

NEW DIMENSIONS IN LAND TENURE – THE CURRENT STATUS AND ISSUES SURROUNDING NATIVE TITLE IN REGIONAL AUSTRALIA

Jude Mannix

PhD Candidate, Science and Engineering Faculty, School of Civil Engineering and Built Environment, Queensland University of Technology, Brisbane, Queensland, 4000, Australia. Email: judith.mannix@hdr.qut.edu.au.

Michael Hefferan

Emeritus Professor, c/- Science and Engineering Faculty, School of Civil Engineering and Built Environment, Queensland University of Technology, Brisbane, Queensland, 4000, Australia. Email: m.hefferan@qut.edu.au.

ABSTRACT: The acquisition and use of real property is fundamental to practically all types of resource and infrastructure projects. The success of those activities is based, in no small way, on the reliability of the underlying tenure and land management systems operating across all Australian states and territories.

Against that background, however, the historic *Mabo (1992)* decision gave recognition to Indigenous land rights and the subsequent enactment of the Native Title Act 1993 (Cth.) (NTA) ushered in an emerging and complex new aspect of property law. While receiving wide political and community support, these changes have had a significant effect on those long-established tenure systems. Further, it has only been over time, as diverse property dealings have been encountered, that the full implications of the new legislation and its operations have become clear.

Regional areas are more likely to encounter native title issues than are urban environments due, in part, to the presence of large scale agricultural and pastoral tenures and of significant areas of un-alienated crown land, where native title may not have been extinguished.

Despite the NTA, numerous cases have emerged where the application of legislative guidelines has proven incomplete and many of those cases remain unresolved, thus complicating property dealings for both the public and private sectors. Research leading to this paper indicates that these issues and their implications are poorly understood, even by professionals involved.

This paper, drawing from recent PhD research, specific examples and court decisions, presents a summary of the nature and processes of such dealings, identifies some of the key factors that typically frustrate early resolution and calls for the urgent production of operational guidelines and professional training in these areas, so relevant to regional Australia.

KEY WORDS: Regional development; Native title; Assessment and valuation; Dispute resolution and court precedent; Professional development and training.

1. INTRODUCTION

A key but arguably underappreciated foundation of the Australian legal, business and community systems, is the highly reliable and successful way in which land tenure and ownership are organised and dealings are managed. These arrangements, in effect, identify and detail each and every parcel of land that has been alienated from the Crown noting its ownership and any significant dealings with that land, all recorded with the public registrar in each state (typically called a ‘Titles Office’). These records, all referring back to that identified land parcel, provide definitive proof of such matters. In parallel, each state has established registration systems for those alienated lands held through crown leases.

The structure for freehold land holdings, known as the Torrens System, was first established in South Australia in 1858 and thereafter was adopted not only in the other Australian states and territories but across many OECD countries. In over 150 years, the system has proven simple, accurate and reliable and, of critical importance in such matters, enjoys the confidence of the business and wider community (Mackie et al., 2011). Its longevity, without significant change, attests to this success.

The recognition of Indigenous rights to land, (that is ‘native title’), followed the High Court of Australia’s Mabo (1992) and Wik (1996) decisions. These, in effect, set aside the ‘Terra Nullius’ principles upon which ‘European’ ownership claims and, thereafter, tenure systems were originally based. Despite early confidence in the development of native title as a new property right at common law, Indigenous groups and practitioners involved in the negotiation of compensation for the loss of these interests have continued to grapple with novel and complex issues in applying both legislation and regulation (Song, 2014; Flynn, 2017). Native title as a ‘new’ property right could be perceived as a challenge to existing property rights, especially where native title co-exists with other rights and interests in land, for example pastoral interests. Such a situation highlights the importance of stable and well understood land use tenure arrangements (Fletcher, 2002; Gerritsen et al., 2018). Remarkably, little is offered by way of specific guidance through policy, precedent, or professional practice notes (De Soyza, 2017a; McGrath, 2017).

While native title can potentially impact lands in any geographic area, regional locations are, in practice, much more likely to be affected given,

among other things, the significant proportion of unalienated lands and the higher proportion of Indigenous residents within those areas.

Nearly one third of the Australian land mass is recognised as having a positive determination of native title, either exclusive or non-exclusive (AIATSIS, 2018). This figure does not include the substantial Aboriginal Land Trust areas or the 67 million hectares of Indigenous Protected Areas which together sum to an even larger portion of the Australian continent (Gerritsen et al., 2018; Australian Government, 2018.). As illustrated in Figure 1, nearly all native title and Aboriginal Land Trust areas are located in regional or regionally remote areas of Australia.

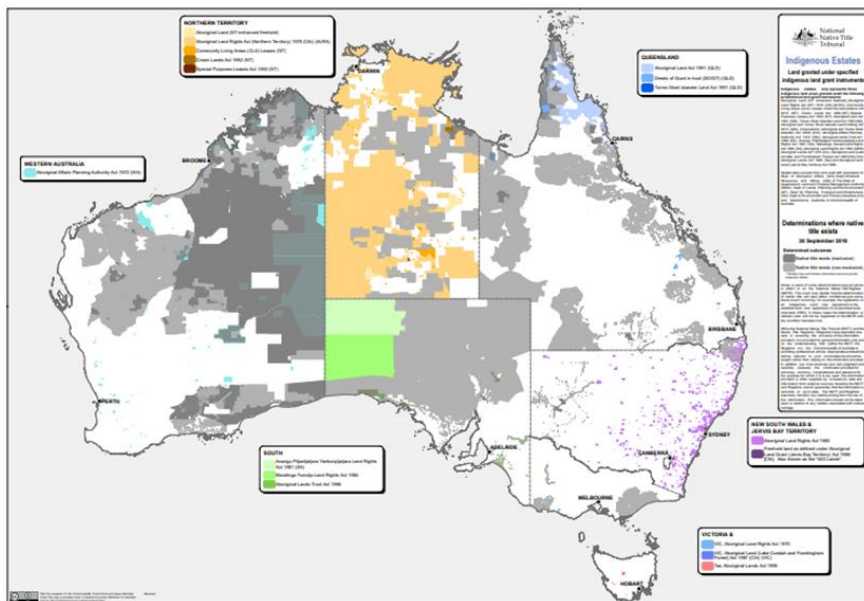


Figure 1. Australia, 2018, Indigenous Estates and Determinations of Native Title (exclusive native title; dark grey, non-exclusive native title; light grey). Source: NNTT (2018b).

