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ABN 47 350 401 635

POSITION PAPER

DOES NATIVE TITLE ACT (NTA) IMPACT ENTREPRENEURIAL OPPORTUNITY? Overview of a Research Study

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"Governments should... facilitate negotiation
…in relation to proposals for
the use of (Aboriginal peoples')
…land for economic purposes."
- Preamble, Native Title Act 1993

BACKGROUND

Regulatory change is an important element of the environment within which entrepreneurial opportunity and new ventures exist. Chicago School and public choice theorists advocated a limited role for regulation and warned of the dangers of regulatory capture by industry interests (Stigler 1971). However, others frame regulatory change as a continuous supply of new information about different ways to use resources to enhance wealth (Eckhardt & Shane 2003, Shane & Venkataraman 2000). Indeed, some consider that it is the 'rules of the game' that determine whether entrepreneurial energy is allocated among productive, unproductive or destructive activity (Baumol 1990). (Theory Overviewed - Appendix I).

The question is extremely important because new venture creation is widely considered to be a major determinant of a nation's economic health, being responsible for job creation and GDP growth with consequent beneficial social implications (Audretsch & Thurik 2001, Birch 1987, Chell 2007, Kumar & Liu 2005). Alongside this, regulatory change is increasingly used to address impediments to business, economic and social needs (Rubin 1989). Regulation is recognised as important to curb market excesses, redirect market activity, initiate new opportunities, industries or markets and make certain products compulsory. Obvious opportunity-creating regulations include water trading schemes, energy efficiency rating schemes and compulsory seatbelt or helmet regulations as well as those that facilitate major development, private government activities or deregulate. Thus, whilst all too often regulation is berated as a barrier to innovation and business activity, it can clearly drive new solutions to problems and go far beyond prohibition, enforcement or simply controlling free market excesses.

Within this context, the study of Indigenous entrepreneurship notes that despite significant economic and social deprivation and high levels of welfare dependency, strong linkages exist between Indigenous communities with a need for stimulation of Indigenous entrepreneurship to both respect Indigenous traditions and empower Indigenous people (Legge & Hindle 2004, 379). Aboriginal entrepreneurship clearly draws on ancient and sophisticated regional, national and international trading traditions. Like the broad spectrum of all Australian entrepreneurship, Aboriginal venturing extends beyond one or two narrow industry segments to include the vast spectrum of business endeavours in both large and small businesses. Whilst urgently needing comprehensive study, key Aboriginal entrepreneurial opportunities appear to arise from monopoly positions in particular

geographical locations, assisted by broad advances in telecommunications and digital communication and supported by unique traditions and culture as well as unique scientific knowledge, techniques and knowledge systems. Emphasis upon community and family obligations and pressures reveals high order social capital and a significant priority. Aboriginal voice is sophisticated and there is need for conversations with Aboriginal people beyond the popularly perceived Aboriginal 'leaders'. Although Aboriginal communities score low on socio-economic indicia, such Aboriginal voice has strongly influenced *Mabo*, key 'test' cases and NTA itself. Aboriginals regard relationship very highly and demonstrate sophistication inter-culturally, economically and politically. Aboriginal regulation occurred traditionally in oral, not written, form through stories, songs and dance. Rights to knowledge according to Aboriginal Law and practices are described as deriving from the spiritual to involve *feeling* lawfulness (Parker 2012). Thus, regulatory change interposes within a complex ancient and recent Aboriginal trading and regulatory setting and its impact on Aboriginal entrepreneurial opportunity must also be set within this setting.

"Regulatory change", in this Paper, means a change to any rule endorsed by any government including primary legislation, international treaties, delegated or subordinate legislation, industry codes of practice and guidance notes (Australian Government 2010). "Impact" is a strong effect or influence, direct, indirect, independent or unintended. 'Entrepreneurial opportunity' and 'entrepreneurship' are bedeviled with differing meanings, however, "entrepreneurial opportunity" is not just any 'opportunity' but a new means-ends relationship (Legge & Hindle 2004, Shane 2012) and, as used in this Paper, means "a new business venture for the introduction of new goods, production methods, markets, raw material supplies or organising methods". The "Benefit Group" is the group of persons to which the regulatory change grants a desirable, feasible, attractive and durable benefit that adds value.

