racial Discrimination Act (the effect of which was in this respect overridden by the Native Title Act 1993), it is probable that no existing non-Aboriginal title to land would have been

put in jeopardy by the decision. Far from using any revolutionary approach in reaching its decision, the Court was at pains to use the traditional techniques of judicial reasoning to show, as Lord Coke might have said, that the common law in Australia had 'degenerated' and needed to be 'restored'.

As a result, while the system delivers decisions on the existence or non-existence of native title in particular locations, serious doubts have emerged in academic and even judicial circles as to the fairness or justice of the outcomes of the judicial process in determining native title.

So for example Bauman (2010) provides an analysis of the shortcomings of the continuity of connection processes as currently operating, and makes an innovative suggestion for a radically alternative approach. Bauman proposes a 'connection proof paradigm' based on 'a presumption of socio-cultural transformation combined with the reasonable inference of identified contemporary societies as 'normative' and the continuous existence and descent of title and entitlement (rather than of people)...' (Bauman 2010:139). The narrative of the relationship between the ethnographic circumstances of the Jawi claimants and the unfolding of the *Sampi* litigation, laid out in Glaskin's recent book *Crosscurrents* (Glaskin 2017) raises similar questions as to the fairness (as opposed to legal correctness) of the judicial processes within the parameters of the Native Title Act and judicial interpretation of its provisions.

In his judgement in the *Ward* case, Justice McHugh (who had been in the majority in *Mabo*) made a number of comments suggesting he had reconsidered the adequacy of the framework which emerged out of *Mabo* and was enshrined in the Native Title Act. He stated, *inter alia*:

The dispossession of the Aboriginal people was a great wrong. Many people believe that those of us who are the beneficiaries of that wrong have a moral responsibility to redress it to the extent that it can be redressed. But it is becoming increasingly clear – to me, at all events – that redress cannot be achieved by a system that depends on evaluating the competing legal rights of land holders and native title holders. The deck is stacked against the native title holders whose fragile rights must give way to the superior rights of the landholders whenever the two classes of rights conflict. And it is a system that is costly and time consuming. At present the chief beneficiaries of the system are the legal representatives of the parties. It may be that the time has come to think of abandoning the present system, a system that simply seeks to declare and enforce the legal rights of the

parties irrespective of their merits. A better system may be an arbitral system that declares what rights of the parties ought to be according to justice and circumstances of the individual case. Implementing such a system in the federal sphere may have constitutional difficulties but may not be impossible. At all events, it is worth considering (McHugh 2002: para 561).³⁴

Justice French, prior to being appointed Chief Justice of the High Court, provided support for the contention that there may be merit in a presumption of continuity of acknowledgement and observance of traditional laws and customs in relation to the proof of native title (French 2008).

Notwithstanding the availability and existence of good ideas, innovation requires an actor or agent with political influence or authority to drive and implement the idea. There appears to be very little appetite within the existing political institutional framework for pursuing such an ambitious and radical agenda.

For example, the 2015 Australian Law Reform Commission Report (ALRC 2015), which *inter alia* was asked to examine the proposal for a presumption of continuity, recommended a number of changes designed to make the connection requirements of the native title system more workable, but did not go so far as to recommend in favour of a presumption of continuity. Nor did the Commission recommend an alternative approach based on transformation and the descent of title rather than people, as advocated by Bauman.

For its part, the Commonwealth has to date moved slowly to implement the ALRC recommendations (apart from its 2017 response to the *McGlade* decision). In November 2017, the Attorney General's Department issued an Options Paper to underpin a consultation process on possible reforms to the Native Title Act (Attorney General's Department 2017). The Options Paper does not canvass the issue of connection.³⁵ When the Commonwealth finally decides its response, it will likely be to implement just a subset of the modest ALRC recommendations. The likelihood of an innovative reform of the native title system to move its primary focus from determining property rights to addressing dispossession either through a presumption of continuity or the introduction of an arbitral system appears extremely remote.

