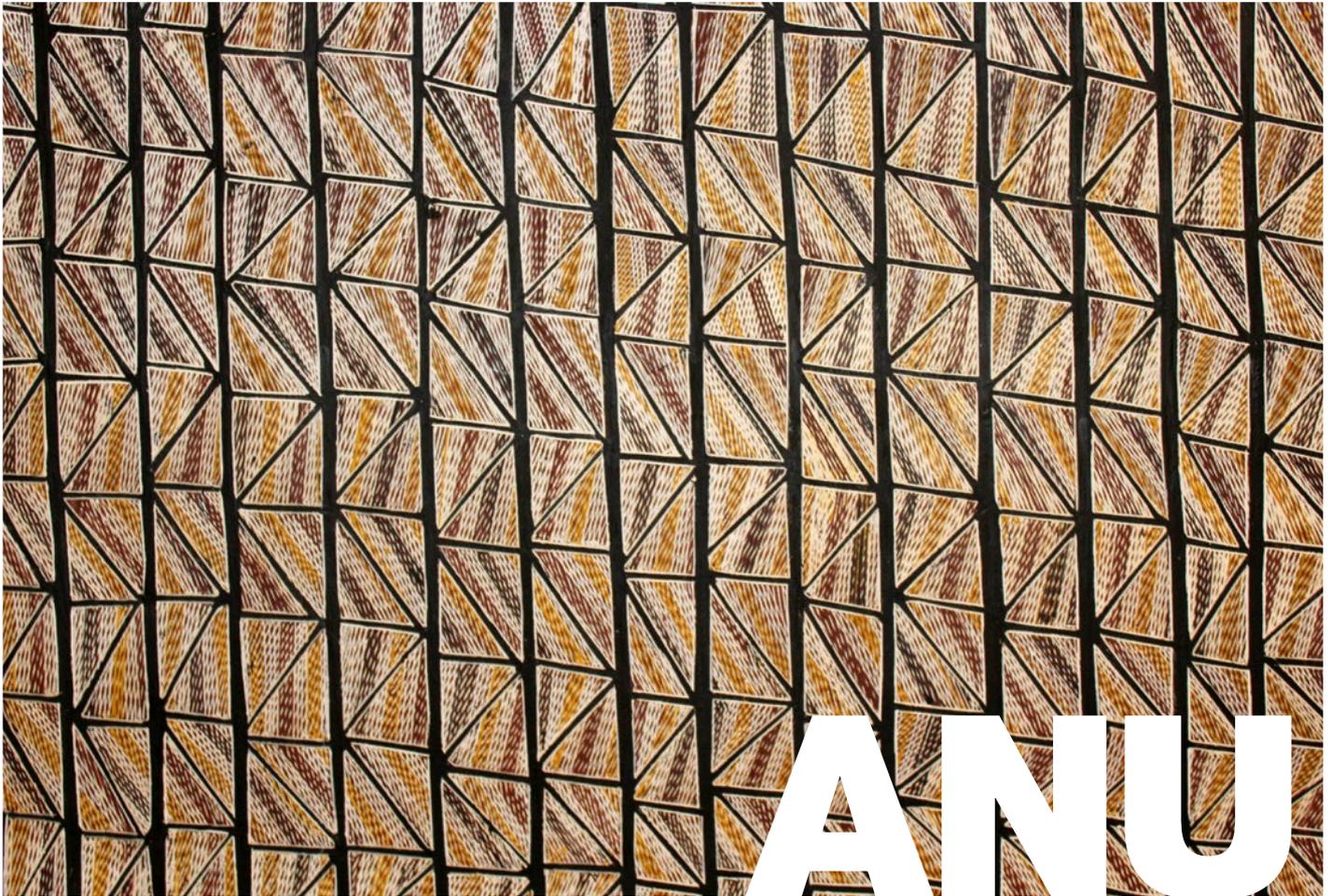




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EMERGING STRATEGIC ISSUES IN
NATIVE TITLE: FUTURE POLITICAL
AND POLICY CHALLENGES

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Centre for
Aboriginal Economic
Policy Research
ANU College of
**Arts & Social
Sciences**

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Abstract

In the 25 years since the Mabo High Court decision, native title claims, litigation, determinations, and land use agreements have proliferated with the result that native title is now an undisputed component in the Australian nation's core institutional framework. This has been a remarkable development. The emergence of public policy for native title over the past quarter century, built on a complex array of conceptual foundations which derive from Indigenous tradition, the common law, statute law, anthropology, history and politics, invites the question: what next? Where will native title policy be in 25 years' time? What are the emerging issues which will most shape that future? This paper attempts to explore and answer those questions from a public policy perspective, adopting an explicitly political frame of analysis from international development theory, political settlement theory. Emerging issues of national, regional and local significance are considered and assessed from both the perspective of public policymakers, and Indigenous interests. It is argued that there are strong grounds for both policymakers and Indigenous interests dealing with native title issues to be more proactive than has been the case to date in managing the emerging strategic challenges identified.

Keywords: native title, Racial Discrimination Act, political settlement, land tenure, compensation for extinguishment, regional agreement, fiduciary duty

Acronyms

ALRA	Aboriginal Land Rights (Northern Territory) Act 1976
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ANU	The Australian National University
ATSIC	Aboriginal and Torres Strait Islander Commission
CAEPR	Centre for Aboriginal Economic Policy Research
COAG	Council of Australian Governments
GST	Goods and Services Tax
IBA	Indigenous Business Australia
ILC	Indigenous Land Corporation
ILUA	Indigenous Land Use Agreement
NNTC	National Native Title Council
NTA	Native Title Act 1993
NTRB	Native Title Representative Body
PBC	Prescribed Body Corporate
PGPA	Public Governance, Performance and Accountability Act 2013
PMC	Department of Prime Minister and Cabinet
RDA	Racial Discrimination Act 1975
RNTBC	Registered Native Title Body Corporate

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Introduction

In June 2017 it was 25 years since the High Court decision in *Mabo v Qld (No.2)*. It is thus timely to look forward to the issues likely to emerge in the native title policy domain over the next 25 years and, perhaps more importantly, reflect on what might be done now to ensure both Indigenous interests and the nation as a whole are positioned to deal with those emerging issues inclusively and constructively. Before looking forward, it is important to place the High Court decision in *Mabo* and the subsequent *Native Title Act 1993* (NTA) in strategic context.

While there is extensive literature on native title issues in the disciplines of law and anthropology, much less has been written from economic or political science perspectives. This paper adopts a public policy perspective, drawing on a range of disciplines, but ultimately focusing on potential policy changes in the native title domain which might emerge over the coming decades. In particular, the paper utilises recent theorising in international development contexts which focus on the political equilibria (or political settlements) which emerge in all societies, which operate to engender stability and allocate societal benefits through the panoply of institutions in place in each society.

Context

The post-federation 'Australian settlement', the broadly shared values which underpinned Australian society such as protectionist trade policies, the 'white Australia' policy, membership of the British Empire, and wage arbitration, had effectively erased Indigenous people from the public sphere.¹ It had been breaking down since the Second World War, and was fundamentally reconstituted following the election of the Whitlam Labor Government in 1972 after 23 years in Opposition. The Whitlam Government moved to modernise the nation's human rights landscape, the enactment of the *Racial Discrimination Act 1975* (RDA) being perhaps the most significant landmark. The Whitlam Government also moved to give effect to the Commonwealth's power to legislate with respect to Aboriginal affairs (a result of the 1967 referendum), established a Commonwealth Department of Aboriginal Affairs, and set in train the Woodward Royal Commission into land rights in the Northern Territory and its follow up, the drafting of the legislation which was ultimately enacted as the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) by the Fraser Government. Facilitating these changes was a fundamental shift in the attitudes and mindset

of a majority of Australians in the major capital cities, particularly in the larger states, in relation to social issues including the place of Indigenous Australians in the nation.