Typical economic development initiatives, such as those proposed by the Australian Government in its Northern Australian agenda, tend to favour enterprises from outside of the region in which the project is located, with the resulting economic benefits flowing to the southern states of the Nation. This situation is particularly pronounced for Indigenous communities whose land is often required for such projects (Gerritsen et al., 2018). Recent research findings indicate that localised economic

development can bring greater benefits to the local community (Productivity Commission, 2017). A bottom up approach to economic development, that engages local communities in the design and delivery of projects, could work to reverse the current situation where inclusive land use planning is nearly non-existent in remote Australia (Gerritsen et al., 2018). Further, case studies in Gerritsen et al. (2018) highlight the potential for land-based service industries to engage local Indigenous enterprises in sustainable, inclusive long-term projects, where economic benefits accrue to not just the development partner, but also to the local community.

This paper, drawing from recent PhD research, court decisions and specific examples, presents an overview and current status of the legislative and tenure and operational arrangements to accommodate native title. From that base, the paper identifies and examines present issues and challenges, both generic and, more often, at a practical and operational level, which might frustrate settlement of individual dealings. It concludes that, if these processes are to work consistently and effectively into the future, much more by way of specific guidelines, worked case study examples and, critically, training, in the form of continuing professional development for those involved from the public and private sectors, is urgently required.

Although by necessity this paper refers extensively to legislation and case law, the work is not intended to constitute legal comment. To some extent, it is a contextual piece recognising that a wide understanding of the entire native title framework is a pre-requisite to addressing continuing issues in operations. Further, the perspective of the work is multi-disciplinary, reflecting the fact that those engaging in native title issues come from a wide variety of personal, cultural and professional backgrounds.

2. THE RESEARCH QUESTION

Arguably, for many Australian households, businesses, communities and local and regional governments, issues surrounding the accommodation of native title tenure and land administration have faded somewhat, and in recent times receive limited media coverage. However, issues here remain very much alive and include elements that are proving extremely difficult to resolve, particularly at an operational, ‘case’ level. Perhaps surprisingly, although government procedural guidelines are available (DNRM, 2018), guidance on *how* such matters are to be dealt with are much more difficult to obtain. Even fundamental methodologies prescribing assessment of

value of land and related resources and rights under such tenure arrangements are not agreed and standards emerging from professional bodies are either superficial or simply do not exist (*Griffiths v Northern Territory* 2016).

Further, the rights, obligations and compensation provisions in the latter event of compulsory acquisition of such lands are far from settled. Tenure adjustments and potential compensation claims involving native title are often simply held without resolution within the offices of Constructing Authorities around the country (Hefferan and Boyd, 2011).

In native title dealings, further complications arise in the confirmation and veracity of individual and tribal claims and, perhaps the most intractable of all, over the fundamental differences in concepts of 'ownership' and 'value' between European based law and Indigenous cultural philosophy (Fletcher, 2002). Even though most densely settled, privately held lands across Australian regions are largely freehold, land parcels surrounding these, such as roadways, public lands or waterways, may be required for infrastructure provision and other development uses. These parcels may remain subject to native title or may already be under claim. Infrastructure provision projects may therefore have further tenure complications because of the need to not only secure (freehold) real property parcels but also to secure access ways, service easements and the like across these unalienated parcels (Hefferan and Boyd, 2011). As demonstrated throughout the *Griffiths v Northern Territory* proceedings, and understood through empirical evidence gained from private practice, the contemporary understanding of dealing with, and the assessment of such claims amongst practitioners and government, is not yet consolidated and clear (De Soyza, 2017a; Hefferan and Boyd, 2011).

The research question posed by this work is therefore two-fold. One asks whether the practical application of tenure changes relating to native title is fulfilling the expectations placed upon it by overarching policy and legislation. Secondly, the paper identifies generic issues emerging in these areas and suggests ways in which those problems may be better addressed. In both questions, the regional context is particularly emphasised.

3. THE LEGAL FRAMEWORK: WHAT IS NATIVE TITLE?

Native title is a complex and emerging area of property law in Australia. Despite some limited recognition of Indigenous land rights in Australia over the years since colonisation (Altman, 2018), it was not until the landmark *Mabo v Queensland (No 2)* (*Mabo*) decision that the legal

doctrine of native title was introduced into Australian law—both an acknowledgment of and retreat from past injustices (Hunyor, 2015).

The Native Title Act 1993 (Cth.) (NTA), hastily drafted over an 18-month timeframe, was the legislative response to the legal uncertainty triggered by *Mabo* (Altman, 2018). Commencing in late 1993, the main objects of the NTA are:

- (a) to provide for the recognition and protection of native title;
- (b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings;
- (c) to establish a mechanism for determining claims to native title; and
- (d) to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title (s3 NTA).

The NTA recognises the existence of Indigenous traditional interests in land and the continuation of these interests except where valid acts of government have extinguished them. Further, it creates a mechanism for compensating Indigenous people for certain acts that have extinguished or impaired native title occurring after 1975. Native title is protected against discriminatory extinguishment or impairment by the operation of the Racial Discrimination Act 1975 (Cth) (RDA).

The *Wik v Queensland (Wik)* High Court decision recognised that native title rights and interests could co-exist with other rights and interests, although where non-native title rights were inconsistent with native title, the non-native title rights would prevail. The *Wik* decision was met with significant hostility from some sections of the Australian community and, in response, extensive amendments to the NTA were made under the Native Title Amendment Act 1998 (Cth). These amendments favoured permanent extinguishment of native title rights and interests and in many ways wound back the earlier gains from *Mabo* and *Wik* (Wensing, 1999; Altman, 2018).

One of the outcomes of the 1998 amendments to the NTA was the adoption of more complex processes concerning future activities (‘future acts’) than those originally in place (Kildea, 1998). In this context, a future act is an activity or action performed after January 1994 which affects native title, such as the granting of a lease or licence. Section 227 of the NTA, states that: “an act affects native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with

their continued existence, enjoyment or exercise”. Where a prior extinguishing act is not evident (freehold title for example), most jurisdictions will follow the future act regime in relation to dealings on land as set out in Part 2 Division 3 of the NTA (Moss, 2016; DNRM, 2018; DNRM, 2015).

The future act provisions contain procedural rights for negotiations between native title parties and other parties that apply to certain acts, for instance mining leases. The right to negotiate gives native title parties the right to voice opinion regarding developments on their land and to negotiate compensation for the loss or impairment of native title rights and interests. The right to negotiate does not allow the veto of an approved development and if an agreement cannot be reached within a six-month time frame, the matter can be referred to the National Native Title Tribunal (NNTT) for resolution (Weir, 2011; O’Faircheallaigh, 2006). The NNTT was established under the NTA as the primary administrative body for native title matters (s4 (7) (b) (c) NTA).

