The Idea of Native Title as a Vehicle for Change and Indigenous Empowerment

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When the decision in Mabo v Queensland (No 2) (Mabo)1 was handed down by the High Court in 1992 it lifted the lid on many things in Australia. It was a much belated acknowledgment of an historical fact, that in 1788 the British asserted sovereignty over territory that was extensively populated and geopolitically diverse. There were land owners and there were legal systems in place. The signal from the court was that, in the right circumstances, the law would recognise the implications of that through into the present day. It was a court decision that understandably raised hopes and expectations for many people. One hope was that legal recognition might bring positive change on a broader front: levels of political and economic empowerment for Aboriginal and Torres Strait Islander peoples that had not been achievable previously. It was also hoped that it would do so in a national sense – to that point, statutory recognition of land rights had occurred piecemeal, one State or Territory at a time.

More than 20 years on from the Mabo decision and the federal legislation that followed – the Native Title Act 1993 (NTA) – this book investigates that hope from the perspective of the past, present and future: is native title proving to be a vehicle for change and Indigenous empowerment, and can it do so in the years ahead? There was certainly nothing inevitable about the fulfilment of that hope. Native title is no conveyor belt, automatically transporting people from a place of political or economic marginalisation to somewhere better. Because the Mabo decision overturned assumptions that were fundamental to the Australian legal system that developed after 1788, the recognition of pre-existing property rights had to be retro-fitted into a system of land ownership and Crown control premised on their non-existence. Political resistance proved strong, particularly in the wake of significant court cases favouring Indigenous applicants, notably Wik2 and Mabo itself. Strategies, doctrines and techniques emerged with the purpose, or at least the effect, of containing the potential implications of Mabo – amongst legislators and courts and in the conduct of respondent parties, to varying degrees. The openings created by Mabo and the NTA also tested the capacities of Aboriginal and Torres Strait Islander communities and their organisations, to define and pursue objectives, to unify and organise internally, to find necessary resources and to prevail against often formidable obstacles.

The title of this book is posed as a question. One reason for that is that we know many Indigenous communities in Australia are dismayed by what native title has not delivered. Some said as far back as 1992 that they did not expect otherwise. The chapters in this book show that, for all its beneficial effects, Australian native title law as developed by courts and legislators since 1992 puts some very substantial hurdles in front of Indigenous groups seeking recognition and some significant technical constraints on what is possible, should they succeed. For instance, in the *Akiba* case referred to in the book title – another High Court decision from the Torres Strait, 21 years after *Mabo* – the recognition of a commercial native title right was a powerful moment, but that right was characteristically hemmed in, in this instance by a statutory licensing requirement.

Overall, this book shows that achieving positive change and empowerment out of the native title paradigm requires extremely hard and sustained effort, both internally by Indigenous groups, and externally in the interactions between those groups and governments, legislatures and third parties.

Internally, success depends on a range of matters. They include determining what the goals of all this activity are – whether they be called self-determination, empowerment, recognition, self-government, community development or something else – and defining them in a way that secures legitimacy within the group. Governance is also critical: deciding who can share in decision-making and in benefits, and on what basis; finding the right institutional balance between effectiveness, accountability and representativeness; achieving economies of scale in terms of professional services and other bought-in expertise; determining the degree of ‘adaptive change’ to Indigenous traditions that fits a group’s situation and sense of identity. All of this is likely to involve the reform or even outright replacement of existing governing structures in order to meet future challenges. History also shows that bringing forth and supporting effective leadership, amongst those who take on top-level positions in Indigenous organisations, is critical to making headway in a political and legal system not well-tailored to the interests of a three per cent minority of the population.

External factors are also of critical importance. First, there is the relationship to the state. The substantial proportion of Australia’s land mass now subject to Indigenous ownership, or at least a significant degree of legal control, creates the potential for significant autonomous activity. But however self-reliant groups may seek to be, Indigenous agency cannot alone achieve greater political and economic empowerment. The state – that is, Commonwealth, State and Territory governments – looms large in native title. Governments are the primary respondents to native title claims and the main financiers of the native title ‘system.’ They exercise control over the introduction of legislative reform, to native title law and to the associated regulatory regime, and they frame public policy in the wider field of Indigenous affairs. The dismay expressed by some in the book at the shortcomings and rigidities of Australian native title law suggests governments and legislatures can do much better, in terms of empowering the Indigenous communities pressing their claims for recognition or seeking subsequently to leverage a better future from their position as property right-holders. The instability

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of government policy and institutional arrangements in Indigenous affairs erodes the certainty needed by groups seeking to plan and to take greater responsibility for the development of their communities.