Treaty negotiations

Perhaps the most obvious opportunity which is currently being explored in at least two States³⁶ is the possibility of State-wide or regional treaties between the state and its Aboriginal citizens. While this might conceivably be undertaken without any reference to land or native title, this seems highly unlikely. Indeed, the whole rationale for a treaty process in these jurisdictions rests largely on the history of dispossession and exclusion of Aboriginal peoples. Moreover, the impetus for these treaty negotiations is driven in some measure by the conservatism of the 'continuity of connection' criteria established in the Native title Act (and reinforced in subsequent judicial decisions such as *Yorta Yorta*).³⁷ These treaty negotiation processes stand in stark contrast to the stalled and likely moribund public discussion regarding constitutional recognition of Indigenous peoples in Australia.

The model adopted in each jurisdiction appears to be based on appointing an Indigenous treaty commissioner to facilitate the development of a treaty, extensive consultation with local Aboriginal communities and groups, and the development of a set of proposals which reflect Aboriginal aspirations and ideally address structural disadvantage.

The two treaty processes currently underway face multiple risks, and will be extraordinarily challenging to implement effectively. They need to simultaneously meet the high expectations of Indigenous citizens for tangible change, while not threatening politically powerful interests in the non-Indigenous sector. In addition, they must be ambitious yet implementable, and must maintain the support and commitment of a highly distrustful Indigenous sector through what will likely be a multi-year process. While there is no point in attempting to lay out specific models or processes, it is clear that there is likely to be a place for, indeed a need for, innovation in both the process and design of the expected outcomes.

One obvious option in Victoria to minimise risks in advancing the Treaty process would be to leverage off the existing regional agreements, potentially upgrading the benefits on offer, and ideally seeking to build in benefits in perpetuity. In effect, this would see the development of a series of regionally based sovereign wealth funds which taken together would constitute the underlying skeletal frame of the State-wide treaty.

A particular hurdle or challenge to implementing such an approach is the reality that to date the Commonwealth has not been prepared to substantively contribute to

these processes, notwithstanding its predominant position in underwriting the national policy on Indigenous affairs. Even Commonwealth bodies such as Indigenous Business Australia and the Indigenous Land Corporation (the latter established in the wake of the Native Title Act) should see the strategic benefits of contributing to these treaty arrangements, but under current policy positions (set in large measure by their majority Indigenous Boards) they appear to define their role in purely commercial terms.

Whatever design frameworks and outcomes emerge as States and ultimately the NT progress their treaty negotiation process, it seems probable that they will both leverage off and impact on the native title system as it applies in those jurisdictions.

Land management issues

One of the consequences of the success of native title across remote Australia has been to unsettle the established assumptions regarding responsibility for land management. Weir and Duff (2017) lay out the issue in detail, but in essence, they point out that the established equilibrium between public responsibility for land management on crown lands and landowner responsibilities for land management on private lands has been upended by the substantial shift in ownership from the Crown to native title holders across much of continental Australia.

The public interest requires various land management functions to be undertaken, and the failure to undertake these functions can also impact on adjacent private land owners. Yet the native title system, which emerged from a concern to provide a redress for dispossession and to meet the demands of social justice, fails to adequately resource native title holders particularly for land management functions.

The unintended result has been to shift the costs of land management from the state to native title land owners. Most native title holders do not have the resources to undertake these functions (unless they are funded as part of Indigenous Protected Area arrangements³⁸ and the often linked ranger programs which are not necessarily focused explicitly on addressing mandatory land management functions). Normally, enforcement is exercised via a threat to resume the land in question, but because native title is inalienable, local authorities who would normally exercise these actions have no recourse. The result is a policy gap, where necessary land management functions may cease to be carried out.

The vast bulk of private landowners operate businesses on these lands. Meeting mandated land management responsibilities would normally comprise a legitimate business expense which is tax deductible, so notwithstanding the apparent split between private and public funding responsibilities, governments indirectly have a significant role in underwriting land management activities on private lands. Yet many native title groups may not seek to undertake commercial businesses on their lands, with the consequence that they will not even benefit from the support offered by the tax system to private landholders.