METHOD

This Paper describes a PhD Study that used one transformative regulatory change, the Australian Native Title Act (NTA), and examined its impact upon entrepreneurial opportunity. It drew on a model of entrepreneurship as an outcome from a gale of **creative destruction**. The process from gale to outcome uses the German term *Bahnbrechen* – literally, a broken railway line, a path so destroyed that it is impossible to continue on the existing track and, from which, new and innovative directions must be forged (Schumpeter [1912] 1933, [1942] 2006). This model is not concerned with the margins of existing business but with mechanisms by which new enterprises make a clear break from the past, striking at its foundations and the very life of existing competitors (Schumpeter [1942] 2006, p. 84).

NTA fitted intriguingly into this model. It **destroyed** the Crown's monopoly in land and **created** an entirely new legal entitlement for its Benefit Group, around a stated legislative intent in its Preamble to create economic benefit. It **created** mandatory new public-private land alliances (*Benefit Group-Government*) and **created** a schema for new

commercial agreements arising from the new legal entitlement. Whilst NTA was a regulatory change with a stated economic benefit goal, it did not directly create an economic opportunity and, in this way, differed from deregulation, privatisation or major project regulatory change.

The Study examined the question by using three sources of information - previously documented studies of post-NTA outcomes, interviews with Aboriginal representatives of native title groups and, for all groups studied via these sources, their judicial decisions where available.

TOOLS

The Study revealed only limited research at all into the sequelae of any regulatory change. For this reason, the multi-disciplinary literature was closely examined to identify key elements. From these key elements, three analytical Tools were derived:

1. a Key Indicia from entrepreneurship theory;

2. a Regulatory Prism from the regulatory and legal literature; and

3. Impact Elements derived from across the literature.

These Tools, drawn directly from the literature, are vastly different from standard Regulatory Impact Assessment (RIA) tools. Clearly, they require further testing for reliability and validity but, assuming the literature is sound, ought to prompt immediate review of existing RIA approaches, to shift focus away from negative burden/costs/risks to comprehensive impact assessment that includes opportunities and strengths.

FINDINGS

NTA was found to impact entrepreneurial opportunity, with activity clearly allocated to productive entrepreneurial activity and evidence of a cumulative increase in entrepreneurial activity. Impact occurred even where the regulatory benefit was not able to be secured. It seemed that the mere existence of the potential for benefit caused third parties to adjust activity and enable even failed Benefit Groups to utilize NTA to positively impact new venture outcomes.

The entrepreneurial opportunity did not appear to arise from the thing **destroyed** by NTA – ie Crown monopoly in land – or even from the thing **created** by it - ie native title right - but from something inherent in the '*Bahnbrechen* or the chaotically altered business environment of NTA itself. NTA's impact appeared not to arise from mandated entitlements, but from a legal imperative around which a wide variety of parties were forced to alter their behaviour, actions and aspirations so as to maximise their opportunity. The Benefit Group had a chance to turn NTA's benefit into an entrepreneurial opportunity.

Recognition is a clear key NTA strength and opportunity. The forced change that provided external recognition of Aboriginal identity and interest in land, enforced against the world, created opportunities can be leveraged and new doors opened through negotiation options. All interviewees regarded recognition as a highly significant opportunity.

However, NTA removed the Aboriginal Benefit Group from the free market. In fact, it removed **the right not to trade** that applies to all business within western economic regimes. Thus, the notion of native title as a commodity for trade like any other consumer transaction (Ritter 2009) is a false conceptualisation, as even powerless consumers retain the right **not** to trade. The free market is a fundamental economic principle of western society and a core principle of liberalism which forms a base for legal systems that rely upon the rule of law. However, NTA goes even further in its constraints upon Aboriginal business venturing, in that it limits the terms that Aboriginals can impose within this forced trading scenario. It removes their right to veto any undesirable development and limits their right to impose any terms that others might regard as unreasonable. Thus, if Aboriginals impose conditions that others (including their trading partner or judiciary) do not regard as acceptable, others determine the terms upon which they must trade. Clearly this is a further free market constraint operation on Aboriginal business that places them at a distinct disadvantage as against their commercial competitors.