However, in regional Australia and less urbanised states, earlier attitudes persisted, and by the mid 1980s, legislation providing for Indigenous land rights had not been implemented in Western Australia and Queensland. An attempt by the Hawke Government to legislate national land rights foundered from both the right and the left of the political spectrum. On the right the state governments in Western Australia and Queensland opposed any suggestion of special rights for Aboriginal citizens. On the left Indigenous interests, particularly the influential Northern Territory land councils, were concerned that the existing rights in the ALRA, particularly the mining veto, would be dismantled in any national legislation. The proposed national land rights legislation was eventually shelved in 1985 by the Hawke Government under pressure from the Western Australian Government led by Premier Burke (Gardiner-Garden 1994:19–25).

At the same time, however, Australia was seeking to engage more actively with the international community particularly in Asia on economic and trade issues, and dominant business interests in particular were keen to put the vestiges of the 'white Australia' policy to bed. In addition, on Indigenous jurisprudence and rights issues, Australia was lagging developments in other settler colonialist nations such as Canada, New Zealand and the United States. Notwithstanding a probable majority of Australians supporting greater land justice for Indigenous Australians, by the mid 1980s, the nation had reached a point of political gridlock. This gridlock reflected the substantial influence of the mining industry (in Western Australia in particular) that had run a concerted political and media campaign to counter the recommendations of the Seaman Inquiry into land rights in Western Australia and later the proposed national land rights model proposed by the Hawke Labor Government.

Enter the High Court and its decision in *Mabo*. Setting aside the motivations or legal reasoning which led to the decision, it is instructive to assess the Court's decision in terms of its impact on the extant 'political settlement' in Australia. In broad terms, the established equilibrium, or what development theorists term the 'political settlement' (see, for example, Di John & Putzel 2009; Khan 2010; Ingram 2014) amongst Australia's dominant interest groups had changed since Federation. Race and the existence of racially distinct minorities were no longer seen as existential threats, and notions of 'white

Australia' and policies of overt race based exclusion were increasingly seen as an impediment to the global aspirations of dominant interest groups, particularly those representing larger internationally focused businesses.

The High Court decision in *Mabo* thus brought the institutional framework which had derived from the original Federation-era political settlement into substantial alignment with the later contemporary shape of Australia's political settlement. The *Mabo* decision acknowledged the prior ownership of land by Indigenous people, but not their prior sovereignty. It created (or technically 'recognised') a new *sui generis* form of title with unique characteristics: it was part of the common law and where native title existed, it was held to have always existed; its elements were determined by the customs of the title holders; it was communally owned; inalienable; and importantly would be extinguished by the grant of inconsistent interests by government. Critically however, the enactment of the RDA meant that any extinguishment since that Act came into force would be discriminatory and thus invalid if it did not provide for 'just terms' compensation in accordance with the Australian Constitution as is the case with the compulsory acquisition of mainstream titles.

The effect was to establish a clever compromise. The decision related to property, not sovereignty. It recognised that native title existed where Indigenous groups retained an ongoing connection with their country and there had been no intervening extinguishment of title by inconsistent crown grants. This meant that in many cases neither native title holders nor governments knew whether *de jure* native title rights continued in relation to particular tracts of land. It accepted the consequences of settlement by non-Indigenous Australians, leaving Indigenous non-native title holders (that is, those whose title had been extinguished through the process of settlement and colonisation) without recompense and compensation, unless their title had been extinguished post 1975. The compromise was particularly clever, because it involved a significant degree of entrenchment: while it cost comparatively little to determine the existence of native title, the financial cost of undoing it would be exorbitant for so long as the RDA and the 'just terms' provision in the Constitution remained in place.

At its core, the High Court's decision in *Mabo* was political insofar as it substantially aligned the law with the shape of the extant political settlement, in circumstances where the nation's political system and legislatures had been unable to effect that change.²

In response to the High Court decision, the then Keating Government set about drafting the NTA. It was driven by two synergistic political imperatives: the widespread sense of uncertainty in the community at large as to the security of their property titles (notwithstanding the terms of the High Court decision) and the refusal, at least initially, of a number of very powerful interest groups, notably the mining industry and the pastoral industry, supported by the West Australian, Northern Territory and Queensland Governments, to accept the decision.

The Commonwealth Government, correctly in retrospect, decided to move quickly to formalise native title rights in legislation. The proposed legislation provided a process for determining where native title exists; established processes for dealing with putative native title in the period between claim and determination; established requirements for incorporation of native title holders in entities named Prescribed Bodies Corporate (PBCs);³ created a 'right to negotiate' provision in relation to proposed processes to explore and mine on claimed or determined native title land; and provided an assurance that non-Indigenous title holders had maximum certainty via the retrospective validation of all titles granted over native title tenure since 1975, with a concomitant provision for 'just terms' compensation. Even so, the process of drafting the native title legislation was mired in contention.

A public campaign was mounted against the Native Title Bill led by major industry interest groups and backed by state governments, particularly Western Australia (Russell 2006:287–305). Even after the Native Title Act became law, Western Australia initiated a challenge to the Act's constitutional validity and also attempted to utilise a provision allowing the establishment of state based regimes to further limit the application of native title in Western Australia. Subsequently, the High Court confirmed the overall validity of the NTA and struck down the Western Australian legislation for inconsistency with the NTA and the RDA (Russell 2006:311).⁴

The point of this analytical vignette is to emphasise that native title came into existence as a result of changed attitudes both in the general community, and particularly amongst the implicit coalition of dominant interest groups which shape and 'own' the national 'political settlement'. Notwithstanding political gridlock, the High Court decided to address the anomalies and injustice arising from the out-dated and counter-factual doctrine of *terra nullius*. Once the High Court compromise decision was taken, robust and vocal 'pushback' emerged from those interest groups who perceived themselves as 'losers'. In the years which followed, in response to that pushback,

the equilibrium or political settlement in relation to the recognition of native title may have swung back in a regressive direction.⁵

Consequently, the legislative response to the *Mabo* decision was close run, and might easily have failed which would have led to a range of seemingly inconceivable consequences: pressure to repeal the RDA; pressure for an adjustment to the 'just terms' provision in the Constitution, and potentially to further and more explicit exclusion of Indigenous citizens and interests in Australian society. In the years since, the political turmoil which surrounded the native title legislation has settled down. Mainstream Australia has come to understand that the compromise put in place by the High Court does not represent a fundamental challenge to the major institutions relating to land, mining, and agriculture and thus does not fundamentally shift the nation's 'political settlement' but rather brings the institutional framework for Indigenous land rights into alignment with the existing political settlement in Australia. Of course, the implication is that Indigenous hopes and expectations that *Mabo* might represent a radical overturn of the current political settlement have not eventuated. This has led to a degree of Indigenous disenchantment over the inherent limitations of native title, as the realisation that it did not necessarily advance their deeper political aspirations became clearer.

It is common to hear Indigenous activists criticise native title as being a complete sham. In a more nuanced vein, Noel Pearson in an article titled 'Promise of *Mabo* not yet realised' (Pearson 2010) made two broad arguments: that the opponents of *Mabo* continue to undermine the implicit bargain involved in the High Court's decision and the NTA, namely that while settled Australia would effectively be off limits to Indigenous interests, 'remnant lands' would be available for claim and determination; and second, that the courts had lost their way, confusing the requirement for proof of continuity of traditional title with the nature of native title tenure. He was arguing in effect for a dynamic definition of the components of native title rights, not a static one set in concrete in 1788.