Given the new circumstances arising from the extent of native title determinations, there is clearly a public interest in rethinking the role of the public sector generally in supporting land management across the remote pastoral estate, and perhaps extending into regional Australia. While the most likely outcome is incremental policymaking at both State and federal levels to 'patch' individual issues which arise, a more systemic and necessarily innovative reassessment would have substantial merit.

Demographic change

A further issue of potential significance for the native title system relates to the progressive geographic dispersion of native title holders (mirroring a broader dispersion of Indigenous citizens across the continent), thus potentially attenuating their social and cultural links to lands for which they have formal rights and responsibilities. This is particularly significant because the Native Title Act provides mechanisms (in section 13) for governments to apply to revoke or vary an approved determination of native title.

Many commentators have pointed to the paradox that by virtue of the native title system which emerged from the *Mabo* decision and the Native Title Act, the state simultaneously demands Indigenous people demonstrate ongoing connection based on traditional laws and customs, but pursues social policies premised on encouraging and even coercing participation in economic and commercial activities which potentially have a consequence of attenuating those links to country.³⁹

Overlaying this are demographic trends which involve slow but continuing migration from remote communities to towns, and from towns to cities; increasing family formation involving individuals from different regions and native title groups; and increasing family formation involving Indigenous and non-Indigenous people, associated with an increasing level of Indigenous

identification in the census (Biddle et al. 2017). Increasingly, many native title holders are likely to reside away from their country. Anthropologists have generally assisted native title claimants to demonstrate the existence of continuing links for the purpose of establishing native title rights, however the point here is that it will become increasingly challenging to handle in terms of land management issues. While the issue usually emerges in a specific context,⁴⁰ it is systemic in nature and there is clearly a public interest in ensuring that the system works effectively both in the interests of particular interest groups (especially native title holders) but also in allowing effective decision-making by landowners in relation to the Indigenous land estate which is in the public interest.

The problem has yet to fully emerge, and there is a long way to travel before it is perceived to be an issue worthy of policy attention, but the portents are clear. There is a clear role here for innovative social analysis which articulates the issues involved at a systemic level more clearly and comprehensively.

Conclusion

Innovation has been part of the native title system from its very genesis, and will inevitably play an important role into the future. However while innovation is essential in unlocking solutions to complex issues and problems, it is not an end in itself. It needs to be contextualised to be assessed, and the context is crucial to its significance. Moreover, the systemic nature of the native title domain suggests that most if not all innovations are likely to have unintended consequences, and sometimes these will outweigh the impact of the intended outcomes.

Perhaps one way to interpret innovation's significance in the native title system is in the ongoing tension between structure and agency in social relations.⁴¹ Innovation both strengthens the potential of individual and interest group agency to make a difference, and opens up new ways of envisaging the institutional foundations of social action which play such a large role in framing social structures. Ultimately, to be successful and to persist, innovation outcomes need to transition from the domain of individual or interest group 'agency' and become embedded in institutional structures. To take just one example, the decade long and highly innovative experiment in Indigenous land management with the extensive growth of local Indigenous ranger groups has driven substantial benefits for both the national interest and Indigenous aspirations to stay on country. But the institutional roots of these innovations remain weak, with funding subject

to annual budget appropriations and the policy whims of government.

Native title has fundamentally transformed not just Indigenous Australia, but the nation as a whole. Its systemic implications are far reaching, with tendrils reaching into multiple policy domains and multiple levels within the federation. The native title system is of direct relevance and import to virtually every Indigenous citizen, but it is also relevant to a wide array of non-Indigenous interest groups and individuals. Accordingly, innovation to drive positive outcomes in relation to any or all of the areas identified above – radical revision of the Native Title Act, the negotiation of treaties, land management issues, and in relation to the changing demographic shape of Indigenous Australia – offers the prospect of tangible and sustained public benefits across the breadth of the native title system.

There is a sense, however, in which the native title system is itself an element in the broader political, economic and social system which comprises the Australian political settlement.⁴² The ongoing and ever changing meta-equilibrium which reflects both political power between interest groups (often locked into place by social and economic institutions) by which all key interests in Australian society are structured into domains of influence and hierarchical pecking orders, and which in effect allocate the nation's social and economic product amongst citizens.

