SCHUMPETER'S *BAHNBRECHEN* CONSIDERED IN THE LIGHT OF NATIVE TITLE LEGISLATION and INDIGENOUS ENTREPRENEURSHIP

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Acknowledgement

This Thesis is dedicated to those who care for the *Udgella*.

Leonie Kelleher

CERTIFICATION

I certify that this thesis entitled: submitted for the degree of Doctor of Philosophy:

a. Is the result of my own research, except when due acknowledgement has been made;

b. Has not been submitted in whole or in part, to qualify for any other academic award; and

c. The content of the thesis is the result of work which has been carried out since the official commencement date of the approved research program.

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ABSTRACT

New ventures and entrepreneurial opportunity substantially contribute to job creation. At the same time, Western countries use regulatory change to order economic and social arrangements. The impact of regulatory change upon new venture creation and entrepreneurial opportunity is, however, not fully understood. Schumpeter's *Bahnbrechen* conceptual model of creative/destruction offers an approach to examining this impact.

In Australia, the Native Title Act 1993 (NTAct) dramatically altered the business and property environment, constituting a *Bahnbrechen* or transformative regulatory change which created the benefit of native title recognition for Aboriginals. This Study provides an account of NTAct's operation and many negative elements, along with its intriguingly positive impact upon entrepreneurial opportunity. It shows that the simple fact of the chaotic setting of a transformative regulatory change shakes things up in a way that impacts upon entrepreneurial opportunity, even while its policies are anti-entrepreneurial and disempowering.

Using a Case Study method, involving earlier case studies, judicial public records and interviews with Aboriginals, it analyses through three new analytic tools, finding that the NTAct does not *cause* entrepreneurial opportunities. However, what emerges is that '*but for*' the NTAct these entrepreneurial opportunities would not exist. The impact, which is nuanced, arises from a mandated recognition of certain entitlements. Parties must alter their behaviour around the regulatory change. Links between entrepreneurial opportunity, co-operation and regulatory control are shown to be strong, taking the form of a shifting flow of alliances. Impacts occur despite deep distrust within the regulatory system and limits on Aboriginal voice. Government emerges as an unreliable partner, having a demotivating influence. Lawyers play a crucial role. A conventional 'command and control' regulatory type may be the only device that can force transformative change, given the strong forces that seek to neutralise regulatory change goals to protect existing institutional interests. Best Practice regulatory impact assessment of the NTAct is shown to be flawed.

Entrepreneurial opportunity exists despite the exclusion of normal free market conditions, compounded by the imposition of severe restraints on trade for Aboriginals. This Study provides powerful evidence of the strength of transformative regulatory change as a life-force that positively impacts the creation of entrepreneurial opportunity.

"Invention, it must be humbly admitted, does not consist in creating out of a void, but out of chaos"

Mary Shelley, 1831

"During most of man's … history, creative behavior has been thought to be artistic … The view that creativity is a matter of artistry, the process by which the artist produces his art, has only in relatively recent years been expanded to include the idea that … many others in their endeavors can also be creative persons employing as does the artist the creative process."

McKinnon 1997

Chapter 1

INTRODUCTION

INTRODUCTION

This Study concerns entrepreneurship and Schumpeter's concepts of creative destruction and *Bahnbrechen*. Using these concepts, this Study aims to describe and explain whether transformative regulatory change impacts entrepreneurial opportunity.

A transformative regulatory change is one that does not concern the margins of existing business or social arrangements but makes a clear break from the past, striking at its foundations and its very existence, forging an entirely new track for the future. To deepen enquiry in answering the Research Question, this Study poses three discrete Research Propositions framed to expand the enquiry.

Chapter 1 justifies the research, explaining its purpose and importance, as well as the Research Propositions. It overviews the Study methodology, explains key terms and clarifies the research focus.

1.1 BACKGROUND

The Study emerged from conference discussions at which Professor Scott Shane highlighted the need to examine the impact of regulatory change upon entrepreneurial opportunity (Kelleher 2009a). Regulatory change is an important element of the exogenous environment within which entrepreneurship occurs and from which entrepreneurial opportunity springs. Early entrepreneurship work, for example, Peter Drucker in 1985, identified the need for research into the impact of regulatory change in the exogenous business environment upon entrepreneurial opportunity (Drucker 1985). Venkataraman, in 1997, observed that regulatory change potentially influenced the relative distribution of productive and unproductive opportunities across locations. Later writers, including Professor Shane, framed regulatory change as a continuous supply of new information about different ways to use resources to enhance wealth (Eckhardt & Shane 2003, Shane & Venkataraman 2000, Timmons 1999, Venkataraman 1997). 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).

Shane suggested that the starting point for examining the impact of regulatory change upon entrepreneurial opportunity should be Schumpeter's concept of creative destruction (Schumpeter 1934, 1942, Shane 2000, 221). Schumpeter brought concepts of innovation to business and economics, emphasizing the role of the entrepreneur in creating and responding to economic discontinuities (Stevenson et al 2000, 4). Notions of creativity and innovation were extended to thought practices, through the work of Edward de Bono whose approaches to innovative thinking were then applied to organizations and organizational theory (de Bono 1992, 1990, 1985, 1970, 1969, Glassman 1991, Kirton, 1994, Tanner 1997). The bottom line of entrepreneurial opportunity is business creativity.