These observations reflect the reality that there are several modes by which the relationship between Indigenous peoples and settler states are conducted or addressed, including:

- legislation;
- litigation;
- policy and administration; and
- negotiation.

Comparing different settler states like Canada, New Zealand and Australia, one can see greater or lesser emphasis placed on these different modes of engagement. Modern treaty negotiations in Canada and the Treaty of Waitangi Settlement process in New Zealand suggest an appreciable tilt toward negotiation, though of course the Supreme Court in both jurisdictions plays a significant role from time to time and the relevance of policy and, to varying extents, legislation is pervasive. In Australia, we have negotiation processes coupled to the native title system, most notably consent determinations of native title and Indigenous Land Use Agreements that are applicable in a wide variety of situations. However, the 522-page federal NTA and its State and Territory complements, together with the hundreds of native title judgments from the Federal and High Courts, speak to a highly legalistic response to Mabo and its implications.

These modes always work in some kind of combination. A native title, land rights or treaty settlement system will involve a constellation of two, three or more of these elements and across its 17 chapters this book, appropriately, addresses all four in significant detail. Negotiation has some innate attractions, particularly in terms of directly involving the participants, avoiding blunt win/lose outcomes and allowing legal rigidities sometimes to be set aside. But simplifications about the desirability of one mode over the others should be avoided. Negotiations may not always be more empowering than top-down legislation or winner-take-all litigation conducted by lawyers in an austere courtroom. For example, Aboriginal people have achieved significant economic and political gains in New South Wales through a regime dominated by statute law. Policy and administration may look like a slender basis for Indigenous empowerment compared to more legally determinate forms like court orders, statutes or even constitutional provisions. But it was a policy decision, an act of political will, in 1995 that brought about governmental recognition in Canada that Aboriginal peoples have an inherent right of self-government.

Several authors in this collection argue that Australia risks squandering the potential benefits of Mabo unless the state accepts the self-government implications of native title recognition, as the corollary of acknowledging legal systems that have sophisticated, intricate and comprehensive mechanisms for allocating and distributing rights in, to and over land. The innovative approach of the Noongar nation in negotiating a comprehensive settlement with the Western Australia government, for instance, shows some of the potential that already exists within the Australian polity – for approaching the relationship between Indigenous groups and the state in new
ways, and for expressing that new relationship in concrete terms, through legislation, policy, resourcing, governance structures, land grants and recognised responsibilities.

Government is not, however, the only external actor relevant to this story. Third party or development interest in native title country, particularly in mineral prospectively areas, has brought Indigenous groups into much closer continuous contact with resource companies in particular. That coexistence, largely in remote and very remote areas of Australia, presents very significant challenges in areas such as environmental and cultural heritage protection. Of course, the rules for third party access to country are crucial to determining what leverage Indigenous landholders might have. Debates will also continue over preferred models for economic development in such communities and the benefits Indigenous groups can derive from mining activity. But this proximity to the resource sector also offers opportunities, for business-to-business relationships and for enhancing community capacity for the long term through education and training – while never forgetting that effectively institutionalising the implementation of agreements reached with private companies is crucial to their success. This book also illustrates that building relationships with non-government organisations and philanthropic entities can open doors to greater opportunity, in the right circumstances.

The two-part structure to this book reflects its interdisciplinary approach to these questions of change and empowerment. In the legalistic environment in which Australian native title is situated, legal questions remain crucial to future possibilities. Part One, concerned with legal dynamics in the development of native title, examines the way in which Australian law has defined and often constrained the scope of this newly-recognised property right. There is a particular focus on legal issues with a direct bearing on the economic potential of native title, such as alienability and the right to trade resources. This establishes a legal foundation for the multidisciplinary analysis of economic and political empowerment in Part Two. This first Part also assesses some of the wider effects that the recognition of native title has had on Australian law, singling out the rethinking of property law and the challenges posed for legal notions of anti-discrimination.