Under Section 56 of the NTA, where native title has been determined to exist, a native title corporation, or Prescribed Body Corporate (PBC) must be established by the native title holders to hold and manage (as trustee), or manage (as an agent), their native title rights and interests. Once the PBC is registered on the National Native Title Register the PBC becomes known as a Registered Native Title Body Corporate (NTBC) (Cawthorn, 2018; ORIC, 2011). Only registered native title claimant groups, PBCs or NTBCs have the right to negotiate under the NTA. Registered native title claimant groups can apply for the right to negotiate prior to a determination confirming recognition of their native title at common law.

Where a future act does not fit within any of the different subdivisions provided in the future acts regime, it can only be valid if carried out in accordance with a registered Indigenous Land Use Agreement (ILUA) (s24AB NTA). As a form of voluntary agreement making between native title parties and others under the NTA, ILUAs must be registered with the NNTT. Section 29 of the NTA sets out the specific processes involving notification and other matters that must be followed prior to an act being carried out. By way of example, in Queensland, the State has guidelines available on the Department of Natural Resources and Mines (DNRM) website outlining these NTA-prescribed procedural steps (DNRM, 2018). Other states and territories have also made similar material available.

In general land dealings, the process for the compulsory acquisition of real property by government is well established. The Australian Commonwealth Government and all state and territory governments in Australia are vested with the statutory right to secure privately owned

assets for public purposes (Brown, 2004). This activity is governed by the nine Federal, state and territory compulsory acquisition statutes and a significant body of case law. Determining appropriate compensation for the compulsory acquisition of land is a specialist activity undertaken by accredited or registered real estate valuers (API, 2007).

Compensation will first refer to the market value, or value in exchange, of the subject property, as per the Spencer principle. The Spencer Principle upholds the notion of the hypothetical, prudent, willing buyer and willing seller, in an arms-length open market transaction, where neither party is under any compulsion to either dispose of or to acquire the property (API, 2007). Spencer therefore is not a method of valuation, but rather an underlying principle that supports valuation processes (Brown, 2004).

Within this compulsory acquisition framework, as well as market value, other factors are also to be taken into consideration to satisfy the just terms requirement of the Australian Constitution (s51 (xxxix)). The nature of ‘just terms’, and how it is to be assessed, is not further explained within the Constitution but is generally understood to extend the compensation amount beyond the market value of the loss, and to include awards as required to rectify other loss (Brown, 2004; Winnett, 2010). This concept of ‘value to owner’, also known as the ‘Pastoral Finance Principle’, is well established by court precedent (*Pastoral Finance Association Ltd v The Minister 1914*). In addition to market value, land may have a special value to the dispossessed owner. Under compulsory acquisition legislation, however, it needs to be appreciated that the term ‘special value’ is an economic measure, placing a financial estimate upon the use to which the land could be put by the owner, but that would be denied due to the compulsory acquisition (Brown, 2004).

Under the provisions of the NTA, where an act extinguishes or partly extinguishes native title, native title holders are entitled to compensation. In these cases, compensation can be determined via an application to the Federal Court, mediation through the NNTT, the right to negotiate procedures, or negotiation through an ILUA. The NTA, at Section 51, sets out general criteria for determining compensation for native title holders. Subject to a number of considerations, native title holders are to be compensated on just terms “for any loss, diminution, impairment or other effect of the act on their native title rights and interests” (s51 (1) NTA).

However, the section immediately following, Section 51A, imposes a limit on the total compensation payable. Compensation “must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters” (s51A (1) NTA).

Section 51A is subject to Section 53 (1), which stipulates the entitlement to just terms compensation.

The NTA at Section 53 (1) ‘just terms compensation’, is taken to refer to Section 51 (xxxix) of the Australian Constitution, which, as noted earlier, requires the acquisition of property by the Commonwealth to be on just terms (Hughston, 2017; De Soyza, 2017). The NTA extends the just terms requirement to all States and Territories (s53 (2) NTA). This is a fine but important distinction from the normal compulsory acquisition arrangements across the states as, in mainstream practice, the requirement to compensate on ‘just terms’ only specifically applies to Commonwealth Government acquisitions under the provisions of the Constitution. The powers of the states do not, except now in these native title dealings, include such caveats.

Unlike ‘mainstream’ compulsory acquisition, the nature of native title tenure is *sui generis* (unique) in each case (Fletcher, 2002). It is a communal right, that is, title is not owned by individuals, but rather by a community: it is inalienable, and it cannot be sold (Small and Sheehan, 2005, Federal Court of Australia, n.d.).

Despite the unique character of native title preventing it from being considered a right to land in the same manner as freehold or leasehold title, real estate valuers and lawyers have developed methods to arrive at a hypothetical freehold value, from which a discount is applied to reflect the lesser right of the native title. For example, in the first successfully determined native title compensation case, *Griffiths v Northern Territory of Australia (Timber Creek)*, the Northern Territory Government argued that native title rights should be valued at 50 per cent of freehold title, a position supported by other states and the Commonwealth.

Nevertheless, in this case, the initial decision by Mansfield determined a value of 80 per cent of the freehold value, although upon appeal this was amended to 65 per cent (*Northern Territory v Griffiths*). At the time of writing, this case remains subject to various High Court appeals. As well as demonstrating the lack of endorsed methodology to value native title interests, leading to quite dramatic fluctuations in assessed compensation, such decisions also reflect the individual nature of native title rights and interests, which vary for each case.

Cases such as *Milirrpum v Nabalco Pty Ltd (Gove Land Rights case)*, *R v Toohey*; *Ex Parte Meneling Station Pty Ltd* and more recently *Timber Creek*, have recognised the special connection of Australian Indigenous peoples to their land and that such ‘special, non-economic connections’ will need to be accounted for under the just terms requirement of the NTA (Winnett, 2010).

Following *Mabo*, much of the early legal and real estate valuation discourse deliberated potential compensation principles to measure the loss of interests in native title, particularly those related to non-economic loss (Litchfield, 1999; Humphry, 1998; Burke, 2002). Proposed approaches included variations of existing heads of compensation, such as solatium and special value or real estate valuation approaches such as profits-a-pendre (Litchfield, 1999; Burke, 2002; Fortes, 2005) Also considered were personal injury and damages principles found in torts law (Humphry, 1998; Smith, 2001).