> "Creativity is essential in order to create new value. Creativity is not a peripheral luxury but the most important ingredient in business in the future" (de Bono 1996, Foreward).

Organizational theory reinforced creativity by emphasizing the crucial role of structure and systems (Balasco 1979).

> "In order for creativity to be successfully applied in business, it has to be accepted as part of the daily culture of the organization" (Herrmann 1997, Foreward).

Schumpeter conceptualized entrepreneurship as an outcome from a gale of **creative destruction** (gale). He described the process from gale to outcome using the 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, 1939, [1942] 2006). He was concerned not with the margins of existing business but with enterprise that made a clear break from the past, striking at its foundations and the very life of its existing competitors (Schumpeter [1942] 2006, p. 84). Schumpeter was intrigued by the interplay of change within the exogenous environment. He strongly advocated the entrepreneurial opportunity that a *Bahnbrechen* change presented to the exogenous environment.

Much entrepreneurship literature considers the *Bahnbrechen* presented by technological breakthroughs. However, regulatory change is also a powerful factor in the exogenous environment that can clearly constitute a *Bahnbrechen*. Its inter-linkages with creativity and innovation are vastly under known, although its potential is obvious, because regulatory change can fundamentally alter the business setting, both prohibiting a return to old paths and dramatically setting up the new. Ready examples of regulation which creates entrepreneurial opportunity include deregulation, privatization and compulsory competitive tendering. Less obvious examples are regulatory changes which indirectly alter resource control, social norms and access to knowledge or information.

All too often, regulation is berated as a barrier to innovation, creativity or entrepreneurial activity. However, societies in fact do not tolerate the anarchy of unregulated commercial activity. Regulatory change curbs market excesses, redirects market activity, directly initiates new opportunities, industries or markets and makes certain products compulsory. Obvious opportunity creating regulatory examples include carbon pricing, water trading schemes, energy efficiency rating schemes and compulsory seatbelt or helmet regulations. Clearly, regulatory change can drive new solutions to problems and go far beyond prohibition, enforcement or simply controlling free market excesses.

According to economic historian, William Baumol, the allocation of entrepreneurial activity occurred over history according to the 'rules of the game' that apply in any society at any particular time. Baumol explored whether, or how, allocations to productive entrepreneurial activity can be increased and how a cumulative increase in entrepreneurial opportunity might be incentivated (Baumol 1990)

1.1.1 Background to this Study

Regulation and the role of regulators occupy the Business Section of most daily newspapers, with particular micro-analysis of their operations and policies. Despite these concerns at regulatory activity, the impact of the regulatory change process upon entrepreneurial opportunity is barely considered and almost entirely unknown. The skills required to optimize the regulatory change process is either ignored or delegated to lobbyists or lawyers. Highly regulated industries receive focus eg pharmaceutical, financial, construction, but even studies of these industries insufficiently examine the impact process itself, particularly the impact upon entrepreneurial opportunity. The Regulatory Impact Assessment (RIA) process, now routine in most western economies, invariably ignores entrepreneurial opportunity.

Legislative purpose, which is formed by Parliament, converted to words by Parliamentary Counsel and enforced by regulators, can evolve other than as envisaged or fail entirely. Anecdotally, it appears that encouraging entrepreneurial opportunity by means of regulatory change is viewed as impossible. Nevertheless, in some regulatory areas, this outcome is achieved in creative and innovative ways on a daily basis. For example, land development ventures are invariably tailored (and facilitated) through sophisticated processes of change to planning scheme instruments. These processes balance commercial and development objectives with societal or community standards, for example infrastructure provision, sustainability and residential amenity, through change to planning controls (The Scottish Government 2010). The implications of this for economic innovation and development opportunity are, for example, clearly stated in the State of Victoria's State Planning Framework:

> "Planning is to provide for a strong and innovative economy, where all sectors of the economy are critical to economic prosperity and ... to contribute to the economic well-being of communities and the State as a whole by supporting and fostering economic

> growth and development by providing land, facilitating decisions, and resolving land use conflicts, so that each district may build on its strengths and achieve its economic potential" (Department of Planning and Community Development, Cl. 17).

Apart from changing the face of land use and the living environment for every citizen, the scale of change achievable through regulatory change can go beyond; to create entirely new legal and property rights and protections, assist major business, substantially improve community disadvantage and right past injustices. The nature, scope and potential of such impact need to be far better understood by careful explanation and description.

1.2 RESEARCH QUESTION

The Research Question was framed to encapsulate what the researcher wanted to know, being intrigued by gaps and absences in the literature.

"**Does transformative regulatory change impact entrepreneurial opportunity?**"

In addressing this Research Question, it was useful to focus upon a given regulatory change to examine its impact across geographical locations, in a variety of different settings and from several different perspectives. This was the approach recommended by Shane (Kelleher 2009a, p. 4). The regulatory change chosen for study needed to be one that created a clear break from the past and forged an entirely new track for the future. It would not be concerned at the margins but likely to create entirely new legal benefits or rights for a specified, identifiable Benefit Group from which, if Schumpeter were correct, entrepreneurial opportunity would be evident from emerging entrepreneurial outcomes.