Ritter's assessment in his book *Contesting Native Title* was that there is little momentum for fundamental change, and the current native title policy consensus 'reflects underlying power relationships; it does not alter them' (Ritter 2009:174). He concludes that:

Existing assumptions and patterns of power relations conditioned by economics, ideology, history, society and politics will continue to shape the evolution of the consensus (Ritter 2009: 176).

To sum up, native title has been a significant and substantial change for the better, both for the nation as a whole and for Indigenous interests. But it has not met Indigenous expectations, and it is inherently limited by the reality that it is based on a compromise which fundamentally reflects the extant political settlement in Australia.

This points to a number of implications which need to be kept in mind looking forward. The first is that the extent to which 'progressive' institutional changes or reforms involving pro-Indigenous change can be implemented is very largely determined by the shape of the extant political settlement in Australia. And just as importantly, to the extent to which the Australian political settlement changes in ways which further exclude Indigenous interests, the existing institutions such as the NTA and native title are at risk.⁶

It follows that notwithstanding the Australian experience of the last 50 years, it is not inevitable that Indigenous interests will continue to be given a more inclusive role within the Australian political settlement. Moreover, the ubiquity and increasing influence of globalisation arguably increases the risks that Indigenous interests will lose relative power, and thus influence within Australian society. In those circumstances, the prospects for adverse changes to the Indigenous policy institutional framework, including the NTA, increase.⁷

It also follows that, from an Indigenous perspective, the first strategic issue to highlight related to native title (albeit one that is of contemporary as well as future significance) is the importance of building and sustaining broader political support for native title and its key buttressing institution – the RDA – in mainstream Australia and, to this end, of building the capacity to advocate and communicate Indigenous policy interests in the wider political system (at Commonwealth and state/territory levels) in a sustained and politically astute way. It is notable that unlike agricultural interests, mining interests, and business interests (all of whom have established and resourced substantial national organisations focused solely on advocating for their members' interests), the Indigenous advocacy organisation for native title established in 2005, the National Native Title Council (NNTC), is effectively a shell, with minimal staff and resources. Admittedly, the NNTC's constituent members – land councils and native title representative bodies (NTRBs) – are much better established and organised. However they necessarily have a primarily sub-national focus and remit, are largely dependent of public funding, and only occasionally do we see them enter the national policy debate, usually at the overtly political level once

governments have already determined a course of action which they perceive to be adverse to their interests.

The next 25 years

What then are the emerging strategic challenges for the coming 25 years? The answer depends on one's perspective, since Indigenous interests and government policy makers will see this policy landscape through different lenses and with the benefit of widely variable histories and backgrounds.⁸

The current Commonwealth Government has not laid out a comprehensive agenda for native title policy, but an examination of its views or response to three significant reports has provided some insights into its thinking, policy aspirations, and implicitly its expectations relating to the future.

Prior to losing office in 2013, the former Labor Government commissioned a report from the Australian Law Reform Commission (ALRC 2015). The report provided a detailed and largely technical assessment of the adequacy of the NTA in processing claims. The main issues raised were 'connection' requirements and continuity of traditional connection; the nature and content of native title (to reflect the *Akiba* decision⁹); authorisation provisions; joinder provisions; and claims resolution issues. To date, there has been no government response, which arguably suggests that native title is a second or third order issue for government.¹⁰ The fact that policy responsibility is in the Attorney General's department means there tends to be a greater focus on litigation strategy than policy development.

The second report is the Government's own White Paper on Northern Development (Australian Government 2015) which ostensibly adopts a 20 year framework, and identifies a number of longer term reforms required in the native title policy space. The most significant are the development of a capacity for leases or 'transferable interests' to be able to be granted on determined native title¹¹ and the reform of mainstream pastoral tenures to broaden the scope of allowed activities, which will require coexisting native title interests to be taken into account in as yet unspecified ways. In addition to these specific reforms, the White Paper includes a very strong focus on expanding the potential for native title land to be utilised for economic development (both by native title holders and external parties).

The third report is the 2015 Council of Australian Governments (COAG) initiated Investigation into

Indigenous Land Administration and Use (COAG 2015a) which recommends changes to claim processes, the removal of impediments to leases over native title land, and improved support for PBCs. COAG endorsed the report; but this was largely 'in principle'¹² and it does not appear that there is an intention to pursue legislative change either nationally or in any jurisdiction as a result of the report (COAG 2015b).

Perhaps the major long term issue to draw from these reports and their responses is that the Commonwealth Government sees a need to make native title tenures more accessible for economic development. But its policy agenda appears to be largely rhetorical, with little apparent progress on drafting legislative changes which would drive such an agenda. Nor has it pursued reform of related issues such as the development of appropriate state and territory based planning regimes which take account of the widespread existence of native title (Wensing 2016:51). The partial exception to this conclusion appears to be the Commonwealth Government response to the Federal Court decision in *McGlade*, which held that certain ILUAs required unanimous consent from native title holders, effectively forced the Government to legislate to overturn the decision and retrospectively validate a large number of existing ILUAs. The Government's recent success in legislating these changes may encourage further policy action over the coming year.

The following discussion attempts to move beyond the limited perspective derived from an analysis of formal Commonwealth Government policy documents such as the ALRC review of the NTA or the White Paper on Northern Development, and attempts to provide a provisional and inevitably partial response to the question 'what are the emerging strategic challenges for the nation in the native title policy space?

It seems useful to break the analysis down into three categories: local, regional and national.

Local issues

At the local level, there appear to be three broad sets of issues which exist today, but will inevitably become more contentious over coming decades: issues related to membership status as native title holders; financial issues; and the ongoing challenge of managing the Indigenous estate.

The *status and rights of membership* of the native title holding group will come under increasing pressure from a number of sources:

- the issues which will emerge as descendants of current native title holders (many no longer resident close to the land) seek to influence and play roles in determining land use activities¹³
- conflict between individuals and groups over their status as members of the native title holding group¹⁴
- the decisions of PBCs, which represent all native title holders for a particular determination (which may be extremely extensive) versus the rights of individuals who may have links to particular locations and/or places¹⁵
- structural conflict between Indigenous occupiers of the land who are not native title holders and native title holders, particularly if native title holders are not resident on the land, but reside elsewhere
- conflict between native title holders over the policies and agenda of their PBC and associated commercial vehicles, and even over the specification and access arrangements related to customary rights (Prout Quicke, Dockery & Hoath 2017:78)
- structural (or implicit) conflict within native title groups where dominant individuals or sub-groups in essence railroad other native title holders in inappropriate ways (Prout Quicke, Dockery & Hoath 2017:37).

These issues clearly raise issues related to the underlying traditional processes of recognition of rights, status and responsibilities.¹⁶ These include the dynamic processes which enable the specification of rights to change or be modified over time – what we might term the informal institutions of native title ownership, versus the processes established in the wake of the NTA to create corporate entities which are recognised by and can engage with mainstream Australia – what we might term the formal institutions of native title ownership. In an ideal world the informal and formal institutions would be aligned (isomorphic). In the real world, there will always be a gap. Moreover, circumstances will inevitably arise where third parties (or dominant personalities within the native holder group) see merit in taking advantage of that gap or potential gap.

Where conflicts or disputes involving membership status are litigated, the strong likelihood is that the courts will favour rights and processes under the formal institutions of native title. Such a judicial predisposition would arguably be unjust, or at least would have the potential to lead to unjust consequences and outcomes, but would be a direct consequence of the fact that native title has

been incorporated into the common law of the Australian nation state.