Solatium refers to the non-financial disadvantage resulting from the necessity to relocate as result of the acquisition, although this head of compensation is not recognised in all Australian jurisdictions (API, 2007). Profits-a-pendre is not a method of assessing value, but a type of title. Fortes (2005) argued that this arrangement, whereby the holder of the title has the right to profit from another's land, could provide assistance in the calculation of compensation amounts (although noting that the manner in which that future profit may be equitably and consistently applied would still require methodology and standards to be developed).

Despite these early discussions, none of these proposed approaches have been endorsed. Suggestions from the literature and case law, indicate that the accepted practice for compensating the loss of native title interests is based on the hypothetical market value of the land as a starting point and modified by an extra amount or proportion to account for 'special indigenous value' (Sumner, 2007; Boydell and Baya, 2012; Song, 2014).

Timber Creek, however, represents a significant departure from this previously accepted practice. Detouring significantly from the seemingly accepted course of valuing non-economic loss via a hypothetical market value plus something, Mansfield awarded the applicants a quantum for non-economic loss many times more than the market value of the land, justifying his decision as 'intuitive'. On appeal, the full Federal Court held that:

“The primary judge’s approach to non-economic loss generally indicates that he properly recognised that inalienability formed part of the assessment of non-economic loss and in conclusion, having found that the primary judge did not fall into error in fixing the award for solatium, no occasion arises for this Court to exercise its own discretion to fix the amount of the award for solatium” (*Northern Territory v Griffiths* 419, 420).

Debate over the appropriateness of using land valuation principles to determine compensation for non-economic loss is not new. In *Jango v Northern Territory (Jango)*, it was held that:

“... it may be the case that, when provided with evidence of the former native title holder’s spiritual or sacred connection with land, the Court may prefer to look to the subjective value of the land in the eyes of the former native title holders than it would to the objective value of the land under land valuation principles” (2007:10).

Questions arise around the appropriateness of aligning intangible benefits to capitalist market values, most recently raised by *Timber Creek*. Using land value as a basis for calculating non-economic loss can present an ethical problem, as traditional Indigenous lands that have not been extinguished by valid acts of government are often located in remote and climatically challenging areas of Australia. Remote property may have limited economic or market value although it can have a significant spiritual or special relationship value to the Indigenous owners (Campbell, 2000; Smith, 2001; Burke, 2002; Jowett and Williams, 2007). A starting point of a (very low) real property market value can therefore distort the overall losses, all things considered.

In the initial *Timber Creek* judgement, it was noted that the NTA did not prescribe any particular framework for the determination of compensation payable, save that assistance “may, but not must” be drawn from principles or criteria for determining compensation set out in the compulsory acquisition statute of the relevant jurisdiction, which in this case was the Northern Territory’s Lands Acquisition Act 1978 (LAA) (De Soyza, 2017). That judgement determined compensation for non-economic loss based on intuition, albeit intuition informed by legal evidence, and as noted earlier, the reasoning behind the determination of the ‘non-economic’ loss, was upheld by the full Federal Court in 2017 (*Northern Territory v Griffiths*).

Although the task of the High Court is to provide direction on the method to compensate for the loss of rights and interests in native title, commentary in the legal and other professions reflects the sentiment expressed by Flynn that there will be “a long way to go before native title compensation assessment is straightforward and predictable” (2017:3)

4. NATIONAL NATIVE TITLE TRIBUNAL REGISTERS

To date, almost 34 per cent of Australia's land mass has formal recognition of native title, with 12 per cent of this area establishing exclusive possession native title (AIATSIS, 2018, 2). This large proportion of land located mainly in regional and regionally remote areas of Australia highlights not only the growing Indigenous estate, but also the substantial impact native title may have on land dealings in regional areas of the nation.

The NNTT maintains three registers as a function of its duties under the NTA. These are; the Register of Indigenous Land Use Agreements, the National Native Title Register and the Register of Native Title Claims. Analysis of data contained in these registers reveals some important insights into native title claims and determinations and provides concrete evidence of the preference in Australia to negotiate dealings in native title under an ILUA, rather than the recourse to litigation.

Of the 2 325 native title applications listed on the applications and determinations register, between 7 January 1994 and 8 October 2018, only 394 (16.9 per cent) have been determined (NNTT, 2018a). The status 'determined' will state whether native title exists in the claim area, partially exists, or does not exist. More than half (56.2 per cent), of all applications have been 'otherwise resolved', meaning they have been dismissed, discontinued, withdrawn, or struck-out (NNTT 2018a). Just over twelve per cent of all applications are currently active, with some under consideration since 1994. This is summarised in Figure 2.

An investigation into native title applications involving the determination of compensation indicates that, of the 41 applications made, 31 (75.6 per cent) have been otherwise resolved, six are active (three applications are from 1998, three are from 2016) and only four have been determined. Of the four determined, three investigations found that native title did not exist (NNTT, 2018a). *Timber Creek* is the only successful application to determine the existence of native title and the only award for compensation since the commencement of the NTA. As discussed above, the case is currently under appeal to the High Court.

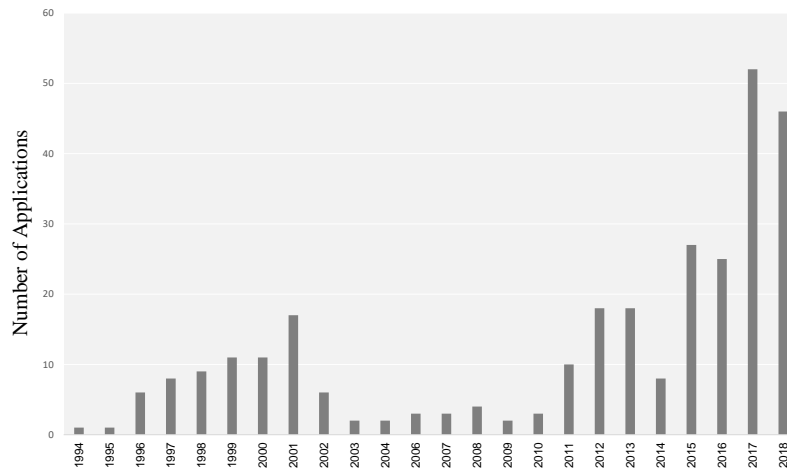


Figure 2. Australia: 1994 to 2018, Number of active native title applications. Source: NNTT (2018a).

The NNTT data highlights the sharp contrast between the number of cases where compensation has been awarded by the Court (one - *Timber Creek*) and the number of registered ILUAs negotiated (1 243), where compensation is a condition of the agreement (NNTT, 2018a). ILUA's are categorised into two types in the ILUA register, being body corporate ILUAs and area ILUAs. During the period 9 July 1999 to October 2018, 351 (28 per cent) body corporate ILUAs and 892 (71 per cent) area ILUAs were registered (NNTT, 2018). The distribution of ILUA's across the Australian states and territories is shown in Figure 3.