It was essential that the regulatory change be very substantial. It must be an objective, measurable, major change: a true *Bahnbrechen*. The Benefit Group of such a transformative exogenous shift needed to be objectively identifiable and reasonably able to impact upon entrepreneurial opportunity across a range of locations. The legislation needed, by its very terms and intent, to give something new and valuable to the Benefit Group. Thus, from a given transformative regulatory change, the researcher would have a constant from which to explore the nature, scope and potential impact of any entrepreneurial opportunity.

The impact considered in this Study would be more than a light flutter, minor switch or incremental adjustment, but rather a strong effect or influence. It could be direct, indirect, independent or unintended and influenced by the people involved in its operations (Griffith 1979). The term is defined in 1.6.2 below.

Entrepreneurial opportunity would be a new means-end relationship, which Schumpeter considered took the form of one of five new combinations – new goods, production methods, markets, raw material supplies or organizing methods (Schumpeter 1934, 66). The term is defined in 1.6.3 below. New business venture can provide evidence of entrepreneurship (Aldrich & Cliff 2003, Gartner 2001, Shane 2008). This approach provides an objective measure of entrepreneurial opportunity, whilst accommodating a broad spectrum of innovative concepts.

Having identified the preferred features of the regulatory change which ought to be studied, the researcher searched for a suitable regulatory change. The regulatory change needed to contain the elements of 'creative destruction' ie by prescribing both something destroyed and something created. The regulatory change needed to have occurred some time ago to allow sufficient time for its beneficiaries to have secured their benefit and experience its impact, if any, on entrepreneurial opportunity. For the purposes of replication, the regulatory change ought to be of international interest or relevance. The study would describe entrepreneurial opportunity among the regulatory benefit group after the regulatory change.

Within Australia, a world-unique and important transformative regulatory change met these key criteria. It was the Federal regulatory change known as the Native Title Act 1993 (NTAct). This legislation dramatically swirled through the exogenous environment of the Australian commercial "gale" and directly impacted key national industries such as mining, pastoral and fishing. It followed the 'bombshell' of one of the most significant decisions ever made by the Australian High Court. This case, *Mabo & Others v Queensland (No 2)* 1992, (*Mabo*), dramatically altered the entire *status quo* of property rights in Crown land in Australia, impacting rights operating since British settlement of Australia. Not only was the Court's decision of enormous public interest and, in many quarters, deep concern, but it dramatically shifted the legal position of Aboriginals, providing them, for the first time under Australian common law, with 'as of right' private property rights to land, arising from their pre-settlement land occupation. No other First Nation peoples in the world experienced the

Australian form of colonial land settlement which occurred without compensation, treaty or war and by denial of the very existence of Aboriginals, with the entire continent treated as *terra nullius* (land where no-one is). The High Court transformed this legal history by finding that, where Aboriginals retained connection to their country, this 'native title' would be recognized by Australian common law.

Such was the transformative effect of this case, that the Federal Parliament was moved to respond to it by the NTAct, a regulatory change that sought to give effect to *Mabo* decision by providing for the orderly processing of the anticipated flood of litigation by Aboriginals seeking orders recognizing their 'native title'.

This was massive, dramatic and globally unique regulatory change of a kind unprecedented in Australia and, in fact, rarely seen in global history. It may be difficult for those outside Australia to perceive the seismic shift of this regulatory change. Even major regulatory changes, such as Eastern European restitution legislation after the fall of Communism or the regulatory changes of the Thatcher government allowing Council tenants to purchase their homes, did not come close. Comparisons might be found in the English Kings' ceding of royal power to Parliament or, in reverse, Communist land nationalization programs.

The NTAct 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 NTAct).

The NTAct **created** an exogenous objectively identifiable benefit for a finite, objectively ascertainable Benefit Group. NTAct'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]). The NTAct's "moral foundation" Preamble includes:

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

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 NTAct upon entrepreneurial opportunity ought to be readily identifiable.

The choice of the NTAct as the transformative regulatory change for this Study addressed a gap in the native title literature. Whilst the NTAct has received extensive attention in literature across many disciplines, there is almost no consideration of its impact on entrepreneurial opportunity either among Aboriginals, landowners, the Crown, location-based commercial entities or otherwise. Likewise, within the entrepreneurship literature, there is no consideration of the NTAct, despite its specific economic goal and the acknowledged need for greater understanding of Indigenous entrepreneurship (D. Foley 2000, Hindle 2009). Finally, study of a regulatory change impacting property rights contributes to better understanding of linkages between property and entrepreneurial opportunity (Morrish, Levy & Dong 2009, Morrish & Levy 2011).