The emergence of the native title system has potentially injected a new element into the Australian political settlement, albeit an element which will take some time to find its true equilibrium within that settlement. Consequently the impact of innovation within the native title system will inevitably form an important element of the overarching settlement which the nation is searching for between its first peoples and later settlers. Systemic innovation in native title can contribute to the achievement of a more positive and inclusive settlement, but it must be harnessed to the task. Untethered, it can become a hindrance or impediment to the achievement of a lasting and constructive outcome. Tethered to a wider objective, shared and understood by the nation as a whole, and moderated by a willingness to revise unintended consequences, innovation in the native title system has the potential to facilitate the remaking of the Australian nation on terms acceptable to all Australians.

Notes

1. Wardrop & Zammit (2012:56), writing about biodiversity conservation, note that the areas for public policy innovation include [inter alia] ‘more use of ideas based in systems theory (non-linear interactions, complexity, resilience), greater recognition of the need for policy and management actions to operate simultaneously at multiple scales...’
2. Notwithstanding the positive frame of reference adopted, it is widely accepted in the literature on social institutions that ideas do matter and are, or can be, highly influential. In this sense, the normative arguments in favour of Indigenous self-government might be interpreted as a form of policy advocacy, albeit with a long-term horizon.
3. Diane Smith (2010) explains the labyrinthine Indigenous systems of governance in terms of the operation of complex dynamic nodal networks of relationships which span and infuse the Indigenous domain, including cross-cultural elements such as the native title system and relationships with the Australian state.
4. This has parallels in the emerging policy literature on multi-level governance, see Daniell & Kay (2017). See also the discussion on the hierarchical nature of complex systems in Ladyman et al. (2013).
5. In analysing native title agreements with resource developers, David Martin (2009:100) made three key arguments: ‘that inadequate attention is paid to the governance of agreements as *systems*; that agreement governance has to be explicitly understood and implemented as *transformative*; and that agreement governance should be seen as *intercultural*...’. Glaskin (2017) explores at some length the various perspectives of individual claimants in relation to key issues which emerged over the course of the Sarnpi native title claim.
6. The term ‘policymakers’ is intended to encompass both politicians and bureaucrats.
7. Little (2009) mentions the existence of radical innovators such as Jackson Pollock as a potential exception, though even Pollock used paint and canvas to make his art.
8. Wardrop & Zammit (2012:58) define innovation as ‘the introduction of new ideas, goods, services or practices into practical use’. The definition used in this paper differs from Wardrop & Zammit in emphasising the role of an agent driving the ‘introduction’ of new elements.
9. Policymakers often argue a change is ‘reform’ when in fact it is designed to legitimate or reinforce the status quo. Such a ‘reform’ is clearly not innovation.
10. This insight underpins the widely accepted rationale for governments to subsidise innovation in private sector markets such as through the Australian Government’s research and development tax incentives. In the economists’ jargon generally used to describe it, the market under-invests in innovation because innovation leads to positive externalities and investors cannot appropriate all the benefits.
11. A further reason why innovation is seen as an unequivocal ‘good’ in market contexts is that it leads to products which usually are subject to consumer sovereignty and thus consumers can choose whether they wish to purchase the product. The assumption that consumer sovereignty exists breaks down however in circumstances of substantial monopoly power and where the externalities involved (both positive and negative) become so pervasive that non-purchasers cannot ignore the existence of the product. A case in point is the emergence of social media in recent decades.
12. See Jarvie & Stewart (2017) and Brown (2017) for case studies of ‘experiments’ in the Indigenous policy domain which appear to have gone nowhere. In a related vein, Sanders (2017:402) recently made the case for more stability in the Indigenous policy domain, and suggested that while it appears unlikely, there may be merit in ‘settling’ on more stable administrative arrangements in Indigenous affairs rather than indulging in the ‘rapid formulaic cycles of striving, disappointment and moving on’. In contrast, Wardrop & Zammit (2012:63) explicitly identify increased use of experimental approaches to [biodiversity conservation] policy and management as an area for potential innovation.
13. Wardrop & Zammit (2012:60) make the point that ‘powerful barriers’ to risk taking and aversion to public scrutiny slow down public policy innovation.
14. Or at the very least, the generally extensive time lag between the origination of an idea, its wider acceptance, and its ultimate implementation.
15. Cowlshaw (2015) states: ‘Those Australian anthropologists whose conception of “Aboriginal culture” was still limited to the classical traditions were rescued from irrelevancy by the advent of a new role as expert witnesses in native title cases. Now named “native title anthropologists,” they segued smoothly into a niche within the Australian state’s postcolonial projects...A new literature, now known as native title anthropology, began to detail Indigenous connections with country in relation to Australian law. This work does not question the authority and good will of the state’.
16. Glaskin (2017) analyses a particular case (the Sarnpi claim) which arguably exemplifies this spectrum, insofar as the decision in Sarnpi (No 3) by French J was more conservative in its approach whereas the subsequent Full Court decision in Sarnpi appears more innovative (perhaps driven by the realisation that a conservative approach would lead to a patent injustice). See also McCabe (2015) for an account of the development of jurisprudence relating to commercial native title rights.
17. This is the lead conclusion in Glaskin’s recent analysis of the Sarnpi claim (Glaskin 2017:221).