The policy implications for Indigenous interests are to ensure that the governance processes of PBCs and related native title entities both meet the formal requirements of the Australian state, but also reflect to the maximum extent possible the underlying informal institutions of traditional ownership and responsibilities for country. This requires more work and effort for corporation members and directors than is strictly necessary, but will create an organisational ‘culture’ (in the mainstream sense) of valuing underlying and traditional forms of doing business.¹⁷

There are two significant policy implications for governments and mainstream stakeholders. The first is the need to understand that by imposing formal institutional arrangements on top of traditional ways of deciding about country, mainstream Australia has both created new sources of potential conflict and imposed alien forms of operating (even though native title holders at least in theory control these new entities). This leads to a second implication, namely that governments should encourage native title organisations to reflect underlying customary and traditional norms in their decision making processes, respect their rights to continue to do so, and facilitate this to the extent possible. It is fair to say that governments have a particularly poor record on this front to date.

The second set of issues at the local level relate to the *distribution and management of financial revenues* by PBCs and associated corporate entities. These include:¹⁸

- key allocation decisions by PBCs and their associated trusts/entities relating to investment versus consumption of negotiated benefits or compensation payments, and
- distributional decisions where benefits are allocated by PBCs (or associated entities) to consumption.

The policy implications for Indigenous interests derive from the fact that the utility (subjective benefit) flowing from the allocation and use of financial assets by native title entities is a function of the preferences and aspirations of the native title holding group. That is, there is no *a priori* reason for preferring investment over consumption or vice versa. All allocational decisions involve risk and/or opportunity costs. What is important however is that native title holders are given the opportunity to make *informed* choices, and PBCs and NTRBs are best placed to ensure that this occurs.

Facilitating informed choice is particularly challenging in cross cultural contexts, and in circumstances where individual native title holders may not have strong financial literacy, nor a background in commercial or investment activities. Moreover, the board members and senior staff of PBCs and NTRBs do not often have backgrounds in commerce, investment, or financial management (Prout Quicke, Dockery & Hoath 2017: 77–78). In other words, most PBCs and NTRBs will not have internal access to the requisite financial skills to guarantee that appropriate financial options are laid out for native title holders prior to decisions being taken, and unless they have taken steps to access those skills externally, native title holders will be making what are very often irrevocable decisions without adequate information.

Moreover, the traditional dynamics of more traditional native title groups are such that consumption is usually preferred to saving and investment, and notions of equitable sharing are constrained by a range of factors such as local politics, individual status, kinship and ownership of particular sites or places.

Finally, the use of external advisers and staff by native title groups creates principal/agent problems, and this is exacerbated by the cross cultural nature of the principal/agent contracts.

Together, these three dynamics suggest that there may be an under-supply of informed choice in PBCs and associated entities dealing with financial issues. While in many or most cases the quantum of revenue may not be significant, in a small number the quantum is huge.

The policy solution, which arguably falls primarily on NTRBs, is to work with PBCs to create governance arrangements which counter these three risks. However, NTRBs are funded by the Commonwealth Government, and there are strong policy reasons for the Commonwealth to give these issues much greater attention, including by funding NTRBs to specifically support the development of greater financial capacity within PBCs and associated entities.

The policy risk for the Commonwealth is that a failure to act proactively to facilitate strong financial management by PBCs and their associated entities will allow the development of a systemic financial capacity weakness amongst PBCs, and in the event of a future decision by the High Court to determine the existence of a Commonwealth Government fiduciary duty (Gover 2016), expose the Commonwealth Government to a significant liability. This risk is exacerbated by the fact that the Commonwealth does not provide

adequate funding for PBCs. The only available funding appears to be the Capacity Building for Native Title Corporations program which is resourced at around \$6 million per annum nationally, and is administered as part of the Commonwealth Government's Indigenous Advancement Strategy.

The third set of issues at the local level concern the responsibilities and opportunities which relate to the ongoing *management of the Indigenous estate*. While native title holders have successfully managed their country for millennia, the colonisation and settlement of the continent has led to new and potentially problematic responsibilities on all landowners, including native title holders: managing the impact of introduced exotic species of flora and fauna; environmental threats from climate change; the demands of managing coexisting rights with other landholders; and the potential for heightened regulatory compliance arising from state/territory and Commonwealth laws, to list the most obvious examples. While native title is inalienable, and is thus protected from loss (at least under current legislative arrangements), failure to meet regulatory obligations has the capacity to financially cripple PBCs and their associated entities, thereby adversely impacting Indigenous landowners' use of their lands.

One policy response available to native title holders is to pursue commercial opportunities on their lands and waters which hold out the prospect of creating a financial surplus which can be redirected to land and waters management. Examples include tourism, carbon farming, aquaculture and agricultural enterprises. Commercial enterprises require the investment of up-front capital, and introduce new, and potentially expensive commercial risks. These financial imposts and the potential for financial losses are additional elements which ought to be considered by native title corporations in allocating available financial revenues. They also raise very real issues related to the comparative merits of pursuing social versus individual commercial options on native title land (Kerins 2013).

Apart from the obvious potential for profits, one advantage of the pursuit of commercial opportunities on the Indigenous estate is that it attracts government financial support via available mainstream business tax deductions. A downside however is that achieving commercial viability is entirely uncertain, involves significant risk of financial losses, and potentially subverts or diverts native title holders' focus on engagement with country.

A policy implication for government is to consider the benefit of strengthening support to the Indigenous Land Corporation (ILC), whose remit is specifically focused on supporting land management across the nation, including in relation to native title. The current Commonwealth Government has previously favoured an amalgamation of the ILC and Indigenous Business Australia (IBA), along with a stronger focus on 'economic development'.¹⁹ Amalgamation of the two organisations would be short-sighted and potentially counterproductive as the issues facing the ongoing management of the Indigenous estate are much broader than a mere lack of economic or commercial development. In particular, it would be retrograde were Indigenous interests to lose access to an agency with a dedicated and explicit land management focus.

Regional issues

A number of emerging strategic issues link to the aspirations of many Indigenous groups for a stronger voice in regional politics in Australia. These aspirations reflect a realisation that much mainstream politics is regionally focused, along with the reality that Indigenous land ownership and social structures, while having strong local characteristics, are simultaneously regional.

Regional support for PBCs

In broader Indigenous affairs contexts, the policy benefits of *greater regionalisation, and in particular, of exploring regional agreements* have a long history. Following on from the largely successful regional councils under ATSIC, there have been a small number of regional agreements established over the past decade (e.g. in Groote Eylandt), though the level of ongoing commitment from government has more often waned than waxed.

In native title contexts, notwithstanding the ever present centrifugal momentum towards smaller clan based arrangements, there is a strong policy case for considering regionally based management arrangements. Anthropologist Marcia Langton has recently canvassed the benefits of Aboriginal interests adjusting their mindset and making 'a decision to escalate their administrative organisational capacity to a much higher level', but she also noted the substantial resistance to date to this thinking among Indigenous interests (Langton 2015:181). While neither Indigenous interests nor governments have to date seriously advocated such a shift,²⁰ the challenges of delivering support to large numbers of PBCs, and the benefits to Indigenous advocacy of utilising larger organisations to advocate for native title interests suggest

that such a policy shift ought to be seriously considered. It would potentially reduce the numbers of PBCs requiring public funding, and would assist in strengthening Indigenous voices at regional levels.

In such a scenario, new and additional funding would be provided either to existing NTRBs or to new bodies established specifically to take on the administrative obligations of PBCs (akin to the way land councils in the Northern Territory undertake the administrative functions of land trusts). Formal decision making powers would continue to reside with PBCs, but responsibility for facilitating necessary decisions would fall to the regional organisations. This system might be established either through legislation, or via funding agreements. It potentially has the capacity to add value in terms of the governance challenges identified above, and in turn, the smaller number of regional bodies managing administrative matters would facilitate strengthened and appropriate regulatory oversight of PBCs either by government or perhaps by NTRBs.