1.2.1 Research Propositions

The Research Question was intensified by three research propositions that invited expanded thinking and 'drilling deeply' into yet to be explored areas of the Research Question and aided its exploration and description. The first Research Proposition shapes the specifics of the transformative regulatory change under study but does not specify whether there will be any impact at all or seek to constrain or define what any such impact might be. **Research Proposition 1** is:

> "**Transformative regulatory change, in the form of the NTAct, impacts entrepreneurial opportunity, in the form of new venture starts, among the category of persons benefitted by the regulatory change i.e. native title claimants**".

However, because regulatory change, particularly a transformative regulatory change, closely ties with parliamentary process, elements of societal dialogue become obvious as potentially driving enactment of the regulatory change, shaping its terms and influencing its operations. This is a key difference between a transformative regulatory change and other exogenous change such as a technological change. Voice is a fundamental of social process. It is by using one's voice and speaking to articulate one's opinions, that an individual participates in societal dialogue of the kind that initiates and shapes a regulatory change. It is core to interface with all legal systems, particularly in western democracies and has also been established as important to entrepreneurial opportunity (Foucault 1982, Habermas 1984, Hazen 2006, Spinoza et el 1997). Likewise, elements of social capital have been found to shape entrepreneurial opportunity. Social capital is a relational capital embedded in habits of trust, reputation assessment and sanctions against untrustworthy behaviour (Florin 1997, Fukuyama 1995, Gambetta 1988, Putnam 1993). The second Research Proposition considers whether these elements affect the Research Question. **Research Proposition 2** is:

> "**The impact of transformative regulatory change upon entrepreneurial opportunity is affected by voice and social capital-trust**".

Finally, it is also possible that different regulatory types vary in how they influence the impact of transformative regulatory change upon entrepreneurial opportunity. Thus, prohibitive changes to the Dog Act may impact entrepreneurial opportunity differently from communications industry self-regulation arrangements. The third Research Proposition focuses upon the possible influences of regulatory type. **Research Proposition 3** is:

> "**Transformative regulatory change impacts entrepreneurial opportunity according to the type of regulatory change**".

1.3 JUSTIFICATION FOR THE RESEARCH - Gap in the Literature

The Research Question crossed the disciplines of law, entrepreneurship and social sciences and its multi-disciplinary approach addressed gaps within the literature in each discipline.

As previously described, Schumpeter's conceptual model of entrepreneurship envisaged entrepreneurial opportunities emerging from the commercial gale via a process of Creative Destruction that irretrievably broke the existing situation, allowing the new to emerge. He called this process *Bahnbrechen*, literally path-breaking or routine disrupting, and regarded it as the seed of entrepreneurship (Schumpeter [1912], 1933, 1939, [1942] 1967). Schumpeter identified five types of 'new combinations' or entrepreneurial opportunities:

(1) The introduction of a new good or new quality of a good;
(2) The introduction of a new method of production;
(3) The opening of a new market;
(4) The conquest of a new source of supply of raw materials or half-manufactured goods; or
(5) The carrying out of the new organization of any industry, eg creating or breaking up a monopoly (Schumpeter 1934, p. 66).

Schumpeter's concept is generally researched to examine the impact of transformative technological change on entrepreneurial opportunity. However, regulatory change is also an important element of the exogenous environment contributing to the commercial "gale". As previously mentioned, it may alter an economic structure (eg industry privatization) or indirectly create such an effect (eg land development controls). It may directly lie behind some or all of the "new combinations" as the examples below illustrate:

(1) new goods or quality of goods - eg lead replacement fuel developed after Clean Air legislation prohibited lead emissions;

(2) new method of production - eg wind or solar energy legislation;

(3) new market - eg seat belt or bicycle helmet legislation;

(4) new resource - eg resource or resource exploration legislation; and

(5) new organizations or new industry - eg privatization legislation.

Schumpeter saw a cautious role for regulatory intervention, although limited to adjustments addressing grey legal areas or business scandals. However, later writers identified that certain

regulatory change provided little benefit to its apparent Benefit Group, eg public utility regulation that neither reduced electricity prices nor increased rates of return to investors and Securities and Exchange Commission regulations that provided no benefit to purchasers of new stock issues (Stigler 1964, Stigler & Friedland 1982). From this, it was postulated that regulatory change may create opportunity only when the Benefit Group is relatively small, expects to make large gains, has similar interests and can exclude others from sharing those gains (Stigler 1971, Macey 1988, Shughart 1990).

Drucker described three categories of market opportunities, one of which was "reaction to shifts in the relative costs and benefits of alternative uses for resources as occurs with … regulatory … changes" (Drucker 1985). Timmons saw regulatory change as an 'opportunity spawner' (Timmons 1999, p. 81-83). Baumol concluded that the 'rules of the game' determined the allocation of entrepreneurial activity between productive, unproductive or destructive activity and suggested modifications to Schumpeter's model (Baumol 1990). Venkataraman suggested that regulatory change may also influence the relative distribution of productive and unproductive opportunities across locations (Venkataraman 1997). 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). 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 (Davidsson & Honig 2003). Others found a relationship between entrepreneurial opportunity, co-operation and the extent of regulatory IP control (Gans, Hsu & Stern 2002). 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).