The majority (65 per cent) of ILUAs registered nationally are in Queensland. Using the datasets from that state by way of example, 130 (16.3 per cent) involved the establishment of a body corporate ILUAs and 421 (52.8 per cent) area ILUAs registered from 1998 to 2018 (NNTT, 2018c). As illustrated in Figure 4, the data indicates a surge of activity throughout 2011 to 2014 for these two categories of ILUAs and a more recent decline, since 2015, in the number registered.

The ILUA register provides important information regarding the purpose of these types of dealings. As shown in Figure 5, the majority of ILUAs registered in Queensland are agreements related to pastoral interests (177), access (139), government (96) and infrastructure provision (81) (NNTT, 2018c). It should be noted here that ILUAs listed predominately as 'Government' also include secondary purposes related to access,

community, infrastructure and development. Mining, gas, pipeline and exploration ILUAs sum to 132 agreements, with nearly all of these agreements (122 or 92.4 per cent) negotiated as area agreements (NNTT, 2018c).

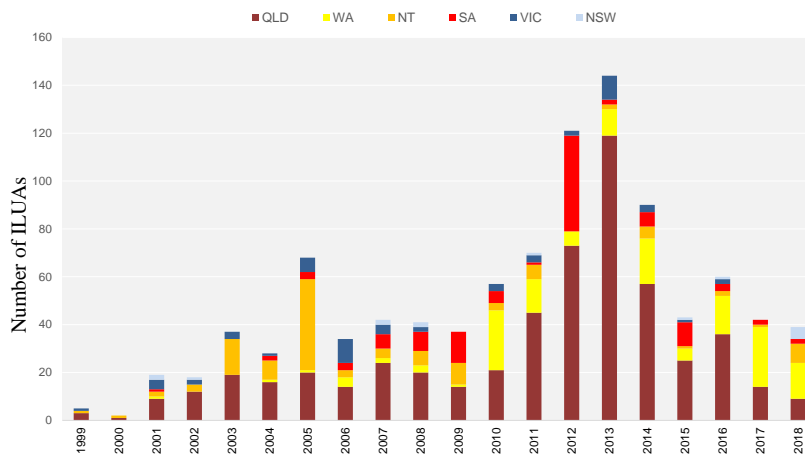


Figure 3. Australia: 1999 to 2018, ILUAs by state/territory and year. Source NNTT (2018a).

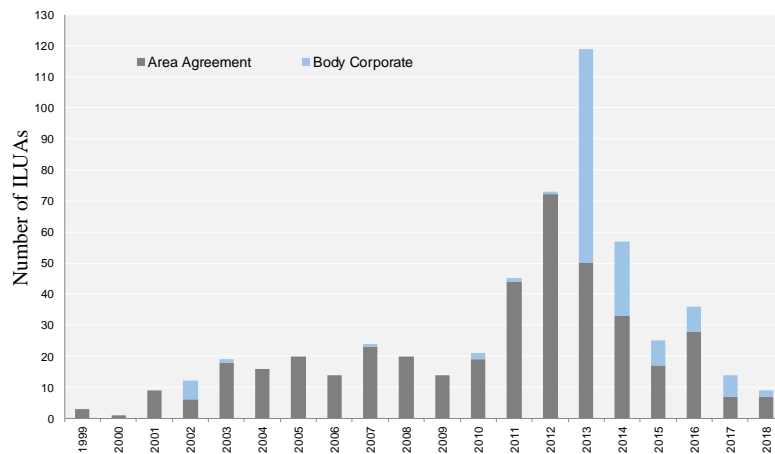


Figure 4. Queensland: 1999 to 2018, ILUAs, by type and year registered. Source: NNTT (2018c).

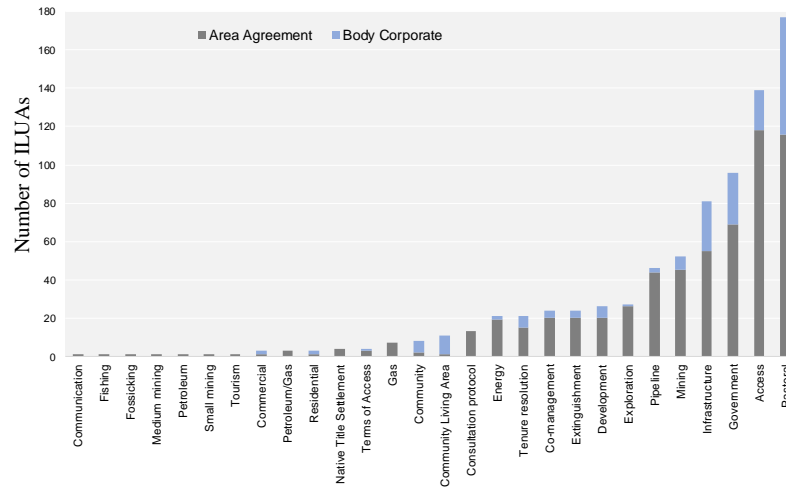


Figure 5. Queensland: 1999 to 2018, ILUAs by purpose and type.
Source: NNTT (2018c).

These diverse uses, ranging across rural, mining and, particularly public infrastructure installation, highlight their importance to regional areas and the need to ensure that all related processes provide clarity and certainty.

5. DISCUSSION

Negotiating an ILUA between parties regarding an act that impacts upon native title has the potential for positive benefits for all. Boydell and Baya (2012) note that negotiated agreements are emerging as international best practice, and are utilised in comparable circumstances in Canada, New Zealand, Papua New Guinea and Fiji, as well as Australia. There are compelling motives for the preference towards negotiated agreements. Litigation is lengthy and complex and consecutive judgments have typically not been made in favour of the Indigenous parties (Finn, 2012). In contrast, agreement-making can expedite the process, with both parties having the opportunity to negotiate an equitable outcome, or at least, an outcome acceptable to both (Fletcher, 2002).

Comfort is provided to native title parties by the requirement, under the NTA, that “an agreement must not leave the native title owners any worse off than they would be if compensation was determined through the courts” (O’Faircheallaigh, 2003, 6). Theoretically, agreement making can also

facilitate the development of mutually beneficial relationships between governments, other parties and Indigenous groups (Cleworth et al., 2008).