In the absence of a much larger financial commitment by the Commonwealth Government to fund all PBCs, the policy implications of not pursuing some version of this proposal will be the continuation of a myriad of small and largely ineffective PBCs, who are vulnerable to financial failure, at risk of inappropriate influence by third parties, and who do not have the capacity to address the land management challenges they will inevitably confront over coming decades. In addition, there will be increasing demands on government for funding of PBCs, many of which do not have the scale to effectively manage complex land management and financial management issues.²¹

Alternative negotiated regional pathways

The substantial volume of outstanding claims, the costs for both governments and Indigenous interests in litigating them, the potential costs for governments of post 1975 compensation for extinguishment, and the potential for increasing uncertainty as to outcomes for all stakeholders suggests that *the scope for negotiated outcomes* exists and will increase, and that the expected comparative payoffs from negotiation versus litigation will begin to tilt toward negotiation. Indeed, the recent ALRC review of the NTA noted that various elements of the legislation, for example the requirement to prove continuity of connection, slowed down the pace of determining claims considerably (ALRC 2015:102–07; also Chapter 6).

There are already indications that stakeholders are keen to explore alternative pathways to litigation of native title matters: in Victoria the state government has made a number of native title agreements with Indigenous groups since 2000, and in 2010 enacted the *Traditional Owner Settlement Act 2010* which provides a formal framework and process for reaching agreements outside of the native title claims process. The Victorian framework also provides a vehicle for underwriting the long term sustainability of PBCs. This legislation has been utilised for the *Gurnaikurnai Settlement Agreement* made in October 2010, and the *Dja Dja Wurrung Recognition and Settlement Agreement* made in 2013.²² In Western Australia, substantial progress has been made towards finalisation of the Noongar native title settlement (Kelly & Bradfield 2015), and the legislative amendments following the *McGlade* decision will probably clear the way for Noongar settlement to be finalised over the next year.

These types of approaches are likely to gain momentum given the increasing appreciation that such processes have the potential to deliver real benefits to regional areas and create sustainable corporations able to exploit economic and cultural opportunities. This momentum might also be further enhanced by the commitment of some state and territory governments to negotiating 'treaty' arrangements that could conceivably look to enhance the attractiveness of such settlements to Indigenous interests.

To date, the Commonwealth Government has been quite passive in this area, presumably content to leave the financial and policy responsibility to the states and territories. Yet the failure to adequately fund, and build capacity of native title corporations, particularly PBCs, has been a tangible constraint on progress down these alternative pathways; the Commonwealth Government appears to have been rather short-sighted in this respect as the consequence of a failure to negotiate outstanding claims will be that the Federal Court and its claim process will be left with the ongoing burden, with a concomitant expansion of legal costs for all stakeholders.

A policy implication for Indigenous interests is to ensure that those agreements which have been made are implemented effectively. In particular, governments must be kept up to the mark, their performance in meeting their commitments constantly monitored; and the opportunities which have been created by these agreements for Indigenous interests need to be grasped. This requires effective organisational capacity under Indigenous control.

In conclusion, the complex mosaic of overlapping native title determinations, ILUAs, negotiated settlements, and the like might form an integral foundation for wider regional policy agreements. Such agreements would be tethered to Indigenous property rights and thus could not be ignored or discarded by governments as have many of the erstwhile regional agreements made in Australia to date. Thus these land title 'mosaics' built on formally recognised property rights could eventually form the foundation for negotiated treaty outcomes at regional levels and at least in theory, more broadly.

National issues

At the national level, the emerging strategic issues can usefully be categorised as those impacting governments: the Commonwealth Government and the states and territories together, and those which primarily impact Indigenous interests.

Governments

For governments, perhaps the most obvious of these relates to *compensation for extinguishment of native title* and validation of the replacement mainstream titles since 1975. We have recently seen in the Federal Court decision in *Griffiths*²³ an indication that the courts are prepared to adopt a more nuanced and expansive interpretation of what the 'just terms' requirement amounts to in relation to native title. One specific implication worth noting is that the quantum of 'just terms' compensation will be context specific; in other words, the cultural history and experience of each native title group will be relevant to calculating the compensation, and this will inevitably require anthropological and possibly other professional assessment.

Perhaps the most innovative and far reaching aspect of the *Griffiths* decision by Justice Mansfield relates to the nature of the intangible costs which were imposed on the native title holders whose ownership was extinguished by the actions of the Northern Territory Government in 1994. Compensation for the intangible costs of a compulsory acquisition is a recognised element in Australian (and British) common law. It is often referred to as '*solatium*'. In many statutes which recognise it, it is capped. Mansfield's assessment referred to it as the non-economic impacts of the acquisition, in other words, the impacts on Aboriginal culture, on connection to country, on sacred sites and so forth. This is an appealing distinction to draw, and is intuitively justifiable.

However, many anthropologists would emphasise the hybrid nature of culture and economy, and indeed Mansfield in his recent decision in *Rrumburriya*,²⁴ a native title case based on land near Borroloola, found that native title rights could include a range of economic and commercial components or elements. It follows that the intangible impacts of extinguishment will not be quarantined to non-economic, religious or cultural matters, but will potentially impact on economic rights. It may be argued that any such economic rights are incorporated into the value of the title linked to comparative freehold values, and there is some merit in this. However the economic activities that non-Indigenous land owners undertake on land are limited in comparison to the range of potential economic activities which are incorporated into native title.

Nevertheless, policy is made and implemented in most areas of public policy on the basis of limited information, and with a focus on simplification aimed at establishing general rules or approaches which can then be adopted without having to re-prosecute *de novo* every new circumstance. Mansfield's approach, while perhaps conceptually conservative, appears likely to form the basis of the approach to intangible costs into the medium term future. The new Northern Territory Government has decided to appeal the Mansfield decision in *Griffiths*, and thus it is not certain that Justice Mansfield's approach will be endorsed by the superior courts. Nevertheless, even a minimalist jurisprudence on compensation based on equating native title value to freehold values will raise significant issues for governments into the future.

The *Griffiths* case opens a new chapter in the national narrative on native title. It will shift the focus of public discussion and debate away from the processes of native title claim and determination, more squarely toward the ongoing and continuing extinguishment of native title (dispossession) since 1975. However, claim processes will remain important given that all compensation claims will require a determination of the existence of native title immediately prior to the extinguishing act. For governments at all levels, (all things being equal) there will be a likely requirement to defensively litigate even more claims (what we may term 'compensation claims'), and where the claims are successful governments will need to appropriate funds for the 'just terms' compensation required.

There is little evidence on the public record as to the potential contingent liabilities facing state and territory governments, though it seems likely that Western Australia and perhaps other jurisdictions will have prepared internal estimates. There is a potential for

the compensation costs to be significant particularly in locations where there has been expansion of towns with potentially thousands of residential blocks since 1975. So for example, the action of the Western Australia Government in negotiating the Yawuru native title settlement agreements in 2010 following the determination of native title for the Yawuru would have been driven at least in part by the potential compensation implications flowing from the growth of Broome in recent years and previous Western Australia governments' failure to fully observe the Future Act provisions of the NTA.

Offsetting the urgency of this potential or contingent liability for governments is the reality that native title claims, cases and negotiations move slowly, giving governments plenty of time to adjust and prepare for the inevitable compensation costs. However the capacity of governments to slow down native title processes in order to defer difficult or unpopular decisions to a future administration is a very real threat, both to the individual Indigenous groups involved and also at a systemic level to the nation as a whole which has a national interest in seeing these issues resolved expeditiously. The courts have a potential role here insofar as (following Mansfield) they could both determine that interest should be paid on delayed just terms compensation to former native title holders, but also take into account (perhaps through higher 'penalty' interest rates) that there is a high degree of injustice involved in delayed or prolonged native title processes.