Part Two directly addresses native title as a potential vehicle for Indigenous empowerment. Authors with years, often decades, of frontline experience and intellectual immersion in questions of Indigenous political and economic empowerment provide a contemporary snapshot of the contribution made so far by native title and the prospects for future strengthening of Indigenous communities. Detailed mapping and analysis provides readers with a geospatial orientation and a sense of realism about the economic potential of the native title estate, while comparison with achievements under a parallel statutory land rights regime in New South Wales offers readers an important benchmark for assessing native title. Drawing on the perspectives of economics, anthropology and history, Part Two also explains some of the challenges Indigenous groups face in areas such as governance, land reform and internal politicking, as they operate in the shadow of the law, seeking to utilise native title for greater empowerment. Importantly, the section features two hard-headed but optimistic accounts of Indigenous empowerment in action, through the innovative use of income from mining agreements in Central Australia and the pursuit of self-determination through comprehensive settlement negotiations between Noongar people and the State government in
the South West of Western Australia. The Noongar settlement process is also notable for its regional scope. The negotiations cover an area of land the size of Victoria and aggregate the claims of six sub-groups. The potential benefits of region-wide approaches is a theme picked up throughout the book.

Overview of Individual Chapters

If native title is to offer up opportunities for political and economic empowerment, Bret Walker SC suggests that Aboriginal and Torres Strait Islander groups must first transcend a body of law characterised, amongst other things, by deep unfairness and excessive technicality. In Chapter 2, Walker provides a bracing critique of Australian native title law from the perspective of an appellate advocate: its departure from conventional legal standards applicable to property rights, its unfairness and the way it saddles native title claimant groups with an undue evidentiary burden. He criticises the reluctance of judges, in conceptualising native title, to give proper weight to its proprietary content and denounces the arbitrariness of extinguishment law that disregards the fact of continuous connection on the ground. Referring to the NTA’s structural bias towards mediation, Walker asks what other property right is governed by legislation that, from the outset, encourages its erosion by compromise. He concludes by warning that over-specifying the detail in native title determinations carries great risks. It ignores the complexity of human relations and the endless capacity for societies to change and adapt, the very qualities that legislation and the common law are considered highly capable of accommodating.

As the primary judge in the Akiba decision (the Torres Strait Regional Sea Claim), Paul Finn brings a unique insider’s perspective on the litigation. After outlining the distinctiveness of the factual basis of this particular native title claim – the difference from rights claimed on the mainland, the comparative absence of dispossession, the overwhelmingly marine basis of the claimed rights – he identifies the critical issues in that case that have bedevilled so many other native title claims. The first of these is ‘authorisation’: who is entitled to participate in the claim? Then there is the question of ‘society’. After the High Court’s decision in Yorta Yorta,4 claimants need to establish that they form part of a discernible society. Yet, as Finn notes, the evidence presented in Akiba indicated that no fewer than five different possible societies existed. The largest of these was a single society encompassing all claimants, stretching from coastal Papua New Guinea to Cape York. A different measure would have yielded 13 societies, reflecting the number of inhabited islands. Noting how native title displays the ‘distressing characteristic’ of ‘Balkanising’ claim groups, he suggests that fairer results might be achieved if claims were to proceed on the level of the largest reasonable aggregation of the groups in a society, and the largest geographical area within which their rights are exercised. He concludes by identifying further problems with conceiving native title too narrowly by recourse to the ‘bundle of rights’ notion, when a more complex anthropological understanding of how such rights are also interpersonal as well as territory-related might be preferable.

It is fitting that Paul Finn’s chapter is followed by Sean Brennan’s examination of the significance of the recent Akiba litigation. Brennan describes that litigation, and

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in particular the trial judgment of then Justice Finn, as crystallising ‘a turn towards greater moderation and realism in the judicial treatment of native title’. He contrasts this with earlier High Court decisions – particularly Ward and Yorta Yorta – which had contained the potential of native title. In what sense does Akiba restore ‘a little optimism about realising some of Mabo’s broader potential?’ Brennan identifies three key reasons. The first is the High Court’s willingness to accept that the rights of native title holders to access and take marine resources were able to be exercised for commercial as well as non-commercial purposes. This contrasts with a reluctance in earlier decisions to recognise commercial rights. Secondly, and relatedly, the court pushed back against the ‘over-specification of rights’. Brennan argues that this gives trial judges greater licence to frame native title rights in broad rather than narrow terms. And thirdly, the court’s conclusion that fisheries legislation regulated rather than extinguished native title reflects a more logical and accommodating approach to the ongoing recognition of native title as a property right. In concluding, Brennan suggests that Akiba, together with the more recent cases of Karpuny v Dietman and Western Australia v Brown, sends a strong message to governments, which should encourage them to take a less obstructionist approach to the litigation of native title.