Institutional theorists found that external pressure of regulatory change clashed with institutional norms. Such norms, actively working to preserve the *status quo,* could lead to a passive 'do the minimum' conformity or active resistance. Thus, regulatory change was

found to achieve only limited core change despite strict legislative compliance (Abraham, Sullivan & Griffin 2002, Sullivan, Kelly & Gordon 2003). At the same time, others found regulatory change altered the structure of industries, creating opportunities for new entrants (Eckhardt & Shane 2003).

It is well known that the impact of a regulatory change is complex and diverse. Nevertheless, 'Best Practice' regulatory change regimes including regulatory impact assessment (RIA) routinely (and at considerable taxpayer expense) apply narrow cost/benefit focused impact measures with risk sometimes included (Bottomley & Bronitt 2006, Griffiths 1979). The role of regulatory change in influencing social and economic structures is well documented and known to belie the unproblematic transfer of responsibilities to significantly shift alliances (Macaulay 1979, Kidder 1983, McKenzie 2005). 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, Seynard et al 2012). Various sectors of Australian industry have reviewed suitable regulatory approaches including health safety and energy efficiency leading directly in the latter to substantial sales of Energy Rating labeled products, lighting, home entertainment, heating, refrigeration and air conditioning, industrial equipment, water heating systems and white goods (Braithwaite 2005, Energy Efficient Strategies 2010, Commonwealth of Australia 2009b).

Clearly, the picture that the literature provides is unsystematic, pointing to a fundamental question as to whether and in what circumstances regulatory change can impact entrepreneurial activity (Capellaras et al 2008, McKeown & Leighton 2012). Eckhardt and Shane in 2003 identified a need for research that examined the exogenous shift-based opportunities within regulatory change (Eckhardt and Shane 2003). In 2008, repeating this call for research, Shane focused on re-examining Schumpeter's creative destruction model, given Baumol's conclusions as to the impact of the 'rules of the game' upon entrepreneurial activity allocations (Kelleher 2009a, Shane 2012).

> "To date, little work has explored the sources of entrepreneurial opportunities and, as a result, we know little about why there are more opportunities in some places or at some points in time that at others" (Shane 2012, p. 16).

The ‘rules of the game’, however, necessarily reflect important aspects of society and societal flows over time.

> “We cannot hope to understand the real world of public law without … understanding something of the real world of politics and government, how decisions are made, what influences are brought to bear on decision-makers, how process affects policy and policy process, how public law and political process are in many respects two sides of the same coin” (McAuslan 1989, p. 682).

Law certainly can help mould social opinion and bring a community to accept propositions it originally rejected. Universal suffrage laws are an example. But there needs to be a degree of societal dialogue supporting such change. 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 influence and shape legislation, 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 (Gewitz 1996, Freire, 1970, 75–77, Kelleher 2008, 2009b). Those whose self-believed stories are officially transformed and enforced into fact by the legal system contrast with those whose stories, still sincerely believed by themselves to be true, are officially distrusted or not heard (Scheppele 1989). For example, the Yorta Yorta People found that there self-believed stories concerning native title were distrusted or not heard and their opponent’s version (State of Victoria) was officially transformed and enforced into fact by judicial determination (*Members of the Yorta Yorta Aboriginal Community* v. *Victoria* 2002 (Yorta Yorta)).

Entrepreneurship theory describes language and communicative action generating, influencing and shaping innovation and entrepreneurship. Links have been made with voice and three processes creating meaningful change, being 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 (Bollman & Deal 1997, Cooperrider 2001). Thus, entrepreneurial opportunity may itself be affected by elements of societal dialogue, including voice.

Extensive research 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 behaviour (Bell 2005, Deutsch 1958, Florin 1997, Fukuyama 1995, Gambetta 1988, Gulati 1995, Jiobu 1988, Larson 1992, Legge & Hindle 2004, Mayer, Davis & Schoorman 1995, Poppo & Zenger 2002, Putnam 1993, Wilson & Portes 1980). 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 (Aydalot 1986, Aydalot & Keeble 1988, Camagni 1991,Capello 2002, Feldman & Audretsch 1999, Gordon 1993, Keeble & Wilkinson 2000, Knack & Keefer 1997, Maillat, Quevit & Senn 1993, Ratti et al 1997, Von Hippel 1994). 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.

Finally, reports and analysis concerning regulatory praxis, including the Best Practice regulatory 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 (Chapman 2008). Thus, it would seem that the impact transformative regulatory change upon entrepreneurial opportunity may vary according to regulatory type.

1.3.1 Research Rationale – Importance and Benefit

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 within a region and having important social implications (Audretsch & Thurik 2001, Birch 1987, Chell 2007, Kumar & Liu 2005). Governments seeking to stimulate their economies are frequently pressured to reduce constraints on entrepreneurship (Acs et al 2004, Minniti et al 2006). Whilst much entrepreneurship theory assumes that entrepreneurship can be managed, entrepreneurship policy tends to fall outside industrial policy, with regulatory change used rather bluntly as a tool for correcting alleged market failures (cf Knight 1985, Legge & Hindle 2004 and World Bank 2004). However, given its potential for impacting prosperity, it is important to understand much more fully how to encourage productive entrepreneurial activity so as to create a cumulative increase in entrepreneurial opportunity.