As entrepreneurship theory predicted, omnipresent Government with a permeating bureaucracy creates severe obstacles to orderly commercial process and entrepreneurial opportunity. The State manipulates the impossible conflict between the potential destruction of its monopoly in land, alongside its role as provider of funds and resources to assist those seeking to destroy that monopoly.

Despite libraries of literature concerning NTA, its conceptualization as a business alliance (a public-private partnership) is currently ill-formed. That conceptualization offers the great entrepreneurial opportunity of any strong commercial alliance, but requires careful and consistent attention to the design, management and review of the alliance. The researcher found no literature considering the NTA alliance (ie Crown-native title group) and no consideration of post-recognition arrangements within the context of alliance theory. Likewise, there was limited conceptualization of NTA processes as networks of trusting relationships building and maintaining social capital.

NTA demonstrates unusual legal features – enormous delay, multiplicity of parties and considerable symbolic and ceremonial elements. Government's dominant role, includes a subtle influence on judicial processes via funding (or its lack) and Rep Body influence (affecting advocacy priorities and approaches). Lawyers play a role in controlling outcomes and have a surprising influence upon the extent of commercial opportunities that are built into Determinations and Agreements - and they cannot be seen as either neutral or passive as they are often paid directly or indirectly by the Government with whom they

are negotiating. The voice of the Aboriginal is filtered through lawyers and the experts they engage. Distrust is a major constraint upon effective operation of NTA and was referred to by both Claimants and Judges. The judiciary perceives elements of its system as innovative. A Native Title Industry exists as its own entrepreneurial opportunity for various professional and industry advisors as well as various Government judicial and administrative bodies. This is an opportunity that appears to be generally unavailable to Aboriginal people.

NTA agreements have received some attention in the literature which confirms that, whilst they offer substantial entrepreneurial opportunity, there exist widespread practical and operational failures that outweigh benefits. The literature reveals very limited numbers of beneficial agreements with monitoring and enforcement routinely poor or non-existent. Taxation of Aboriginal native title payments creates additional constraints, along with Government arrangements that are often irrelevant or foreign to Benefit Groups.

Optimization techniques identified by the National Native Title Council in 2008 and recognized over and over in the literature prior to and after 2008 have not yet been mandated into agreement requirements, resulting in on-going lost opportunity. Inadequately resourced Aboriginals continue to attempt to negotiate with mighty power in a dramatic power imbalance, whilst their hands are tied by NTA. The literature indicates that, despite the fanfare usually accompanying NTA determinations, agreements that are beneficial to Aboriginals tend to remain few, due to inadequate terms, monitoring and enforcement.

There is need for conversations with Aboriginal people beyond the popularly perceived Aboriginal 'leaders' and outside the native title 'industry'. Although Aboriginal communities score low on socio-economic indicia, Aboriginal voice has strongly influenced *Mabo,* NTA and key 'test' cases.

The Interviews described NTA's tragedy and misery, along with its burdens on the Benefit Group.

> "It's just a river of pain, a river of hopelessness."

Despite this, Claim Groups, including failed Groups and non-benefit Groups, sought and found alternative ways to use NTA to 'beg, borrow or steal' some benefit. Government's all-pervading role was often time-consuming, unhelpful and often mischievous for Aboriginals. Umbrella groups were often viewed with distrust and serious problems were articulated with Rep Bodies and Land Councils. Claim Groups were described as having limited funds and resources and feeling forced into agreements and compromises simply to secure <u>some</u> benefit, whilst attempting to keep their people unified.

Rationally, Aboriginals adjusted their activity to obtain the benefit, eg recognition, but other parties also adjusted their behaviours by stalling applications, stage-managing authorisation meetings or deferring funding. Aboriginals described feeling themselves

'wheeled out' to be told what they were to agree to. Whilst there was opportunity for Aboriginal voice, bureaucratic layers and multiple 'formal' (not genuine), consultations were described as a mere formality prior to securing the Aboriginal tick to pre-arranged outcomes that others considered would benefit them. Social capital among Aboriginal groups appears strong and a clear driver of entrepreneurial opportunity. However, trust is fractured from the perspective of both Aboriginals to Government and Government to Aboriginals, with distrust recorded throughout the entire system.