Of course the existence of a national interest in resolving native title issues does not necessarily mean that the Commonwealth Government will engage; indeed, it is arguable that over the past 25 years, the Commonwealth Government has largely stepped back from proactively addressing these future policy challenges. This has been a function of a number of factors: the placement of policy responsibility for the NTA with the Attorney General's portfolio, which inevitably means that the focus is on case by case management of litigation; the absence of sustained pressure from stakeholders, and in particular states and territories, for early resolution of native title issues; and the strategically short-sighted decision of the states and territories to reject (or not accept) the Keating Government's offer to pay 75% of state and territory compensation liabilities (the states were arguing that the Commonwealth Government should pay 100%). At present, there is no effective Commonwealth Government commitment to underwrite state and territory compensation liabilities, and as a consequence, the Commonwealth Government does not see it as

in its interest to manage the issue so as to minimise overall costs.

What is clear however is that at some point in the next 50 years, and potentially in the next 25 years, the issue of native title compensation will shift from policy background to foreground, and at that point, the Commonwealth Government will be brought into the equation, if only because for every dollar the states spend on compensation, there is an opportunity cost in foregone government services elsewhere. The issue also has the potential to play into the relativities assessments by the Grants Commission which underpin the distribution of untied Goods and Services Tax (GST) revenues to the states and territories. It follows that the Commonwealth Government will eventually see the systemic issues shaping compensation liabilities in the states and territories as being not only in the national interest, but as warranting federal action or intervention.

One obvious course of policy action which the Commonwealth Government might adopt is to actively support the moves underway in some jurisdictions for alternative settlements (discussed above). An explicit policy stance of supporting such agreements at the national level would encourage laggard jurisdictions to develop appropriate frameworks, and would potentially limit the overall quantum of compensation costs for taxpayers.

In this context, some may query the ethics of seeking to minimise compensation. One obvious response is that if the *quid pro quo* is that Indigenous interests move from being excluded from the national political settlement to being included within the extant political settlement, with all the potential economic, social and cultural benefits that are entailed, then that is an equation that they may find attractive. At the end of the day however, whether or not governments seek to encourage alternative settlements, Indigenous interests will always have a choice regarding whether to participate.

A further issue for the Commonwealth Government relates to the effective use of agreement monies by Indigenous interests, and in particular, whether the Commonwealth Government has a potential oversight role. In contrast to statutory land rights regimes where the Commonwealth Government has a formal regulatory oversight role, in relation to native title, its status as an inherent property right (which is part of the common law) means that the Commonwealth Government has a minimal formal regulatory oversight role. In particular it cannot legislate to control or regulate the use of native title payments (i.e. funds derived from native title

agreements) without risking legal claims arguing that it has acquired a private interest and must pay 'just terms' compensation. It does have the ability to regulate corporations, but must do so on a non-discriminatory basis unless it wishes to over-ride the RDA, a step bound to attract widespread political opposition from mainstream interests.

Nevertheless, the use of native title payments is potentially politically sensitive, and were for some reason a major political issue to emerge around the use or 'misuse' of native title payments, particularly if external advisers were diverting funds away from native title holders, then there would be considerable pressure on governments to be seen to be acting. The amounts involved are potentially large, and while they may not expand in the future following the cessation of the resources boom, the life span of the relevant agreements extend well into the next decade and in some cases beyond. In the event that it were to become clear at some point in the future that regulatory failures had led to widespread diversion of native title payments away from relevant beneficiaries, the likelihood of a successful fiduciary duty claim against the Commonwealth Government would increase significantly.²⁵ Such an eventuality is most likely if the relationship between the underlying political settlement and the terms of political debate fall out of alignment. Of course, if the terms of the political settlement moves adversely against Indigenous interests, then the courts are less likely to decide governments have a fiduciary duty, and indeed could even wind back the terms of the current native title laws.

There were previously proposals advocated by the Minerals Council of Australia and some Indigenous leaders for the introduction of a mechanism to facilitate tax deductibility for investments derived from native title payments, an issue strongly opposed by Treasury because of its concerns it would open a potential floodgate for tax evasion (not necessarily by Indigenous interests). Following consideration by a Working Party comprising officials and key stakeholders (Treasury 2013), the Treasury ultimately determined to close down the potential vulnerability by determining that all native title payments were 'compensatory' and thus tax-free. In June 2013, legislation was passed to retrospectively remove the tax liability for native title payments back to 2008 (Ashurst 2008). While this was a plus for Indigenous interests, it removed the scope for an incentive structure tilted towards investment over consumption to be introduced, which had clearly become a concern for at least some of the major resource development corporations (Murray & Wright 2015:148–149). The outcome thus reinforces the arguments made above

in support of proactive measures to ensure native title holders are able to make informed choices regarding the allocation of native title benefits.

While a number of the major resource development corporations are clearly concerned at the potential for public disquiet to emerge in relation to agreements they have signed and payments they have made, it is also clear that not all resource developers share those concerns, and indeed, may even see it in their interests to establish 'loose' payment structures which allow key individuals to benefit at the expense of the broader native title group.

It follows that there is an argument for establishing a robust corporate governance regime over native title payment arrangements while respecting the rights of native title holders to make informed choices. The most effective means of doing this is through the various corporate regulation schemes. Many native title groups utilise numerous corporate vehicles to implement their financial strategies, often incorporated under different legislative regimes, thus ensuring that no single regulator can ever oversight the totality of the group's commercial and corporate activity. Addressing these types of challenges requires a level of coordination and political leadership across all jurisdictions which to date has not been in evidence. Improved and proactive regulatory oversight arrangements for native title corporations are in native title holders' interests, in the national interest, and also in national policy makers' interests.

Indigenous interests

For Indigenous interests, the emerging strategic issues are different depending on whether native title has been determined or is considered to exist and has not yet been determined. A third category (perhaps the majority of Indigenous citizens) which ought not to be forgotten are those who have had their native title rights and interests extinguished prior to 1975 without compensation by the Australian nation state.

Perhaps the most obvious emerging national strategic issues for the next 25 years in the native title domain are those facing native title holders. Building on the challenges discussed above in relation to local issues, there is a pressing need for the NNTC to be expanded into a *stable and sustained national voice to articulate native title holder aspirations* and advocate pro-native title holder policy. This challenge is largely organisational, but requires the development of a longer term perspective and implementation plan. Effective long term advocacy requires building the capacity to engage with all

sides of politics, the development of a secure funding base independent of government, and robust internal governance which assists in resolving inevitable internal conflicts constructively and expeditiously.

Putative native title holders also have a national-level interest in having their views advocated effectively to government and other influential stakeholders. While each native title group has potentially difficult choices to make in relation to their own country (e.g. as between litigation and negotiation), Indigenous interests nationwide have an interest in learning what other groups have done both in their litigation and negotiation strategies. There is probably a reasonably effective informal network of lawyers, anthropologists and Indigenous leaders who share this type of information, but we are approaching a time when a degree of formalisation might ensure that relevant information is diffused efficiently and in a timely fashion. Again, this is a potential role for a national advocacy organisation.

A further potential role for an upgraded national native title advocacy organisation relates to the development of a strategy and resources to proactively manage the potential concerns of governments relating to the financial policies of native title corporations. The creation and sustenance of a 'culture' of informed and conservative financial management amongst native title corporations will do much to pre-empt the potential for governments to intervene over the coming decades, as well as contributing to better quality decision making on the ground.