Lisa Strelein’s analysis of native title law fundamentals – the difficulties of proof, over-specification of rights and harsh extinguishment rules – shares significant common ground with Bret Walker’s chapter. But her focus on a subset of native title law – the recognition of native title resource rights capable of commercial exploitation – draws forth some cautious optimism. She explores the potential for Indigenous economic empowerment through judicial elaboration (citing, for example, Canadian approaches to prioritising Aboriginal interests as against other interests in defined circumstances) and/or legislative reform (noting Justice Patrick Keane’s extra-judicial observations about dealings with land by prescribed bodies corporate). Strelein sets out the range of Australian legal responses to the assertion of commercial native title rights, showing the way in which such rights were occasionally recognised and sometimes left (arguably) implicit. In other instances, however, they were explicitly ruled out – by judicial determination using a variety of rationales or frequently by State negotiating pressure, as part of the price of a consent determination. She shows that the recent Akiba decision protected a commercial native title right to fish by taking a realist approach, against freezing for all time the way in which rights can be exercised, and by favouring regulation over extinguishment in the face of fisheries legislation. Strelein professes an open mind as to whether Indigenous economic empowerment via commercial native title rights is better achieved by amendment of s 223(2) of the NTA or by judges following Finn J’s lead in broadly characterising native title rights without reference to purpose. Either way, or by both, the important thing is to avoid unnecessary legal constraints on the future exercise of Indigenous rights of economic value.

One of the issues considered by the High Court in Mabo was whether native title could be alienated outside the landholding group. As David Yarrow describes in Chapter 6, five members of the majority concluded that it could not, while Toohey J

5 Western Australia v Ward (2002) 213 CLR 1.
6 (2013) 303 ALR 216.
NATIVE TITLE FROM MABO TO AKIBA

regarded it as open to debate. Yarrow describes this majority position as a ‘conclusion in search of a rationale’ and sets out to interrogate its roots. Drawing on a selection of historical materials from Canada, the United States and New Zealand, he argues that it was, and remains, open to Australian courts to conclude that native title might indeed be alienable. He also argues that greater openness to this possibility would be more consistent with the recognition of native title as a property right. Yarrow concludes by arguing that a more fulsome theory of inalienability of native title is required. This might again result in a complete repudiation of alienability, but it might also result in a more qualified limitation that is more responsive to the laws and customs of the landholding group.

The next two chapters widen the frame of reference to examine other ways in which the recognition of native title brought change, to Australian law and wider society. In his chapter, Brendan Edgeworth explores the role of courts in offering up a narrative of the historical origin of property rights, and the influence they thereby exert beyond the level of legal doctrine. The entrenchment of power over territory is closely linked with foundational narratives about property rights. Theories of land law are pliable material he says, contingent not fixed and capable of being reshaped in the service of wider objectives, whether it be colonisation of Ireland by the British, American moves towards independence and republicanism, or Australia’s journey towards what he calls a more inclusive post-colonial nationalism. Thus, for instance, the High Court majority provided an extended, critical treatment of *terra nullius* and common law fictions of feudal tenure, not because they were strictly necessary to the case in a legal sense, but as part of a broader process of recasting and legitimising Australian property law. Edgeworth compares the effects of *Mabo* with the reception of another momentous appellate court decision, that of the United States Supreme Court in *Brown v Board of Education,* assessing the extent to which it has already proved to be a progressive influence of historical dimensions not just in the legal domain but also in wider social, political and intellectual contexts.