The significance of the regulatory change framework to contemporary business settings cannot be overstated.

> "[P]olicy formation has displaced the incremental operation of the common law as our primary means of social regulation, and regulatory agencies have displaced the common law courts as the primary means by which that regulation is effectuated" (Rubin 1989, p. 369).

This Study will extend the entrepreneurship literature by examining the process that occurs after enactment of a transformative regulatory change that provides a clear beneficial shift in the exogenous environment for a particular category of beneficiaries (Eckhardt & Shane 2003, Kelleher 2009a, Shane 2012). In this way, the Study will assist policy makers to better understand the impact of transformative regulatory change upon entrepreneurial opportunity, how impact operates, what might be achievable by it and what policy directions may be required beyond it by way of economic or other incentives. As Government business innovation programs, including enterprise stimulation funding, frequently operate without regard to regulatory change, this is important new knowledge.

Its focus on regulatory type will separate the grab-bag of regulatory types badged together as regulatory change and contribute to building a systematic approach to the use of different types of regulatory change. Whilst Australian regulators must, in certain circumstances,

undertake an RIA or an Economic Impact Assessment, such assessments are not required to, and generally do not, have regard to entrepreneurial opportunity. This Study will be important to improving frameworks for such impact assessments.

Finally, in considering the specific economic objectives of NTAct as stated in its Preamble above, within the context of entrepreneurial opportunity, the Study will suggest practical ways to better address these goals. Focus within a deprived social setting will create additional understandings, from an outlier group, of the overall impact of regulatory change upon entrepreneurial opportunity. It also offers possibilities for tangible beneficial outcomes to address disadvantage.

This paper's extensive multi-disciplinary literature review in itself provides an important theoretical contribution as this has not, to the researcher's knowledge, been previously undertaken. From the literature, key Elements are compiled as a conceptual framework for modeling the impact of regulatory change upon entrepreneurial opportunity and these could form parameters for broader theoretical and practical use. Finally, the case study and its analysis make an important empirical contribution.

1.4 METHOD

The purpose of the research is descriptive aiming to explore, describe and, where possible, explain a currently uncertain problem. It aims to identify patterns and develop, rather than test, hypotheses. Descriptive research is used to identify and describe characteristics of a population or phenomenon.

The Study adopted the *phenomenological* paradigm as its research approach, focusing on subjective human behaviour and meaning rather than measurement. It is based on the belief that, given the limited existing research into the impact of regulatory change upon entrepreneurial opportunity, what is required is a rich, deep understanding of the phenomena and its complex intertwining associations and linkages. At this point in time, this is more important research than an overview survey or mathematical cause-and-effect measurement. Key indicators likely to evolve from such exploration, description and, where possible, explanation will create a sound base for parameters that later research can effectively test and

refine through survey or measurement (Hofer & Bygrave 1992, Perry, Alizadeh & Riege 1997).

Crossing the boundaries of academic disciplines can bring important gains but it risks weakness in one academic area and loss in the benefits of specialization. Addressing such dangers requires well-defined boundaries and clarity as to how studying one of the disciplines provides insights into the other (Prosser 2007, p. 7). This Study gave careful attention to the scope and wording of the Research Question and refined three focus triggers as Research Propositions. It necessarily involved an extensive literature review across the disciplines as well as meticulous attention to research design and methodology to ensure clear boundaries.

The research used the qualitative Case Study method, applying Grounded Theory techniques to achieve flexible interaction between data and theory and facilitate pattern and theme identification, from which theory can be developed. Such an approach is well suited to the study of entrepreneurship, which remains a pre-paradigmatic discipline that still requires theory construction. Recording and interpreting the entrepreneurship experience firmly embeds the research in the complexity of the phenomena. Exploring and describing the phenomena in its setting of social truths and conflicting perspectives maintains an action orientation and works with reality rather than abstracts, to meet the current theoretical need for a more complete understanding of the nature of the phenomena (Perry, Alizadeh & Reige 1997).

Considering the Schumpeter conceptual model required that the regulatory change under study be transformative, a *Bahnbrechen*, containing within it both creation and destruction. It also required that the regulatory change created a finite, objectively ascertainable Benefit Group and an objectively identifiable benefit.

The NTAct met the criteria for a suitable transformative regulatory change offering exciting and important possibilities for deep rich study. As discussed in 1.2 above, the regulatory change contained both creation and destruction. Enacted for nearly two decades, and despite extensive delays facing the Benefit Group in securing benefit, a sufficient number of determinations and numerous negotiated outcomes and agreements, established that sufficient time had elapsed for entrepreneurial opportunity to emerge.

The Benefit Group was finite and objectively ascertainable, being defined by the NTAct and registered with National Native Title Tribunal (NNTT). The benefit was objectively identifiable, a Determination recognizing native title over precisely and objectively identified land. As the NTAct provided benefit to a category of persons at the interface of social disadvantage, its impacts were likely to be noticed and traceable. The Study used new venture formation as its evidence of entrepreneurship (Shane 2012, Shane 2008).