Projects on native title lands have the potential to stimulate economic development, an outcome that can be welcomed by native title holders, hoping for positive benefits despite their loss of access benefits (Smith, 2001; O’Faircheallaigh, 2016; Altman, 2018). However, aspirations here are not simply focused on monetary recompense. Rather they typically relate to more general desires to “achieve a better life for themselves and their children and, in doing so, to determine their own direction and priorities. A better life often translates to being able to enjoy the pleasures of being ‘on country’, to hunt and fish, carry out ceremony, to paint and carve” (O’Faircheallaigh, 2006, 3). Recent research has demonstrated the economic viability of sustainable land based, regional development projects that are inclusive of Indigenous communities in North Australia (Russell-Smith et al., 2018).

Despite potential benefits and Indigenous aspirations, concerns that agreement making can be economically detrimental to Indigenous peoples in the long run are not unfounded. Persistent evidence of less than equitable outcomes, driven in many cases by the relatively weak bargaining position of Indigenous groups, are well documented (O’Faircheallaigh, 2003; Sumner and Wright, 2009; Keane, 2011). Longitudinal studies of 40 native title agreements involving mining activity over a ten-year period established that only 25 per cent of these agreements provided substantial revenues to Indigenous groups and, the majority of agreements ‘offered limited or negligible economic benefits’ (O’Faircheallaigh, 2011, 2).

As discussed earlier, there are three types of ILUAs, body corporate agreements, area agreements and alternative procedure ILUAs. When native title has been determined, a PBC or NTBC will enter into a body corporate ILUA. Where a native title determination has not yet been made, the registered native title claimant group can negotiate via an area ILUA (Strelein, 2008). In Queensland, 92 per cent of mining, gas, pipeline and exploration ILUAs are negotiated as area agreements. In the context of the ability of native title owners to unlock economic benefits from their interests in land, Keane (2011) considers that the greatest opportunity lies via the body corporate ILUA route. A determination of native title provides native title holders with certainty regarding their rights and interests, and (in theory at least) a stronger bargaining position.

The outcomes of terms and conditions negotiated via ILUAs are not publicly available, due to the commercial-in-confidence nature of these dealings and only those party to the agreement are privy to the details

(O’Faircheallaigh, 2003; Everard, 2009; Boydell and Baya, 2012). It must be questioned in these negotiations if all parties are fully conversant with the complex and changing body of knowledge involved. Further, Native Title Representative Boards (NTRB’s), established to provide wide-ranging professional, independent advice in such matters, have been hindered in their ability to do so because of a severe lack of funding (O’Faircheallaigh 2006, Altman 2018, Strelein 2008). Submissions to the federal Attorney-General’s Department regarding proposed reforms to the NTA strongly reiterate the serious underfunding of native title bodies as a major reason for ongoing delays related to native title dealings (Keon-Cohen, 2018, Altman, 2018; AIATSIS, 2018).

Concerning to many working in the native title agreement arena are attitudes perpetuated by the current native title legislative framework. Economic development opportunities are frustrated for both Indigenous and non-Indigenous parties because of convoluted and overly legalistic procedures, particularly those related to government, which continue to reflect a need to ‘ensure certainty’ for non-indigenous interests (AIATSIS, 2018). Such an approach results in the failure of individual cases to reach an expeditious conclusion and limits the ability of Indigenous groups to direct economic development opportunities towards outcomes that reflect their cultural obligations (Hefferan and Boyd, 2011, Gerritsen et al., 2018).

Although government requirements for dealing in native title, such as those published by the Queensland Government (DNRM 2018), can give the impression of order and clarity, the actual situation is much more haphazard, as evidenced by the ongoing debates over the *Timber Creek* case. Again returning to that case by way of example, the original judge awarded compensation for the loss of native title at 80 per cent of the freehold value of the land. The Northern Territory Government, supported by the Commonwealth Government, and relying on the expert opinion of real estate valuers, argued the economic interests to be 50 per cent of the freehold value (although each respondent used differing approaches to determine compensation). The native title holders, in cross-appeal, claimed the economic value to be 100 per cent of the freehold value (*Griffiths v Northern Territory, Northern Territory v Griffiths*, Hughston 2017).

Clearly greater transparency around dealings in native title and trans-disciplinary discussions need to occur. Concerns have been raised by some real estate valuers that they would be working outside of their area of expertise when engaged to provide advice on native title matters, raising all manner of professional ethics and liability issues (Myers and Shah 2004). Such concerns have been echoed by anthropologists and those in the legal profession (McGrath, 2017; Flynn, 2017). Nevertheless, Fletcher

(2002) supports the important role professionals working in the native title arena can provide. Encouraging others to overcome such concerns, he comments that in relation to native title matters, “professional advisers have a real opportunity and a responsibility to understand the issues and influence the direction of dealings and negotiations, both within the legal recognition space and across the boundary” (2002:14).

Such an opportunity is exemplified in the *Timber Creek* case, where a number of departures from the usual professional practice undertaken by anthropologists occurred. Anthropologists are engaged to assist native title holders in proving their connection to country and substantiating their traditional rights and interests. In the *Timber Creek* case, their evidence was also used to substantiate elements of loss as described by the traditional owners. Further, the focus of the loss was not only from the perspective of the community, it also emphasised the impact of the loss on individuals (McGrath, 2017).

These examples demonstrate the often complex and legalistic systems that native title holders must interact with, and that the challenges of meeting these requirements are compounded by limited funding and/or policy direction (Weir, 2011; McGrath, 2017). Added to these issues, is the unresolved approach to compensation, leading to uncertainty and delays in land use dealings in native title. In contrast, enabling stronger, well resourced, native title groups and NTBCs will support their internal governance and decision-making structures, which, in turn, will enable ‘culturally legitimate’ negotiations that unlock benefits for themselves and other parties (AIATSIS, 2018, 12). The literature is supportive of greater involvement of the Indigenous ‘voice’ as the expert on native title matters, as well as a trans-disciplinary or collaborative approach to native title dealings (Campbell, 2011; McGrath, 2017; Everard, 2009; Smith, 2001).

6. CONCLUSIONS/ RECOMMENDATIONS

This paper recognises recent demands placed on existing land tenure and management systems in Australia, due to the ‘new’ property right of native title. Across the Australian states and territories, changes in land tenure systems are rare, with the fundamental structure and principles remaining largely unchanged for almost 150 years. In the broad sense, such change and evolution are welcome as advancing Australian society and community, and to some extent at least, redressing a grave injustice to original Australians.