To some extent, concepts of fairness and equal treatment have always been central to the recognition of land rights in Australia, including native title. In Chapter 8, Jonathon Hunyor carefully examines the relationship between native title and the law and principles of non-discrimination. His discussion reveals a great deal about each. It is well known that at crucial moments in its development native title law has drawn on principles of non-discrimination. In *Mabo v Queensland (No 1),* the court found that Queensland legislation that attempted to extinguish all remaining native title was invalid due to being inconsistent with the *Racial Discrimination Act.* In *Mabo v Queensland (No 2),* five of the seven judges found that principles of non-discrimination and equality demanded a re-examination of the common law as it was formerly understood. On the other hand, the introduction of demanding rules for the recognition of native title, combined with the ease with which it can be extinguished, mean that Aboriginal and Torres Strait Islander property rights continue to receive discriminatory treatment. This discrimination was exacerbated by amendments to the *NTA* in 1998, which Hunyor

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10 (1992) 175 CLR 1.
describes as destroying the balance that had been achieved in the original NTA. More broadly, Hunyor describes the way in which decisions about Indigenous property rights have influenced the development of anti-discrimination law in Australia. In particular, he draws out the clumsy way in which Australian law deals with the distinction between formal and substantive equality and the concept of special measures. His conclusion is that the relationship between native title and concepts of racial discrimination and equality has been a dance between strangers: while ‘there has certainly been dancing, there has also been miscomprehension’.

Chapter 9 contains Jon Altman and Francis Markham’s important work on mapping Indigenous land ownership, not just by reference to its geographic reach but also in terms of its resource value and strategic potential. Their maps provide a graphic depiction of what they describe as a ‘land titling revolution’. In the mid-1960s there was no legal recognition of Indigenous land ownership in Australia; whereas today, Indigenous groups across the country have exclusive property rights to more than 20 per cent of the continent. As has frequently been noted, much of this ownership occurs in remote and very remote areas. Altman and Markham help us make further sense of the significance and potential of this land ownership by articulating its relationship to mineral resources and areas of high conservation value. They argue that these maps should shape the way we think about economic development in the different parts of Australia. Where the relative advantage of that land is its conservation value or proximity to mineral deposits, they say that it may be counter-productive to pursue strategies based on partitioning land ownership to encourage free market development.

Before the High Court recognised native title at common law in the national arena, there were statutory land rights systems in various States and Territories. In Australia, these were the first concerted attempts at using law to reverse rather than ratify or perpetuate Indigenous dispossession. They illustrate some of the advantages that can accrue from reliance on legislation as a primary mode of Indigenous-settler state engagement. In Chapter 10, Andrew Chalk and Sean Brennan focus on a lesser-known but important land rights regime that has operated in Australia’s most populous State, New South Wales, for over 30 years. The process for regaining land is distinctive, turning on an administrative process using statutory definitions of claimable land, and it has led to sometimes very valuable freehold land being held by Local Aboriginal Land Councils. The strategic use of litigation to advance the prospects of Indigenous land ownership is more feasible here than in the more open-ended national environment in which native title operates, and it has proven highly successful in the appeal courts. Chalk and Brennan note the diversity of values that might be served by a development and empowerment agenda – social, cultural and spiritual, as well as more overtly commercial ones. The balance sheet after 30 years shows a substantial land and capital base, a self-funding system of governance and operations and growing levels of capacity and confidence at a local level for managing assets and planning for the future. The governance and regulatory arrangements are necessarily different from those applying in the native title sphere, but the authors suggest that there are lessons to be absorbed from 30 years of experience in defining and refining these arrangements. Preventive measures can be built into the system of legal regulation and are preferable to sanctions after the event. These structural features, like the requirement to develop
and follow a community land and business plan, can emphasise forward planning, transparent decision-making and redress for regional inequalities amongst Aboriginal groups. These evolving changes take account of experience and the peculiar blend of private and public functions carried out by local land councils. The chapter concludes with an example of how this blend of private and public law features has informed the construction of at least one governance system in the wake of a positive native title determination.