18. One of the strategies interest groups (and individuals) adopt to deal with complexity is to interpret events through an ideological lens. One consequence of this is that while the incentives for innovation may change, interest groups may not immediately recognise that this has occurred, with the consequence that they will not immediately respond to the new circumstances. Kelleher (2013:8) makes the point that larger commercial organisations may adapt to change more readily than smaller Indigenous groups.
19. In an interview published in December 2016, former Chief Justice Robert French noted: ‘there is an incremental lawmaking function that everybody has recognised as legitimate. Sometimes, of course, there is a debate about whether judges have gone too far. Mabo was such a decision. We have all settled down about that now...’ (Merritt 2016:27). See Chaney (2013:536) on the role of academic historians and anthropologists in facilitating the High Court’s new approach.
20. In *Brandy v Human Rights and Equal Opportunity Commission* 1995 127 ALR 1, the High Court found that judicial power was being exercised where an administrative tribunal had the power to make enforceable determinations, thus breaching the separation of powers doctrine which is a cornerstone of Australian constitutional law (see Henderson 1995).
21. One of the potential issues with this mechanism is that it potentially allows claimants who are ultimately unsuccessful a role in prior land negotiations, and may also provide an incentive for claimants to slow down the claim process if the merits of their claims are weak or uncertain. Having said this, the point may well be outweighed by the system’s potential to deny claimants with strong cultural claims access to positive determinations on the basis of a range of essentially arbitrary actions and technicalities.
22. However, the ‘right to negotiate’ did not provide native title interests with a veto over resource development activities on their land, instead requiring negotiation and if necessary arbitration. In addition, one of the most significant implications of the High Court decision in *Wik* was to expand the potential extent of (non-exclusive) native title determinations to the pastoral estate, and thus to substantially expand the potential application of the ‘right to negotiate’. Interestingly, many resource developers have chosen to by-pass the ‘right to negotiate’ processes in favour of negotiation of an Indigenous land use agreement with relevant native title interests, thus increasing the leverage of the native title holders.
23. McCann (1999:8) credits Justice French (presumably while still President of the National Native Title Tribunal) with coming up with the idea. See also Smith (1998) for detailed analysis of the ILUA provisions.
24. The subsequent ‘Wik amendments’ to the Native Title Act which in most respects wound back Indigenous rights were in structural terms a reflection of the political strength of those countervailing pressures.
25. Refer *Griffiths v Northern Territory of Australia (no 3)* [2016] FCA 900 and *Northern Territory of Australia v Griffiths* [2017] FCAFC 106.
26. The legal definition of solatium refers to the non-financial impacts on a person affected by an action. Thus Australian legislation provides for solatium to be taken into account in assessing the compensation required for compulsory acquisition of property interests by governments; see for example sections 55 and 60 of the *NSW Land Acquisition (Just Terms Compensation) Act 1991*.
27. Jon Altman (pers. com.).
28. This decision provides significant insight into the concerns within Treasury regarding tax minimisation, as they were clearly prepared to give up access to considerable tax revenues in return for removing the potential scope for creating a pathway to tax structures which facilitated even more extensive tax minimisation by third parties.
29. The Treasury policymakers would no doubt argue that the outcome was in the public interest, albeit a public interest which extended beyond the native title domain to the tax revenue base more generally.
30. There are three types of ILUA in the Native Title Act: a body corporate ILUA, an alternative procedure ILUA, and an area ILUA (which is made in relation to land or waters for which no prescribed body corporate exists). Refer to the Explanatory Memorandum to the *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* for a brief description of the implications of the Federal Court decision in *McGlade*.
31. Alternatively, a requirement for a ‘super majority’ of say 60% or 70% would have approximated ‘group consent’ while retaining a simpler mechanism for determining the outcome.
32. In Daniel Little’s terms (Little 2009), this may be the result of the fact that the ‘conventions’ of the native title system are relatively under-developed due to its relatively recent emergence.
33. Various statutes refer to the ‘public interest’, for example, the *Freedom of Information Act 1982*, but it is not defined thus leaving significant discretion to the Executive and ultimately the courts.
34. Justice McHugh’s comments appear intended to offset his more narrow interpretation of the effect of native title on pastoral leases – he disagreed with the majority in *Wik*, and as an alternative to ‘stretching’ what he considered the appropriate role of the judiciary. Nevertheless, the points can be taken at face value.
35. The Options Paper notes (p.3): ‘...this paper focuses on improvements to claims resolution, agreement-making and dispute resolution processes, rather than proposing significant changes to the key concepts of the law (including on connection and the content of native title)’.