In relation to the situation of Indigenous peoples who have been dispossessed without compensation, there are numerous non-native title aspirations and issues which require attention and advocacy. These issues span the Indigenous affairs policy agenda. However, there is one native title related institution which deserves more strident and robust support at national and regional levels from native title groups.

The Aboriginal and Torres Strait Islander Land Account²⁶ was initially established by the NTA, and has been progressively and incrementally adjusted over the past 25 years to make the revenues it produces less amenable to Indigenous oversight and more embedded within government. The Account is a special account for the purposes of the *Public Governance, Performance and Accountability Act 2013* (PGPA), and has a balance of \$2 billion at 30 June 2016. Its revenues are used to provide annual appropriations, independent of government control, to the Indigenous Land Corporation (PMC 2016:204–206).

Here is not the place to provide an account of the recent travails of the ILC, but suffice to say that the Commonwealth Government has previously sought to amalgamate the ILC with IBA and has more recently reverted to an interim step of amalgamating the back office functions of the two organisations. The consequence of any future amalgamation would be that the revenue stream of the Land Account would inevitably be directed away from land based investments. Given the size and challenges of successfully and effectively managing the Indigenous estate, such a policy appears retrograde.

The potential of the Land Account to assist Indigenous groups who for one reason or another have been unable to regain or access their traditional country is substantial,²⁷ but it is being inexorably engulfed by the bureaucratic systems of the Commonwealth. There is a strong case for the ILC and the Land Account to be effectively privatised, divested from government control and re-established as an independent Indigenous controlled institution. This would necessitate both successfully resisting the current attempts by government to 'colonise' the Account and incorporate it into the Commonwealth Government's budgetary priorities. In order to persuade a future government to divest, it will be necessary for Indigenous interests and the combined Indigenous native title leadership to develop a robust implementation strategy. Again, this is a potential role for a strengthened NNTC.

The analysis in this paper categorises the emerging strategic issues in native title under three headings: local, regional and national. It also examines the issues from the perspective of Indigenous interests and those of policy makers and governments, particularly the Australian Government. The emerging strategic issues are summarised in Table 1.

Conclusions

Native title has been a major institutional change to Australia's legal system and in particular its land laws. Twenty-five years on, the nation is still working through the implications of this seismic shift. In particular, it is too early for policy makers to take their hands off the tiller and leave developments entirely to the vagaries of interest group competition, untouched by a firm national vision of what native title institutions should look like in 25 years' time. After all, the extent of native title means that it covers and affects an extraordinary expanse of the continent.

In attempting to think through the emerging strategic issues for the next 25 years, this analysis has adopted a largely positive (as opposed to normative) analytic frame. In other words, it is focused on *what is* rather than *what might be*. In contrast to much writing on native title, the focus in this paper is not on aspirations such as Indigenous sovereignty, or improved access to human rights, but rather attempts to inject a degree of realism by basing the analysis on the inchoate equilibrium or 'political settlement' in Australia – which in effect determines the shape of the institutions which deliver benefits to the dominant coalition of interests which 'own' that settlement.

A key implication of this analysis is that to the extent that the Australian political settlement becomes more inclusive of Indigenous interests, there will be greater scope for changes to native title and land rights which acknowledge and recognise Indigenous needs and aspirations.²⁸ However, to the extent that the Australian political settlement becomes less inclusive, Indigenous interests will struggle to retain the benefits embedded in the NTA and associated institutions.

There is no guarantee of perpetual progress, and Indigenous interests' relative political and economic influence is vulnerable to external changes in Australian and global society. Whether the future political settlement in Australia is more or less inclusive of Indigenous citizens, Indigenous interests will be better positioned to deal with what emerges, be it threat or opportunity, if they are organised and independently funded to advocate for and influence policy.

Professionals working in native title, particularly anthropologists and lawyers, have much to offer, both to Indigenous interests and governments. The complexity of working in a fluid and developing field of law, replete with cross cultural tensions and dilemmas, make for extraordinary challenges. The guiding principles of effective work in these contexts should be a commitment to facilitating or assisting Indigenous groups to make *informed* choices, and this includes ensuring that Indigenous decision makers consider and take into account the 'bigger picture'. The purpose of this analysis has been, in large measure, to begin a discussion about some of those systemic and 'big picture' issues.

An overarching conclusion for Indigenous interests is that they should allocate greater resources to advocacy and political organisation in order to ensure that the wider political system cannot ignore Indigenous aspirations and concerns in making decisions. In particular, Indigenous interests need to strengthen their focus on protecting and

TABLE 1. Summary of emerging strategic issues in native title

Strategic issues	Implications for Indigenous Interests	Implications for Governments
Local issues		
Status and rights of membership of native title groups	Ensure governance processes of PBCs and native title corporations are robust	Encourage and facilitate hybrid organisational structures for native title corporations which reflect both formal and informal customary norms.
Distribution of financial revenues from native title agreements	Commit to ensuring native title holders are provided with opportunity for making <u>informed</u> choices and decisions	Act proactively to facilitate and encourage strong financial management of PBCs and native title corporations
Management of the Indigenous estate	Consider greater commercial use of the Indigenous estate	Strengthen the commitment to retaining the Land Account and the ILC
Regional issues		
Exploring greater regionalisation	Work towards ‘changed mindsets’ which are more open to greater regionalisation	Consider funding models for PBCs based on region-wide support
Alternative negotiated settlements	Consider merits and trade-offs involved in negotiated settlements vis a vis litigation Ensure an ongoing focus on implementation of existing agreements	Consider greater proactive support (including from the Australian Government) for alternative settlements in states and territories in order to limit future litigation costs
National issues		
Compensation for extinguishment	Prioritise claims to maximise political leverage – this requires system wide leadership	Address the systemic incentives to defer and delay resolving compensation claims, e.g. through national policy support for alternative settlements Introduce more proactive regulation of native title corporations
Strengthened national advocacy of Indigenous native title interests	Strengthen the NNTC Engender a ‘culture’ of robust and ethical financial management in native title corporations Develop a strategy to implement plan to ‘privatise’ and divest into Indigenous control the Land Account and the ILC	Facilitate greater inclusion of native title interests in the policy making process to counter the likelihood of future political gridlock Upgrade funding to the PBC system
Resolution of bulk of outstanding native title claims, including ‘compensation claims’	Explore greater use of negotiated settlements	Explore greater use of negotiated settlements Provide more targeted support for capacity building of PBCs

advocating in support of the institutional gains that have been made in the past, as without active support there is the very real prospect that those gains will incrementally (and invisibly) erode and disappear.

For government, the overarching argument of the analysis is that there are systemic challenges and dynamics which require proactive attention, particularly from a national perspective.

There is the possibility for the Commonwealth Government that a future High Court will determine that like Canada and New Zealand, the Commonwealth Government owes Indigenous citizens, and in particular dispossessed native title holders, a common law fiduciary duty. Indeed, the likelihood of such a decision is arguably in inverse proportion to the quality of national policy making on native title and Indigenous policy generally over coming decades.

Such a determination in the future would potentially amount to a 'new Mabo' and would potentially upend the terms of the current relationship between the state and Indigenous peoples in Australia. The best way for governments to manage this possibility is to develop and implement policies which are proactively inclusive of Indigenous interests, and to facilitate the development and emergence of a stronger and independent advocacy voice for native title interests in the future. This would be win/win, being both in the national interest and of benefit to Indigenous interests.

Of course, governments are largely constrained by the parameters of the political settlement in place at any time. However, there is always some scope for political leadership and agency, and visionary proactive policy making can shape key institutions within the existing political settlement, and sometimes even influence the shape of the political settlement itself.