The focus of the next three chapters in on what happens after a claim for native title recognition has succeeded. The first of these is Ciaran O’Faircheallaigh’s, which highlights the acute problems impeding Indigenous economic development once native title has been established. Because native title as currently defined, both at common law and in the NTA, is anchored in ‘inherent rights in land and sea country’, it offers no legal basis for self-government. With only limited property and procedural rights to bargain with, Aboriginal people lack the kind of institutional power that a governmental structure would confer. It remains difficult to secure stable, long-term funding and policy frameworks and the quality service provision that are necessary for greater Aboriginal participation in the economy. The inequality of bargaining power that is directly traceable to this lack of self-government is further evidenced in dealings with the corporate sector. O’Faircheallaigh shows how the Australian position appears significantly less beneficial for Aboriginal people when contrasted with the Canadian approach, where Aboriginal self-government routinely follows establishment of Aboriginal title. ‘Two parallel tracks’ of policy development ensue: the precise ambit of rights over surface and subsurface land is settled at one level, alongside matters of devolution of responsibility for various political and administrative functions. With complementary rights over land and administrative autonomy in place, Aboriginal people in Canada are in a much stronger position to negotiate with the corporate sector. More importantly, self-government leads to the promulgation of rules, policies and regulations that help avoid the constant renegotiation of agreements with the corporate sector that typifies the Australian experience. He concludes with a call to re-ignite 1990s debates about linking native title to self-government.

Self-governance is also the subject of Marcia Langton’s chapter, but hers is an analysis of the internal effects, rather than the external possibilities, of native title. She examines the extent of the administrative burden imposed on native title representative bodies by recognition of native title. Tracing the gradual evolution of organisations that have represented Aboriginal people as native title has been recognised, she identifies an exponential increase in costly compliance requirements on Indigenous organisations. All forms of regulation necessarily involve costs, but the particular requirement of the NTA that native title be held by duly-constituted corporations has imposed complex legal obligations on communities. From one perspective, this is a positive development as it provides many opportunities for civic engagement and participation for Indigenous people. But it has a downside: small organisations that may have multiple stakeholders to consult, funders to report to and contracts to administer, can find their scarce resources seriously depleted by attending to these tasks. In the circumstances, Langton asks how sustainable these corporations are, particularly in light of the ‘Balkanisation’ problem also noted by Paul Finn. She canvasses some possible solutions which include
pooling resources so that services such as auditing and accounting can be delivered more cost-effectively, and relying on emergent ‘purpose-specific social enterprise’ philanthropic organisations to provide necessary professional expertise on a pro bono basis.

An examination of Indigenous empowerment by reference to the process of incorporation forms the subject of Tim Rowse’s chapter. His starting point is the paradox that this now conventional mechanism for political action is effectively imposed upon Indigenous people by legislation as a requirement of recognition of native title. Does that therefore mean it is disempowering, insensitive to cultural difference and the latest tool of colonial oppression? On the contrary, his ‘abiding intuition’ is that, on balance, Indigenous incorporation represents a positive step towards autonomy. Against this view, he examines two distinct styles of critical literature on Aboriginal self-determination. On one side, researchers have focused closely on actual Indigenous groups and organisations. The ensuing accounts risk being too close to their subjects, and in turn, insufficiently objective about their weaknesses and limitations. On the other side, more critical approaches direct attention to the dynamics of colonial, ‘white’ domination. If reliant on essentialised notions of timeless and placeless ‘indigeneity’, the risk of this second approach is paying too little attention to the agency of Aboriginal organisations or individuals, seeing them only ‘through the fog of supportive quotation from generalised models of colonial modernity’. Rowse finds valuable reflections on contemporary Indigenous institutional design in the ‘Our Future in Our Hands’ document which details the process to establish a national representative body for Indigenous people following the demise of ATSIC. It shows a vibrant Indigenous political culture at work, with clearly articulated political values, notably independent from state influence and domination.

In Chapter 14, David Trigger addresses the issue of claim group membership. This often complex issue can be central to the way in which claimants experience the native title system. The chapter takes as a case study the Waanyi native title claim, in which the author was involved as a consultant (all references are drawn from the public record). It describes how genealogies, historical events, personalities, geography and group politics can all intersect in the making of decisions about whether to include or exclude a particular person or family from the claimant group. At times these decisions are neither straightforward nor clear cut. As Trigger describes, the decision-making process can be ‘emotionally and physically debilitating for protagonists’. This sobering assessment goes to the heart of one of the key limitations of native title as a vehicle for empowerment. Its constrained nature means that it does not, and cannot, deliver benefits to all Indigenous people. Trigger’s chapter is ultimately a discussion of how claimant groups decide who is included, and how the native title system affects this decision-making.