Social capital may exist even where social conditions are far from optimum and do not 'look pretty'. Social capital may take different forms according to context and culture and this must be recognised and accommodated if NTA is to be optimised. One size does not fit all. Care is needed to avoid confusing community dysfunction, eg crime statistics, with an absence of social capital. It is possible that such indicia signal ineffective 'rules of the game' that are resulting in entrepreneurial activity being allocated to destructive, rather than productive, activity. They may also signal extreme distrust between Government and the Benefit Group.

NTA is a 'command and control' statue that leads to the usual practical problems of such regulatory type ie monitoring and enforcement. Government was present at every turn. 'Best practice' regulatory types eg 'industry' self-regulation are non-existent for Aboriginals. However, unwritten Aboriginal Law and societal arrangements appeared to be micro-regulating an impact.

The Study supported the emphasis on information control, not because information provided knowledge from which an entrepreneurial opportunity could be created but, in the negative - in that control of information by others hindered the exercise of rights given by the transformative regulatory change - and, in this way, limited entrepreneurial opportunity was limited. NTA included no stimulants to build knowledge, although knowledge and knowledge systems were integral to the rights bestowed by it. Unique and important Aboriginal knowledge became channelled and controlled by the Government, as well as competing commercial interests and lawyers, without any regulatory mandate to link that knowledge with knowledge stimulants such as R&D or new venture incubators.

Networks

Entrepreneurial opportunities appeared to arise through shifting networks. The criteria required to achieve benefit brought together people who would not otherwise have come together. From this, the opportunity for new-means-to-new-ends became feasible. The multiplicity of parties interested in NTA outcomes placed multiple groups of people in relationship whether they liked it or not. Certainly, this could be (and often was) acrimonious, but new relationships were forged and forced that would not otherwise exist and this appeared to be relevant, and now possible, to impact entrepreneurial opportunity by virtue of NTA.

Institutions

The Study confirmed that large organizations, with much at stake commercially, appeared better able to familiarize themselves with NTA and the methods for optimizing corporate advantage, than the small Benefit Groups for whom it was purportedly enacted.

There was clear evidence of a formal regulatory compliance without core change. 'Letter of the law' compliance with regulatory change appeared to be impacted by powerful non-regulatory social and institutional influences outside the formal regulatory change process.

Powerful corporate and State government interests, despite initial vocal opposition to NTA, adjusted well, turning it to advantage and normalizing it within their corporate systems. These institutions were both strongly involved in settling the form of NTA to include terms they could accommodate commercially and, once the regulatory change was enacted, moulded themselves effectively to it. The Study showed that Government and Judicial institutions applied existing organizational norms and approaches to NTA, congratulating themselves on their 'innovative' modifications, rather scrutinising NTA outcomes as to whether they presented adequate business or economic opportunity for the Benefit Group.

Outside Benefit Group

Corporate interests outside the Benefit Group, found to be operating positively under it, hinted at the possibility that, in the chaos of drafting NTA itself, those outside the native title groups may have been substantially compensated or even over-compensated. Alternatively, it may be that whatever the regulatory provisions, those with the strongest market position can more readily position themselves to optimize its impact upon their entrepreneurial opportunity. A third possibility is that NTA actually creates three Benefit Groups whose interests and entitlements clash and conflict, ie Aboriginal to Native Title determinations, developers to agreements and Government accountability post-native title determination. Alternatively, these clashes may have been deliberately intended by the policy-makers. As this regulatory change had an important symbolic role in reflecting certain social value ideals and ways of thinking, it is quite possible that policy clashes hidden in the fine print or operational implementation may have deliberately sought such an outcome. A final alternative may be that the energy within NTA alters critical elements that could not otherwise change. These critical elements may be the alliances; the opportunities for new relationships or flow of power within relationships. Alternatively, the elements may, as with regulatory capture, significantly restrict or expand competitive opportunities.