36. The two States are South Australia and Victoria. There has recently been a change of government in South Australia, and it is not yet clear what impact this will have on the treaty process in that state. A State election is scheduled for Victoria in November 2018, and a change of government would similarly engender a degree of uncertainty as to the future of the process there. See a more detailed discussion of treaty issues in Norman (2017) and Hunt (2017).
37. In the *Yorta Yorta* decision the High Court upheld the decision of Olney J that native title had not continuously existed within the claim area. See Lavery (2003) for a discussion of the wider implications. See also Glaskin (2017).
38. Rose (2012) provides a succinct outline of the operation of Indigenous Protected Areas.
39. For example Martin (2009:108) describes the challenges of the native title claims process as a 'state resourced and mandated project of *traditionalism*'. He distinguishes between the requirement on claimants to construct an account of their present society in terms of an unbroken connection to the past which is the result of *adaptation* to wider society whereas land management agreements allow native title holders to construct their futures through explicitly *transformative* processes involving engagement with the institutions of the dominant society' (emphasis added).
40. See, e.g., recent public discussion regarding the processes around the development of an ILUA in relation to the Adani coal mine in Queensland, where one of the native title holders pointed out that the fault line within the native title group between those who supported and those who opposed the project was between those who lived in communities and those who resided in capital cities (see Robinson 2017).
41. For an entry point into the extensive sociological and philosophical literature on structure and agency, refer to Daniel Little's blogpost 'Structures and Structuration' (Little 2011).
42. There is an emerging literature on political settlements, largely focused on development issues. See for example Di John & Putzel (2009) and Hickey et al. (2016).