Consequently, accommodating this new ‘property right’ should be addressed in a positive and progressive way. Recent research has demonstrated the development potential of sustainable land sector industries to provide inclusive economic benefits to Indigenous communities in North Australia. While considerable challenges remain, innovative development initiatives inclusive of Indigenous communities, have the potential to address Indigenous disadvantage and provide opportunities for greater engagement. To do so, it will be necessary to ‘refit’ previous approaches, protocols and dealings, as present circumstances and issues could never have been envisaged when tenure systems were first established long ago. The paper notes that, in this area, the basic policy and approach to a raft of property development and acquisition matters has been established through over-arching legislation but without either clear judicial precedent nor detailed, multi-disciplinary practice guidelines that consider issues such as specific rights, valuation and assessment, competing rights and the non-monetary nature of intangible rights or interests. Contrary to the probable belief of many across business, government and wider communities, numerous quite serious operational and delivery components of native title remain unresolved—a large number of cases simply held ‘in abeyance’. These operational issues are more obvious and pronounced in regional Australia as compared with major urban areas.

As systems mature and precedent is added in the longer term, the situation may improve. Nevertheless, this paper establishes that direct action in providing detailed operational guidelines (including worked examples and assessments), together with enhanced professional training by those with expertise in native title (including native title holders) are urgently required.

REFERENCES

- Altman, J. (2018). Submission to Attorney-General's Department, Reforms to the Native Title Act 1993. Online version accessed 10 September 2018, <https://www.ag.gov.au/Consultations/Pages/Reforms-to-the-Native-Title-Act-1993.aspx>.
- Australian Government (2018). Indigenous Protected Areas - IPAS, Department of Prime Minister and the Cabinet, Online version accessed 8 December 2018, <https://www.pmc.gov.au/indigenous-affairs/environment/indigenous-protected-areas-ipas>.
- Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) (2018). Submission to Attorney-General's Department, Reforms to the Native Title Act 1993. Online version accessed 10 September 2018, <https://www.ag.gov.au/Consultations/Pages/Reforms-to-the-Native-Title-Act-1993.aspx>.
- Australian Property Institute (API) (2007). *Valuation Principles and Practice, 2nd edn*. Australian Property Institute, Deakin, ACT.
- Boydell, S. and Baya, U. (2012). Resource Development on Customary Land – Managing the Complexity Through a Pro-Development Compensation Dolution. Proceedings of the Annual World Bank Conference on Land and Poverty, The World Bank, Washington DC, 23-26 April.
- Brown, D. (2004). *Land Acquisition, 5th edn*. LexisNexis Butterworths, Australia.
- Burke, P. (2002). *How Can Judges Calculate Native Title Compensation?* Discussion Paper, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Canberra.
- Campbell, D. (2000). Economic Issues in Valuation of and Compensation for Loss of Native Title Rights. *Land, Rights, Laws: Issues of Native Title*, Vol 2, no. 8, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS).
- Campbell, D. (2011). Application of an Integrated Multidisciplinary Economic Welfare Approach to Improved Wellbeing Through Aboriginal Caring for Country. *The Rangeland Journal*, 33, pp. 365-372.

- Cawthorn, M. (2018). The Native Title Act and PBC Regulations, PBC, Online version accessed 10 October 2018, <https://www.nativetitle.org.au/learn/native-title-and-pbcs/native-title-act-and-pbc-regulations>.
- Cleworth, B., Kapterian, G. and Gilles, P. (2008) *Gove: Forgotten Catalyst for Native Title or are we Just Where we Started? Native Title and the Mining Industry Issues in Australia from Gove to the Present Day*, Macquarie Law Working Paper Series 2008-7, Macquarie University, Sydney.
- Department of Natural Resources and Mines (DNRM) (2018). Queensland Government Native Title Work Procedures. Online version accessed 20 August 2018, <https://www.dnrm.qld.gov.au/qld/atsi/native-title-work-procedures>.
- Department of Natural Resources and Mines (DNRM) (2015). Guide to the Native Title Process, State of Queensland, Online version accessed 10 September 2018, https://www.dnrm.qld.gov.au/_data/assets/pdf_file/0007/362698/native-title-process-guideline.pdf.
- De Soyza, A. (2017). Native Title Compensation Explained; Part 1. *Native Title News*, 12(4).
- De Soyza, A. (2017a) Native title compensation explained; Part 2, *Native Title News*, vol.12, no. 8.
- Everard, D. (2009) *Scoping Process Issues in Negotiating Native Title Agreements*. Research Discussion Paper no.23, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Canberra.
- Federal Court of Australia (n.d.). Native Title guide, Online version accessed 26 November 2013, <http://www.fedcourt.gov.au/law-and-practice/areas-of-law/native-title>.
- Finn, P. (2012). MABO into the Future, Proceedings of the Aboriginal and Torres Strait Islander Studies (AIATSIS) Native Title Conference, Townsville, 4-6 June.
- Fletcher, G. (2002). The Development of Coexisting Property Rights in the Native Title Context. Proceedings of the Valuation of Land subject to Native Title Conference, Australian Property Institute and the University of Queensland, Brisbane, 24-28 June.
- Flynn, L. (2017). Full Court Upholds Most Findings in Timber Creek Native Title Compensation Case, *Law Society of NSW Journal*, 37, pp. 71-73.

- Fortes, R. (2005). Compensation Models for Native Title. Proceedings of the Pacific Rim Real Estate Society Conference, Melbourne, 23-27 January.
- Gerritsen, R., Whitehead, P., and Stoecki, N. (2018). Economic Development Across the North: Historical and Current Context of Possible Alternatives. In J. Russell-Smith, G. James, H. Pedersen, and K. K. Sangha (Eds) *Sustainable Land Sector Development in Northern Australia*. Taylor and Francis, Boca Raton.
- Hefferan, M. and Boyd, T. (2011). *Report on Related Valuation Methodology Associated to the Torres Strait Regional Authorities' ILUA Template*. Confidential report prepared for Torres Strait Region Infrastructure and Housing.
- Humphry, C. (1998). Compensation for Native Title: The Theory and the Reality. *Murdoch University Electronic Journal of Law (E Law)*, 5(1).
- Hughston, V. (2017). Valuing native title compensation after *De Rose and Griffiths (no.3)*?, 6 June. Online version accessed 10 September 2018, <https://aiatsis.gov.au/publications/presentations/griffiths-v-northern-territory-no-3-principles-compensation-and-native-title-law>.
- Hunyor, J. (2015). Dancing with Strangers: Native Title and Australian Understandings of Race Discrimination. In S. Brennan, M. Davis, B. Edgeworth, and L. Terrill (Eds). *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* The Federation Press, NSW.
- Jowett, T. and Williams, K. (2007). Jango: Payment of Compensation for the Extinguishment of Native Title. *Land, Rights, Laws: Issues of Native Title*, 3(8), Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS).
- Keane, P. (2011). Opportunity and Responsibility, Proceedings of the Aboriginal and Torres Strait Islander Studies (AIATSIS) Native Title Conference, Brisbane, 1-3 June.
- Keon-Cohen, B. (2018). Submission to Attorney-General's Department, Reforms to the Native Title Act 1993, Online version accessed 10 September 2018, <https://www.ag.gov.au/Consultations/Pages/Reforms-to-the-Native-Title-Act-1993.aspx>.
- Kildea, J. (1998). *Native Title: A Simple Guide. A Paper for Those who Wish to Understand Mabo, the Native Title Act, Wik and the Ten Point Plan*. Human Rights Council of Australia.