Regulatory Type

The regulatory change studied was a deterrence or 'command and control' regulatory model using a conventional regulatory method. It contained no sign of industry self-regulation or other alternative models now regarded as Best Practice in non 'high-risk' settings. It may be that a 'command and control' regulatory type is required to force through a *Bahnbrechen* change that may be vehemently opposed by powerful vested

interests. However, such a regulatory type will face the negatives that are typical of the 'command and control' regulatory type, i.e. difficulties of enforcement and cost, inflexibility and an assumption that those being regulated will resist the control. There was a sense in this Study that the impact of the regulatory change might have been optimized had other forms of regulatory type been incorporated within the post-determination schema, for example, 'industry' self-regulation within the PBC constructed in close practical interaction and consultation with the Benefit Group itself might better optimise opportunities.

Government/Bureaucracy

Overwhelmingly, the role of Government and bureaucracy emerged as a dominant feature influencing impact frequently seeding a 'divide and rule' approach. Government emerged as an unreliable alliance partner. Public-private land ownership partnerships created by NTA were structured on the faulty assumption that each partner would have somewhat equal power, resources and access to legal advice whereas Government holds 'all the cards' and if not overtly hostile to entrepreneurial opportunity, given is public accountability imperatives, was frequently paternalistic or passively neutral to it.

Lawyers

Lawyers played a crucial role in influencing the impact of the regulatory change upon entrepreneurial opportunity. They were gatekeepers, even to the point of deciding the timing of negotiations and the terms of the benefit itself, holding back some opportunities and bringing forward others. They appear to have a surprising influence upon the extent of commercial opportunities that are built into Determinations and Agreements. They are often neither neutral nor passive as they are often paid, directly or indirectly, by the Government with whom they are negotiating according to the demands and economic priorities of that Government. Legal system alliances were very strong and it was not infrequent to see the voice of the Benefit Group itself tokenised or excluded and the voice of the Aboriginal is invariably filtered through lawyers. The Native Title 'industry' exists as its own entrepreneurial opportunity for lawyers as well as the other experts they require to provide evidence. Some native title lawyers are now actively advocating that Aboriginal People may only engage certain 'expert' lawyers to represent them in native title matters, potentially creating even higher barriers to entry for Aboriginal clients.

RIA

Australia's National Competition Policy was released in 1993, the same year as enactment of the NTA. It required an annual summary of legislation reviewed by the Commonwealth. Between 1995 and 2005, the Productivity Commission included such a summary in its annual regulation report (Industry Commission 1997, Productivity Commission, 1998, Productivity Commission 2001, Productivity Commission 2002, Productivity Commission 2003, Productivity Commission 2004, Productivity Commission 2005). Although the 'Native Title Act & regulations' were listed in its 1996-1997 report for review in 1999-2000, each of the annual reports from 1999-2000 to 2001-2002 shows

NTA as "not commenced". In the 2002-2003 report, it became listed as "Not commenced/seeking to delist" and, in the 2003-2004 and 2004-2005 reports, an annotation was added stating:

> "Departments have advised that, for various reasons, they will be seeking to delist these reviews. Formal moves to delist appear not to have occurred as yet" (Productivity Commission 2005, Table D.1, p. 72).

The Productivity Commission ceased reporting in this fashion in 2006, but its 2005-2006 Report contained no mention of NTA (Productivity Commission 2006). In 2007, the Office of Best Practice Regulation (OBPR) was created within the Department of Finance and replaced the regulatory review functions of the Productivity Commission. Again its annual regulatory reports contained no mention of NTA (OBPR 2011, OBPR 2010, OBPR 2009, OBPR 2008, OBPR 2007). Since 2010, OBPR has maintained an online register of regulatory impact statements (RIS), Ministerial Exemptions and other updates and documents relating to regulatory review (http://ris.finance.gov.au). This online register (which is in the form of a 'blog') is searchable. A 2012 search of this Register for the terms 'native title', 'indigenous' and 'aboriginal' yielded no RIS, exemption or any other document relating to NTA or regulations except, under 'native title', two RISs concerning directions of the Ministerial Council on Energy concerning electricity distribution and mandatory energy reporting (Walker 2012, 2). A 2010 Legislation Review by the National Competition Council summarised the "Major restrictions" of NTA and regulations as "Management of land tenure", noting that review was "not required" as:

> "Since 1996, the competition policy issues (particularly in relation to issues faced by mining companies and in relation to pastoral leases) have been addressed through various developments, such as the Native Title Amendment Act 1998. Also, other mechanisms and fora are now in place to address emerging concerns about native title rights and mining tenements" (National Competition Council 2010, 37)

The Productivity Commissions' RIA Benchmarking Draft Report contained no mention of NTA (Productivity Commission 2012).