A different type of perspective on native title is offered by Leon Terrill. Taking his cue from the influential work of Hernando de Soto, he explores the implications of de Soto’s claim that exclusive private property rights along familiar Western lines represent the best way forward for the poor. De Soto’s popular, neo-Lockean, yet controversial claim that non-transferable land represents a form of ‘dead capital’ potentially has normative implications for native title. Some have argued that native title is an ineffective form of ownership and should therefore be shunned by legislators.
and policy-makers if the interests of the Indigenous poor are to be advanced. But de Soto never focused specifically on the rights of Indigenous peoples, so what might his message be for this form of tenure by reference to the question of ‘empowerment and advancement’? Terrill notes qualifications in de Soto’s work, such as the need to be attentive to existing social conditions and arrangements; these factors might modify a full-blown commodification of native title. An examination of existing arrangements around native title in Australia appears to indicate that much of what de Soto advocates is currently in place. A distinction is drawn between native title that coexists with non-Indigenous interests in land and exclusive native title. The latter clearly meets de Soto’s criteria for an effective system, as it is more aligned with mainstream property rights, and can be more readily integrated into that system. It follows that his work offers tentative theoretical support for enlarging those rights to the greatest extent possible, and this would include allowing the greatest commercial exploitation of those rights.

Land use payments are one of the more tangible ways in which native title provides an opportunity for empowerment. But this is by no means straightforward. It cannot be assumed that all payment processes will have equivalent outcomes, or even that all payment processes will be positive. There are risks as well as benefits associated with the management and distribution of benefits. In Chapter 16, Danielle Campbell and Janet Hunt document the Central Land Council’s work on implementing a community development approach to land use payments. The Central Land Council is one of Australia’s largest land councils. Ten years ago it created a ‘Community Development Unit’ to better support traditional owners from Central Australia in applying a portion of the income they receive from land use agreements to community development activities. The Community Development Unit builds on the Land Council’s experience of working with traditional owners over several decades and has grown rapidly. The Unit’s six major projects generate more than 100 sub-projects each year. Campbell and Hunt describe the different approaches that are used to manage the implementation of each community development project and summarise the outcomes of recent evaluations. The story they tell is overwhelmingly positive. Despite considerable challenges, they describe how traditional owners are using the process to support programs that reflect the values and aspirations of local residents. In some cases it has even had an impact on the relationship that community residents have with the government. The chapter provides a compelling account of this significant and complex development.

The book ends with the remarkable story of the Noongar people’s negotiations with the State of Western Australia. As Glen Kelly and Stuart Bradfield from the South West Aboriginal Land and Sea Council (SWALSC) suggest, there are positive signs on the road to self-determination for the Noongar nation, in the wake of litigation victory and then setback in Federal Court native title judgments in 2006 and 2008 respectively.11 The Agreement-in-Principle reached between the State of Western Australia and SWALSC in October 2014, by way of an alternative settlement process, lays the foundation for Noongar to secure recognition, a land base, funding streams, access to Crown lands, specific heritage arrangements, joint management of conservation areas, greater participation in the economy and a community development package. Kelly and Bradfield set out some ingredients of Noongar success so far, including an Indigenous

political strategy built around the idea of a nation-to-nation dialogue, political will on the part of government, strong leadership through the Noongar negotiation team and a determination to transcend the limitations of strict native title law. Ratification of the agreement by vote within the six Noongar sub-groups was achieved between January and March 2015, a decisive step closer to implementation of the settlement. The achievements to this point strongly suggest that when the right combination of internal and external factors are present, native title, despite all its legal shortcomings, can offer a vehicle for symbolic and practical change and significant Indigenous empowerment in political and economic terms.

There are, in other words, many factors that influence the capacity for native title to generate greater Indigenous empowerment and economic progress. The various chapters in the book collectively tackle the many different aspects of these issues – Indigenous leadership and strategic choices, political will from the executive branch of government, the need for legislative reform and/or new directions in judicial interpretation, third party interest in accessing Indigenous country, partnerships with and beyond government, and hard work on the internal health of Indigenous organisations. They reveal some of the key priorities for the next 20 years of native title, especially if it is to realise some of the hopes triggered by the Mabo decision.