Native title is already deeply embedded within Australia's institutional framework, and is unlikely to disappear or be overturned. The challenge for the nation is to ensure that the institutions of native title work as well as possible, and continue to provide inclusive opportunities for Indigenous Australians. The alternative is not in the national interest.

Notes

1. See the discussion in Kelly (2009:25-27; 267-8) which recounts the role of the Hawke / Keating governments in finally laying the post-Federation Australian settlement to rest.
2. In an interview published in December 2016, Chief Justice French noted that the Courts do have a legitimate lawmaking role: 'There is an incremental lawmaking function that everybody has recognised as legitimate. Sometimes, of course, there is debate about whether judges have gone too far. *Mabo* was such a decision. We have all settled down about that now and there has been a statute which sets up the process by which the common law is to be applied. But none of that detracts from the proposition that judges do have a legitimate lawmaking role. It is a fantasy to pretend otherwise' (Merritt 2016:27).
3. PBCs are sometimes referred to as Registered Native Title Bodies Corporate (RNTBC) or merely as native title corporations. The term native title corporations is used here to include PBCs and associated corporations established to receive and administer native title payments under agreements with third parties.
4. *Western Australia v Commonwealth of Australia* (1995), 183 CLR 373.
5. That regressive adjustment to the political equilibrium was perhaps most evident in the outcome of the debate over the response to the later High Court decision in *Wik* which, with the support of Tasmanian independent Senator Harradine, ultimately led to further amendment of the NTA to amongst other things, substantially expand the scope and operation of the validation provisions in the NTA (further constraining the potential for successful Indigenous claims), and to guarantee certainty in relation to the *future* renewal of a vast number of leases and Crown grants.
6. Indeed, given the symbolic significance of native title in Australian public life, it may well be the case that changes to native title institutional frameworks will be the mechanism by which the political settlement is made either more inclusive or more exclusionary.
7. This reality has already been amply illustrated by the 2004 decision to simply abolish the Aboriginal and Torres Strait Islander Commission (ATSIC) rather than institute appropriate reform. The implications of this decision in terms of the disempowerment of Indigenous interests are over time becoming more apparent at both the local, regional and national levels, including in the centralisation of power and decision making in the hands of a single Commonwealth minister, and the tenuousness of the voice of Indigenous advocacy nationally.
8. Other stakeholders, such as businesses with interests or potential interests in native title land, will have their own perspectives. These perspectives are not included in the analysis here.

9. The High Court in *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 250 CLR 209 upheld the notion that the right to take resources under native title should be conceived as a widely-framed right, and as it applied to the facts in *Akiba*, was a right to access and to take resources from the identified waters for any purpose.
10. The Federal Court decision in *McGlade*, which opened the prospect that many Indigenous Land Use Agreements (ILUAs) might be invalid, and the consequent immediate action to introduce an amendment bill to Parliament which is largely based on one of the ALRC recommendations, may have raised the profile of a Commonwealth Government response to the ALRC report within the Government. Refer to the evidence of Attorney General's Department officials before the Senate Legal and Constitutional Affairs Legislation Committee Hearing into the *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* on 13 February 2017.
11. Arguably this is already possible at least in relation to determined exclusive possession native title.
12. Refer to the extract from the COAG Communique: 'COAG considered the report of the investigation into Indigenous land administration and use that it commissioned in October last year. To better enable Indigenous land owners and native title holders to use rights in land for economic development, jurisdictions will implement the recommendations of this report subject to their unique circumstances and resource constraints' (COAG 2015b).
13. Burke (2013) discusses the emergence of an Indigenous 'diaspora' linked back to traditional communities, but resident in various regional and metropolitan locations.
14. Palmer (2009) discusses the various ways that land holding groups can be conceptualised by anthropologists and lawyers, thus implicitly acknowledging that Indigenous notions of landholding group membership are potentially fluid, multivalent, context specific and innately political. See the recent decision of the Federal Court in *Peterson on behalf of the Wunna Niyiyaparli People v State of Western Australia (No 2)* [2017] FCA 289 for an example of the type of conflicts which can emerge in the claims process.
15. Weiner (2007), discussing Sutton (2003) and citing Merlan (2008) explores the changing implications of residency off-country for the assertion and exercise of traditional rights in country. Occupancy (in the form of ongoing foraging over particular tracts of land), was never according to Sutton (2003:26) the prerequisite for assertion of rights to country, but as Merlan (1998:111) notes the relationship of traditional owners to their country changed as they moved from foraging to permanent residence in nearby towns and even further afield. This leads to fundamental changes in the ways in which ownership rights are conceptualised over time. As Wiener (2007:158) notes: 'The disparity of knowledge and experience of country in Aboriginal country groups is a colonially engendered one and must at some point represent a real break with the phenomenological experience of landedness that existed at the threshold of colonisation'.
16. The recent ALRC review of the NTA was largely premised on the ALRC's recognition that 'traditional laws and customs may adapt, evolve or otherwise develop' over time (ALRC 2015:137). However, the likelihood that a Government will take up these recommendations without some external political driver appears rather slim, at least in the short term. Note the comments above in relation to the *McGlade* decision.
17. But see Martin (2004) for a contrary argument. He suggests that 'there are compelling arguments for establishing Indigenous corporations which leave as much social and political process as possible within the informal Indigenous realm and do not attempt to codify it within formal corporate governance mechanisms' (Martin 2004:74). What is common ground is that informal Indigenous norms and values will be influential, and perhaps even predominant. The policy judgement for Indigenous interests boils down to whether to manage the inevitable interactions between formal and informal dynamics inside or outside the relevant corporation.
18. Prout Quicke, Dockery & Hoath (2017:78) list five challenges arising from their case studies related to the management of financial resources arising from native title agreements.
19. This policy appears to have been shelved in favour of an interim step, the amalgamation of the back-office functions of both organisations. Refer to Minister Scullion's comment to this effect in the 3 March 2017 Estimates Hearings of the Finance and Public Administration Legislation Committee at page 4.
20. Strelein & Tran (2013:37 and footnote 73) indicate that a 2002 review of the Aboriginal Councils and Associations Act recommended 'direct funding [of PBCs], either via representative bodies or through a regional support model'. This doesn't appear to be a formal recommendation of the 2002 Review, but there is discussion of the potential for a multiplicity of PBCs and overlapping memberships (refer Corrs Chambers Westgarth 2002:283).
21. There is also a structural challenge embedded in the current arrangements. Where a PBC which has been unfunded (or substantially underfunded) is suddenly required to deal with a major land use or development proposal, it is faced with having to scale up and build organisational and negotiation capacity (often funded by the proponent which is a problem in itself) as well as simultaneously negotiate the access arrangements. Thus the inevitable structural inequity and negotiating power between the proponent and the native title corporation is further exacerbated.
22. Refer to the Department of Environment and Primary Industry website for further details: www.depi.vic.gov.au/forestry-and-land-use/managing-land/indigenous-land-management/agreements-with-traditional-owners, accessed 17 January 2017.
23. *Griffiths v Northern Territory (No 3)* 2016 FCA 900.
24. *Rrumburriya Borroloola Claim Group v Northern Territory of Australia* 2016 FCA 776.

25. Prout Quicke, Dockery and Hoath (2017: 86) point to a gap in the regulation of native title related trusts, and recommend the appointment of a specific public trustee office to service PBCs, essentially to minimise the risks arising from the potential for advisers to act unscrupulously in relation to the revenues of native title agreements.
26. It was originally named the Aboriginal and Torres Strait Islander Land Fund.
27. Bearing in mind that many native title groups do not have access to the whole of their country and they too stand to benefit from the ILC and the Land Account.
28. It is worth noting however that inclusion is a relational concept, and being included on adverse terms may involve continuing disempowerment (Hickey, Sen & Bukenya 2016:5–6).

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