The Australian Government has adopted a three-tiered system for assessing all regulatory and quasi-regulatory proposals (Australian Government 2010). To determine which level of analysis is appropriate, a preliminary assessment must be undertaken for *all* regulatory proposals and this is currently undertaken by OBPR. For proposals determined to have *no or low* impacts on business, individuals or the economy, no additional regulatory analysis or documentation is required. Proposals that are likely to involve *medium* business compliance costs, require a full (quantitative) assessment of the compliance cost implications must be carried out using the Business Cost Calculator (BCC) or an approved equivalent. Those proposals considered by OBPR to be likely to have a *significant* impact on business, individuals or the economy, a Regulation Impact Statement (RIS) is required. However, despite the Australian Government guidelines and

Best Practice RIA principles that require regulatory impact assessment and review in all but no or low impact situations, it seems that there has been little or no attention to impact review of the NTA. Enquiries with OBPR can offer no explanation for why it dropped off the Productivity Commissions listing except that there is "probably a lot of history". OBPR confirms that no RIS or RIA has been done on NTA in recent years (Walker 2012).

Overall Outcome

The Study confirmed that regulatory change can impact entrepreneurial opportunity, even when, unlike deregulation, privatization or major project regulation, it contains no provisions that deliberately create such opportunity. The regulatory change appears to provide a *setting* for entrepreneurial opportunity impact, with indirect effects. Rather than the regulatory change causing entrepreneurial opportunity, it is more like a 'But For', ie 'But For' NTA entrepreneurial opportunity would not have arisen. The Study provided little direct support for risk as relevant to transformative regulatory change impact upon entrepreneurial opportunity. It also noted the influence of other regulation, as a matrix within which one individual regulatory change will slot.

RECOMMENDATIONS

A comprehensive RIA for NTA is urgently required. NTA seriously interferes with free market trading by Aboriginal native title holders and clearly has far more than a '*no or low*' impact on Indigenous business. It is of great concern that it has substantially fallen outside formal RIA process (save for certain amendments) for twenty years.

Greater linkages between native title agreements and Government Indigenous economic policy would appear to be required urgently. Greater transparency in agreements ought to be mandated wherever possible so that the veil is lifted on the Aboriginal economic outcomes as required by the Preamble. Resources are urgently required to support implementation and enforcement of agreements. Given this Study's findings as to the influential role which lawyers play in negotiating and drafting the agreements upon which future entrepreneurial opportunity impact rests, preparation of template agreements that mandate Indigenous benefits appear to be critically important. Funding needs to be sufficient to allow adequate Aboriginal representation in negotiations. A greater emphasis upon individual Groups than umbrella bodies appears required.

Indigenous Business Australia (IBA) in 2012 began a native title division which could be potentially important in optimizing entrepreneurial opportunities from agreement-making. There needs to be dramatically increased attention to the triggering of new ventures via ILUAs, with value in comparing practical agreement-making among First Nation Peoples internationally. Standard form ILUAs could be created that build in consistent new venture performance indicators, including steps to monitor and enforce as well as a degree of consistency in documentation formatting and contents along with considerable improvement in simplicity and volume. In this way, Groups with limited resources and/or

uninspired legal assistance will be assured, through template agreement, of minimal provisions to optimize entrepreneurial opportunity. The template should include unambiguous concrete goals, commitments and responsibilities supported by identified key representatives able to provide ongoing leadership. It must include credible enforcement methods to deal with failure to fulfill obligations, specified performance outcomes and measures with clearly identified review and reassessment dates and timelines into the future life of the agreement. There is need to modify NTA to tailor it better to the 'lived' experience of the Benefit Group.

A form of 'industry self-regulation' of post-determination organisations (PBC's) might be beneficial. It would need to take varied forms according to location, ultimately including non-market values such as reputation and peer assessment, healing and the spiritual, memories and revenge, as well as its tangible possibilities for providing nurture and care of those benefitted.