Because societal dialogue was postulated as a key difference between transformative regulatory change and other transformative changes to the exogenous environment, Research Proposition 2 maintained focus upon this important difference. Similarly, because the regulatory type effecting transformative regulatory change may influence its impact, Research Proposition 3 maintained focus on this variable.

A context review of literature regarding NTAct and Aboriginal Venturing is Chapter 4. The Case Study used two separate methodological tools – documentary analysis and interviews. The documentary analysis located and generally described the details and outcomes of the NTAct regulatory change as well as analytical and factual documentary data and media (Collis and Hussey 2003, p. 68; Neuman 1997, 422). It was based upon a document set comprising four earlier case studies and the publicly available judicial records of Federal Court and the NNTT. Whilst the documentary analysis provided useful insight into the Research Question, there was a sense that more data was required for a fuller understanding of the impact of transformative regulatory change on entrepreneurial opportunity, particularly as the NTAct Benefit Group expressed itself less frequently in documentary form, so the documentary analysis contained an inherent 'educated white' bias.

To this end, a series of interviews intertwined with the documentary analysis, enabling the voice of the Benefit Group to directly describe the impact of the NTAct regulatory change upon their lived experience of entrepreneurial opportunity. The interviews involved four Aboriginal Elders.

Thus, the Study focuses on a transformative regulatory change and deliberately limits itself to the *Bahnbrechen* situation, excluding other forms of regulatory change, such as specific major projects or incremental, operational or micro regulation. It examines a transformative regulatory change that creates a *property* benefit concerning land and location. Finally,

because it is regulation affecting Crown land monopoly interests throughout the entire Australian nation, it is a regulatory change of considerably more public and political sensitivity than many others. This was a deliberate choice because, if Schumpeter is correct, such transformative regulatory change will impact upon entrepreneurial opportunity.

Its focus is Australia and its results are necessarily constrained by Australian regulatory conditions. That said, this unique transformative regulatory change is selected for its potential to extrapolate internationally, so results can be generalized. The Study does not attempt to unweave the impact of one individual regulatory change, isolating it for 'impact' testing, but its descriptions touch on these interweavings.

Whilst this Study provides useful signposts to the fields of native title and Indigenous entrepreneurship, its focus is the impact of regulatory change upon entrepreneurial opportunity. It does not intend or attempt to, and does not, compare or contrast the experience of business venturing among Canadian, Native American other First Nations with Australian experience in any way. Such research is certainly required, but is not the work of this Study.

1.5 OUTLINE OF THE STUDY

Chapter 1 provides a Statement of the Research Question, introduces Schumpeter's concept, formulates three Research Propositions, outlines the purpose of the Study, defines the key terms used and discusses the limitations.

Chapter 2 reviews the extensive literature across disciplines, identifying gaps that the Research Question and Research Propositions seek to explore. This literature review is wide-ranging and complex, describing both Schumpeter's concept and the literature concerned with the impact of regulatory change upon entrepreneurial opportunity. It then overviews each of the primary theoretical areas of 'entrepreneurial opportunity' including Indigenous entrepreneurship, 'regulatory change' and 'impact'. Finally, it considers the literature, concerning voice, social capital-trust and regulatory type, that is relevant to whether transformative regulatory change impacts upon entrepreneurial opportunity. From this, Key Elements emerge to shape an analytic framework.

Chapter 3 describes and justifies the research design and method. It explains the use of the Key Elements from the literature as analytic tools for examination of the Research Question and Research Propositions. It includes attention to the particular methodological issues impacting research with Aboriginals.

Chapter 4 comprises the first phase of the Case Study, providing context to the regulatory change under study. It includes a broad overview of the background and key provisions of NTAct, along with commentary from the literature as to its strengths, weaknesses, opportunities and threats. It situates the regulatory change within the entrepreneurial setting of the Benefit Group, identifying relevant unique characteristics and opportunities. Chapter 5, the second phase, describes the data collected by this Case Study. Chapter 6, the third and final phase of the Case Study, analyses this data, beginning with description and analysis of each individual data set and then cross-analysing the data aided by the literature's Key Elements. Wherever possible, voice is given weight. Overall analytical outcomes are then synthesized and folded in with the broader regulatory setting identified in Chapter 4 to review emerging themes and patterns.

Chapter 7 draws Conclusions about the Research Question, Schumpeter's concept and the Research Propositions. It addresses implications for theory, policy and practice as well as directions for future research. The structure and methodological sequence of this Study are set out in **Figure 1** below.