References

- AIATSIS (2010). *Annotated bibliography: native title agreement making research resources*, AIATSIS, Canberra. www.aiatsis.gov.au/publications/products/native-title-agreement-making-research-resources
- Attorney General's Department (2017). *Reforms to the Native Title Act 1993 (Cth): options paper*, Attorney General's Department, Canberra.
- ALRC (2015). *Connection to country: review of the Native Title Act 1993 (Cth)*, ALRC Report 126, ALRC, Canberra.
- Barker M (2013). 'Innovation and management of native title claims: what has the last 20 years taught us?', Paper to the AIATSIS 2013 National Native Title Conference, 3–5 June, Alice Springs.
- Bauman T (2010). Serendipity is not enough! State and territory native title connection processes. In: Bauman T (ed.), *Dilemmas in applied native title anthropology in Australia*, AIATSIS, Canberra.
- Bauman T & Macdonald G (eds) (2011). *Unsettling anthropology: the demands of native title on worn concepts and changing lives*, AIATSIS, Canberra.
- Bauman T, Strelein L & Weir J (2013). Navigating complexity: living with native title. In: Bauman, T Strelein L & Weir J (2013). *Living with native title: the experiences of registered native title corporations*, AIATSIS, Canberra.
- Biddle N, Gray M & Schwab J (2017). *Measuring and analysing success for Indigenous Australians*, Working Paper 122, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra.
- Brown, P. (2017). Attempting to cultivate mindsets for boundary spanning in remote indigenous policy. *Australian Journal of Public Administration* 76(4):412–425.
- Burke P (2010). Overlapping jural publics: a model for dealing with the 'society' question in native title. In: Bauman T (ed), *Dilemmas in applied native title anthropology in Australia*, AIATSIS, Canberra.

- Chaney F (2015). Innovation in the rangelands: the role of people. *The Rangelands Journal* 37:535–540.
- Cowlshaw G (2015). 'Friend or foe? Anthropology's encounter with Aborigines', Inside Story, 19 August 2015. www.insidestory.org.au/friend-or-foe-anthropologys-encounter-with-aborigines/
- Daniell K & Kay A (2017). *Multi-level governance: Conceptual challenges and case studies from Australia*, ANU Press, Canberra.
- Di John J & Putzel J (2009). *Political settlements: issues paper*, Governance and Social Development Resource Centre, University of Birmingham, Birmingham.
- Dillon MC (2017). *Emerging strategic issues in native title: future political and policy challenges*, Discussion Paper 292, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra.
- Dillon MC & Westbury ND (2007). *Beyond humbug: transforming government engagement with Indigenous Australia*, Seaview Press, Adelaide.
- Edmunds M (1999). *Regional agreements key issues in Australia, volume 2 case studies*, AIATSIS, Canberra.
- French R (2008). 'Lifting the burden of native title – some modest proposals for improvement', *Speech to Federal Court native title user group*, Adelaide, 9 July 2008.
- Glaskin K (2017). *Crosscurrents: law and society in a native title claim to land and sea*, University of Western Australia Press, Perth.
- Guest K (2009). 'The promise of comprehensive native title settlements: The Burrup, MG-Ord and Wimmera agreements', AIATSIS Research Discussion Paper number 27, AIATSIS, Canberra.
- Henderson E (1995). 'Trials, tribunals, tribulations: Brandy v Human Rights and Equal Opportunity Commission', *Sydney Law Review* 17: 581-590.
- Hickey S, Sen K, & Bukenya B (2016). Exploring the politics of inclusive development: towards a new conceptual approach. In: Hickey S, Sen K, & Bukenya B (eds), *The politics of inclusive development: Interrogating the evidence*, Oxford University Press, Oxford.
- Hunt J (2017). Self-determination. In: Aboriginal Affairs NSW, *Transforming the relationship between Aboriginal peoples and the NSW Government: Aboriginal Affairs NSW research agenda 2018–2023*, Aboriginal Affairs NSW, Sydney.
- Jarvie W & Stewart J (2017). Multi-level governance in Aboriginal community development: structures, processes and skills for working across boundaries. In: Daniell K & Kay A (eds), *Multi-level governance: Conceptual challenges and case studies from Australia*, ANU Press, Canberra.
- Kania J & Kramer M (2013). Embracing emergence: how collective impact addresses complexity. *Stanford Social Innovation Review* 21 January.
- Kelleher L (2013). *Does Native Title Act (NTA) impact entrepreneurial opportunity?*, Position Paper, Kellehers Australia. www.kellehers.com.au/wp-content/uploads/Kelleher-NT-Position-Paper.pdf
- Ladyman J, Lambert J & Wiesner K (2013). What is a complex system? *European Journal for the Philosophy of Science* 3(1):33–67.
- Langley H (2017). *Corruption risks: mining approvals in Australia*, Transparency International Australia, Melbourne.
- Lavery D (2003). A greater sense of tradition: the implications of the normative system principles in Yorta Yorta for Native title determination applications. *Murdoch University Electronic Journal of Law* 10(4) December 2003.
- Little D (2009). 'Creativity, convention and tradition', blog post 26 April 2009, *Understanding Society*. www.understandingsociety.blogspot.com.au/2009/04/creativity-convention-and-tradition.html
- Little D (2011). 'Structures and structuration', blog post 8 April 2011, *Understanding Society*. <https://understandingsociety.blogspot.com.au/2011/04/structures-and-structuration.html>