- Litchfield, J. (1999). Compensation for Loss or Impairment of Native title Rights and Interests: an Analysis of Suggested Approaches (Part 1). *Australian Mining and Petroleum Law Journal*, 18(3) pp. 253-266.
- Mackie, K., Histed, E. and Page, J. (2011). *Australian Land Law in Context*. Oxford Press Sydney.
- McGrath, P. (2017). *Native Title Anthropology after the Timber Creek Decision*. Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Canberra.
- Moss, J. (2016). Overview of Future Acts in the Native Title Act 1993, Crown Solicitor's Office, New South Wales Government. Online version accessed 13 October 2018, <http://www.cso.nsw.gov.au>.
- Myers, M. and Shah, K. (2004). Why Native Lands are Worth Less than Freehold: A Review and Analysis of Three Recent High Court Rulings. Proceedings of the Pacific Rim Real Estate Society Conference, Bangkok, 25-28 January.
- National Native Title Tribunal (NNTT) (2018). Search Register of Indigenous Land Use Agreements. Online version viewed 1 July 2018, <http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/Search-Register-of-Indigenous-Land-Use-Agreements.aspx>.
- National Native Title Tribunal (NNTT) (2018a). Search Native Title Applications, Registration Decisions and Determinations. Online version viewed 10 October 2018, <http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/default.aspx>.
- National Native Title Tribunal (NNTT) (2018b). Indigenous Estates and Determinations, Maps. Online version viewed 8 December 2018, http://www.nntt.gov.au/Maps/Indigenous_Estates_and_Determinations_A1L.pdf.
- National Native Title Tribunal (NNTT) (2018c). Native Title Vision. Dataset provided by NNTT, 9 July 2018
- Office of the Registrar of Indigenous Corporations (ORIC) (2011). *A Guide to Writing Good Governance Rules: for Prescribed Bodies Corporate and Registered Native Title Bodies Corporate*. Australian Government, Woden, ACT.
- O'Faircheallaigh, C. (2003). Financial Models for Agreements Between Indigenous Peoples and Mining Companies. *Aboriginal Politics and Public-Sector Management Research Paper No. 12*, Griffith University, Brisbane.

- O’Faircheallaigh, C. (2006). Aborigines, Mining Companies and the State in Contemporary Australia: A New Political Economy or ‘Business as Usual? *Australian Journal of Political Science*, 41(1), pp.1-22.
- O’Faircheallaigh, C. (2011). Native Title and Australia’s Resource Boom: a Lost Opportunity? 11 August, Online version accessed 15 September 2012, <http://theconversation.edu.au/native-title-and-australias-resource-boom-a-lost-opportunity-2725>.
- O’Faircheallaigh, C. (2016). *Negotiations in the Indigenous World, Aboriginal Peoples and the extractive Industry in Australia and Canada*. Routledge, New York.
- Productivity Commission. (2017). *Transitioning Regional Economies*. Study Report, Canberra.
- Russell-Smith, J., Sangha, K. K., Costanza, R., Kubiszewski, I. and Edwards, A. (2018). Towards a Sustainable, Diversified Land Sector Economy for North Australia. In J. Russell-Smith, G. James, H. Pedersen and Sangha, K. K. (eds). *Sustainable Land Sector Development in Northern Australia*, Taylor and Francis, Boca Raton.
- Small, G. and Sheehan, J. (2005). Valuing Your Grandmother: Why Customary Title is Incomparable to Western Conceptions of Property Value. Proceedings of the 11th Pacific Rim Real Estate Society Conference, Melbourne, 23-27 Jan.
- Smith, D. (2001). *Valuing Native Title, Aboriginal, Statutory and Policy Discourses about Compensation*. Discussion Paper no. 222, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra.
- Song, W. (2014). What’s Next for Native Title compensation: The De Rose Decision and the Assessment of Native Title rights and Interests. *Indigenous Law Bulletin*, 3(10), pp11-14. (January/February).
- Strelein, L. (2008). *Taxation of Native Title Agreements*. Research Monograph, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Canberra.
- Sumner, C. (2007). Getting the Most out of the Future Act Process, Proceedings of the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Native Title Conference, Cairns, 7 June.

- Sumner, C. and Wright, L. (2009). The National Native Title Tribunal's Application of the native Title Act in Future Act Inquiries, *University of Western Australia Law Review*, 34(2), pp. 191-227.
- Weir, J. (2011). Karajarri: A West Kimberley Experience in Managing Native Title. Research Discussion Paper no.30, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Canberra.
- Wensing, E. (1999). *Comparing Native Title and Anglo-Australian Land Law: Two different Timelines, Two Different Cultures and Two Different Laws*. Discussion Paper No.25, November, The Australia Institute, ACT.
- Winnett, C. (2010) Just Terms or Just money? Section 51(xxxi), Native Title and Non-Monetary Terms of Acquisition. *University of New South Wales Law Journal*, 33(2), pp. 776-807.

Cases

- Griffiths v Northern Territory* (No3) (2016) FCA 900 (Timber Creek)
- Jango v Northern Territory* (2006) FCA 318 (Jango)
- Mabo v Queensland* (No 2) (1992) CLR 186 (Mabo)
- Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (Gove Land Rights case)
- Northern Territory v Griffiths* (2017) FCAFC 106
- Pastoral Finance Association Ltd v The Minister* (1914) AC 1983 (Pastoral Finance principle)
- R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327
- Spencer v Commonwealth of Australia* (1907) 5 CLR 418 (Spencer)
- Wik Peoples v Queensland* (1996) 187 CLR 1 (Wik)

Legislation

- Commonwealth of Australian Constitution Act 1900* (UK) (The Constitution)
- Lands Acquisition Act 1978* (NT)
- Native Title Act 1993* (Cth)
- Native Title Amendment Act 1998* (Cth).
- Racial Discrimination Act 1975* (Cth)