ABS statistics, data and information profiling of Aboriginal business activity is most important and overdue in guiding national policy and practice. Finally, as raised by Aboriginal researcher Karen Martin, and confirmed in this Study, issues of relatedness and ceremony between researcher and interviewee merit further research (Martin 2008). Sound research involving Aboriginals requires detailed and careful attention to 'relatedness', if findings are to have validity. All studies purporting to reflect Aboriginal views need to be carefully scrutinised to ensure they are soundly based.

CONCLUSIONS

This Study asked – *does transformative regulatory change impact entrepreneurial opportunity?* Within the context of NTA, it concluded that it did - with impacts both positive and negative and extending beyond the Benefit Group. For those within the Benefit Group, its impact primarily took the form of a recognition, a seat at the table, an agreement or set of agreements and an opportunity to set terms into the future in respect to that land and the business venturing associated with it. Bureaucracy and government intervention were significant burdens to impact and attempt must be made to reduce and avoid any increase in bureaucratic involvement in native title.

The Study confirmed the influence of Aboriginal voice and social capital that builds powerfully on existing and new networks. It identified that NTA is a 'command and control' regulatory type that may be necessary to force through the change, but that 'industry' self-regulation models post-determination or innovative regulatory types offer potential for improved impact once native title benefits are secured.

APPENDIX 1: THEORETICAL OVERVIEW

Entrepreneurship and Regulatory Change

Schumpeter saw a cautious role for regulatory intervention, as long as it was limited to adjustments addressing grey legal areas or business scandals. The Chicago School postulated that regulatory change created opportunity only when the Benefit Group was relatively small, expected to make large gains, had similar interests and could exclude others from sharing those gains. North described how institutional environments, by determining the 'rules of the game', reduce uncertainty but constrain human action (North 1990). Porter argued that regulation can stimulate innovation and produce competitiveness (Porter 1990).

Lyotard saw regulatory change in terms of information (Lyotard 1984 [1979]). Shane and Venkataraman considered regulatory change offered a continuous supply of new information about different ways to use resources to enhance wealth (Shane & Venkataraman 2000, 221). Knowledge of a regulatory change was identified as impacting entrepreneurial opportunity. Regulatory change directed to stimulating new knowledge through devices such as incubators, R&D or university-industry links, was found to result in geographically clustered startups (Minitti 2008). Sarasvathy emphasised control describing the entrepreneur as a chef creating a meal, not from a given recipe of knowledge (causation) but from the ingredients that happen to be in the pantry (effectuation) (Sarasvathy 2001, p. 245).

Institutional theorists found that external pressure of regulatory change could clash with institutional norms, resulting in active response to preserving the *status quo* and a passive, 'do the minimum'/ lip service, with regulatory change found to achieve only limited core change despite formal legislative compliance (Macaulay 1979). At the same time, others found regulatory change altered the structure of industries, creating opportunities for new entrants (Eckhardt & Shane 2003).

Regulatory change is well known to influence social and economic structures and to belie the unproblematic transfer of responsibilities so as to significantly shift alliances (Macaulay 1979, Kidder 1983, MacKenzie & Martinez 2005). A relationship has been found to exist between entrepreneurial opportunity, co-operation and the extent of regulatory IP control (Gans, Hsu & Stern 2002). Turbulent regulatory environments have been shown to require business to adopt tighter market orientation than calmer conditions (Barreto 2010). Regulation of land has been found to work differently from regulation of knowledge and regulatory change has been found to provide quality assurance (Westgaard et al 2008). Various sectors of Australian industry have found regulatory change lead directly to substantial new product sales (Braithwaite 2005).

Societal Dialogue and Social Capital

The literature provides an unsystematic picture. However, regulatory change differs from technological change in that it involves the real world of politics and government. There needs to be a degree of societal dialogue before the regulatory change even occurs.