- McCabe P (2015). Pilki and Birrilburu: commercial native title rights after Akiba. *AILR* 19(2):64–96.
- McCann L (1999). 'Induced institutional innovation in response to transaction costs: the case of the National Native Title Tribunal', Paper to the 43rd Annual Conference of the Australian Agricultural and Resource Economics Society, 20–22 January Christchurch, New Zealand. www.ageconsearch.umn.edu/bitstream/123852/2/McCann1.pdf
- McNeil K (2012). Mabo misinterpreted: the unfortunate legacy of legislative distortion of Justice Brennan's judgement. In: Bauman T & Glick L (eds), *The limits of change: Mabo and native title 20 years on*, AIATSIS, Canberra.
- Macdonald G & Bauman T (2011) Concepts, hegemony and analysis: unsettling native title anthropology. In: Bauman T & Macdonald G (eds), *Unsettling anthropology: the demands of native title on worn concepts and changing lives*, AIATSIS, Canberra.
- Martin D (2009). The governance of agreements between Aboriginal people and resource developers: principles for sustainability. In: Altman J & Martin D (eds), *Power, culture, economy: Indigenous Australians and mining*, CAEPR Research Monograph 30, ANU Press, Canberra.
- McHugh M (2002). 'Reasons', *Western Australia v Ward* 213 CLR 1.
- Merritt C (2016). 'French charts way forward for women', *The Australian*, 16 December 2016.
- Norman H (2017). Return of public lands to Aboriginal control/ownership. In: Aboriginal Affairs NSW, *Transforming the relationship between Aboriginal peoples and the NSW Government: Aboriginal Affairs NSW research agenda 2018–2023*, Aboriginal Affairs NSW, Sydney.
- Robinson P (2017). 'Traditional owners say they were forced to negotiate with Adani for fear of losing native title rights', ABC News, 11 December 2017, www.abc.net.au/news/2017-12-11/traditional-owners-fear-losing-native-title-rights-adani-mine/9246474
- Rose B (2012). Indigenous protected areas – innovation beyond the boundaries. In: P Figgis et al. *Innovation for 21st century conservation*, Australian Committee for IUCN, Ultimo.
- Sanders W (2017). 'Administrative Arrangements in Australian Indigenous Affairs: will they ever settle', *Australian Journal of Public Administration* 76(4): 400–402.
- Smith D (1998). *Indigenous land use agreements: the opportunities, challenges and policy implications of the amended Native Title Act*, Discussion Paper 163, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra.
- Smith D (2001). *Valuing native title: Aboriginal, statutory and policy discourse about compensation*, Discussion Paper 222, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra.
- Smith D (2010). Cultures of governance and the governance of culture: Indigenous Australians and the state. PhD thesis, ANU, Canberra.
- Treasury (2013). *Taxation of Native Title and traditional owner benefits and governance working group: report to government*, Australian Government, Canberra.
- Wardrop M & Zammit C (2012). Innovation in public policy for conservation of biodiversity. In: P Figgis et al. *Innovation for 21st century conservation*, Australian Committee for IUCN, Ultimo.
- Weir J & Duff N (2017). Who is looking after country? Interpreting and attributing land management responsibilities on native title lands. *Australian Journal of Public Administration* 76(4):426–442.
- Wootten H (1995). Mabo and the lawyers. *Australian Journal of Anthropology* 6(1&2):116–133.

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