Habermas contended that law is generated through a procedure of public opinion and will-formation, via language and communicative action, in which participants "thematize contested validity claims and attempt to vindicate or criticise them through argumentation" (Habermas [1981]1984). It is the 'heard' voices in this public discussion that shape regulatory change, with those silent or silenced more likely ignored (Schepelle 1989, Foucault 1982). Voice is the way individual rights are articulated and it is from within the intricately interwoven political and social conditions of a democracy that regulatory change responds to the voices heard and listened to. Entrepreneurship theory also describes language and communicative action as influential upon innovation and entrepreneurship with links between creative change and articulation, reconfiguration and cross-appropriation (Spinoza et al 1997). Within a commercial organization, inability to give voice has been found to directly result in missed opportunities for organizational stability and goal achievement as well as individual growth (Hazen 2006). Narrative and story within an institutional frame has also been shown to powerfully and positively act on enterprise outcomes (Bolman & Deal 1997). Thus, entrepreneurial opportunity may itself be affected by elements of societal dialogue, including voice and this element may be more relevant where regulatory change is involved.

Extensive research also shows that channels of intense trusting cooperation, lasting over time and arising from belonging to a community, optimize business outcomes. Such 'relational' capital comprises shared values that underpin co-operation drawing upon embedded habits of trust, reputation assessment and sanctions against untrustworthy behaviours (Florin 1997, Fukuyama 1995, Putnam, et al. 1993). These trusted channels of social capital have been found to maximize knowledge transmission, particularly by geographic proximity, because synergetic mechanisms arise from economic integration within a socio-cultural homogeneous local population containing dense public and private partnerships. Such social capital has, in the reverse, constrained the way entrepreneurship develops and stifled entrepreneurial opportunity where it did not exist (Fukuyama 1995). Social relationships are said to influence opportunity identification by affecting access to information and the cognitive properties needed to value it (Shane 2012, p. 17). Thus, any impact of regulatory change upon entrepreneurial opportunity is also likely to be affected by social capital-trust.

Regulatory Impact Assessment (RIA)

'Best Practice' regulatory change regimes routinely include regulatory impact assessment (RIA) but generally apply narrow cost/benefit/risk impact measures. Best Practice RIA movements internationally, recommend the use of a variety of different types of regulatory models or methods according to desired outcomes (for example OECD 2002). The transformative exogenous shifts involved with the transition to free market conditions in former Soviet bloc countries found differing impacts according to the different regulatory approaches adopted (Ellerman 2010). Communications regulators envisage innovative regulatory types are required to adequately respond to new media and the digital age. Thus, it would seem that the impact transformative regulatory change upon entrepreneurial opportunity may vary according to regulatory type.

NTA's Creative Destruction

The NTA altered Australian law by **destroying** unencumbered Crown rights in land and **creating** recognition of traditional Aboriginal native title over the same land. It **destroyed** Government monopoly in Crown land and **created** a new relationship between Government and Aboriginals who now shared interests in the same parcel of land. In addition, it **created** entirely new institutional systems throughout Australia as well as new judicial and quasi-judicial bodies and new inter and intra-Governmental arrangements. It required Aboriginals to **create** and operate a new landholding entity, called a Prescribed Body Corporate (PBC), to manage land over which native title was recognized. Finally, it **created** a new and additional development approvals process for third parties seeking to act in any way that could affect any native title right (a Future Act). The process required negotiation in good faith with native title groups. Future Acts included not only commercial projects for the use or any development of land, but also subsequent regulatory change and Ministerial or bureaucratic action that could affect native title in relation to the land or waters to any extent (S233 NTA).

NTA **created** an exogenous objectively identifiable benefit for a finite, objectively ascertainable Benefit Group. NTA's purposes were identified in its Preamble. A Preamble is "a continuing declaration" of the "moral foundation" of the legislation that informs its construction (*Sampi v State of Western Australia* [2005] FCA 777 at [942]).

NTA's "moral foundation" Preamble includes:

- *Governments should facilitate negotiation... in relation to ... proposals for the use of (Aboriginal peoples') land for* ***economic purposes***." (Preamble, NTA).

The Preamble also identified Aboriginals as "the most disadvantaged in Australian society". Focusing upon entrepreneurial opportunity among such Aboriginals, at the extreme edge of Australian business, provided a setting in which any impact of the NTA upon entrepreneurial opportunity ought to be readily identifiable.

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