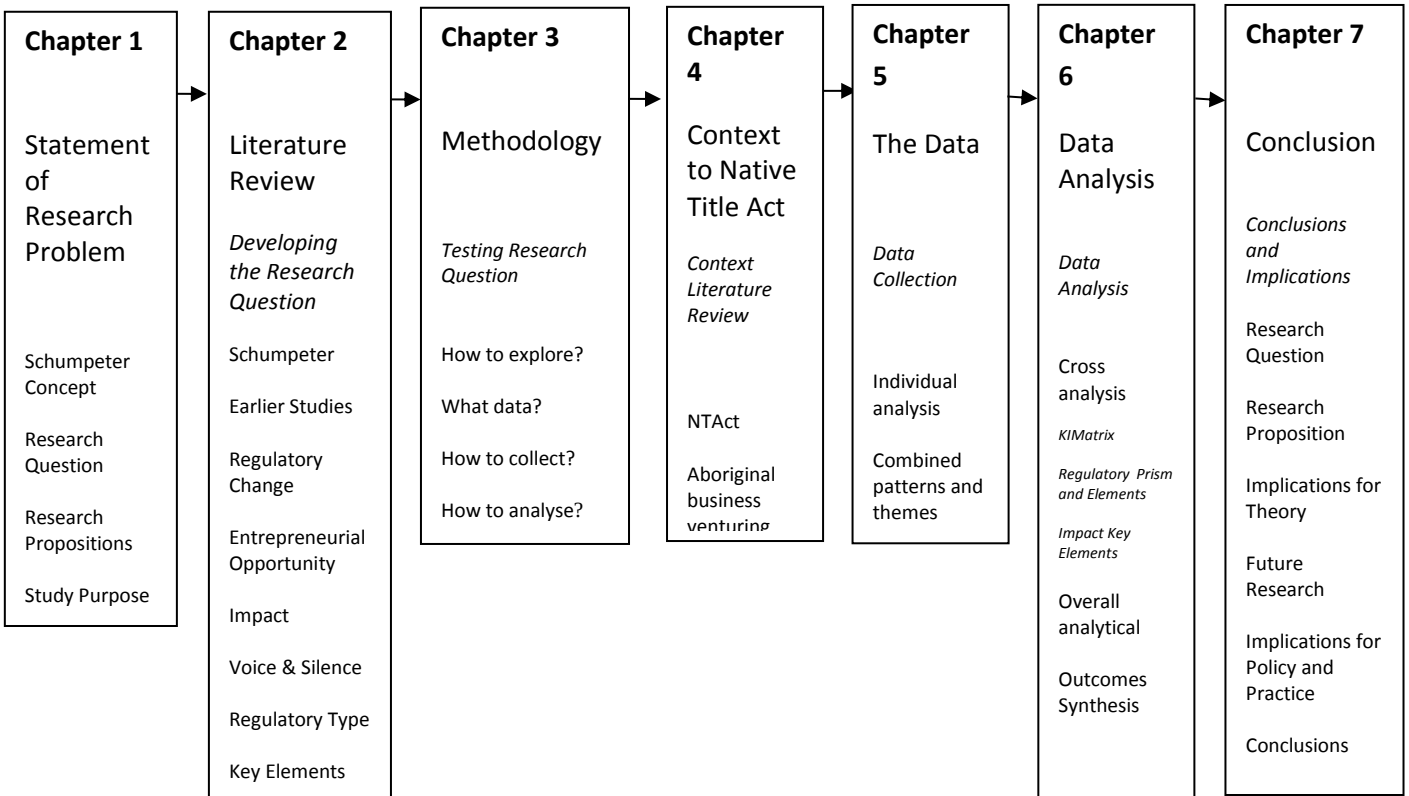

Figure 1: **Study Summary**
Source: Researcher

1.6 TERMS

The key terms, "regulatory change", "impact" and "entrepreneurial opportunity", are defined below, along with terms relevant to the regulatory change under study (NTAct).

1.6.1 Regulatory Change

It is surprisingly difficult to define "regulation" partly due to the different disciplinary perspectives from which it is studied (Bottomley & Bronitt 2006, p. 312). Economic research tends to see regulation as a politico-economic concept, whereas sociological approaches consider processes of diverse individual and social interactions (cf Bird et al 2003 and Ogus 1994). Definitions vary from the very broad – "all mechanisms for social control or influence intentional or not" to the narrow and mechanistic - "the promulgation of rules accompanied by mechanisms for monitoring and enforcement" (Black 2001, p. 6). Jurisprudential debate sees conflict between legal positivism and a wider sociological and practical context.

Searching for a single definition has been considered unhelpful because there is merit in defining regulation in different ways (Bottomley & Bronitt 2006, p. 313, Parker et al 2004, 1). Nevertheless, this Study rejects definitions of 'regulation' as "*controlling* human or societal behavior by rules or *restrictions*" (Bert-Jaap Koops et al 2006). It adopts a common law view that "regulation" is not prohibition or control but governance of that which will continue to exist in the best interests of society (*Ontario* v *Canada* [1896] AC 348, *Toronto* v *Virgo* [1896] AC 88). It recognizes that modern regulation is increasingly diverse in its regulatory type, with considerable different regulatory types working in tandem (Commonwealth of Australia 1998). The Victorian Competition & Efficiency Commission recently defined 'regulation' as "the rules made by Parliament and government, and their *administration* and *enforcement* by government authority, in order to *influence behaviour* and *achieve identified outcomes* and objectives" (VCEC 2011). Again, whilst this Study supports the emphasis

upon influencing behaviours and achieving identified outcomes and objectives, it rejects inclusion of operational elements of administration and enforcement in any definition.

The Australian Commonwealth Best Practice Handbook defines "Regulation" as a 'rule' endorsed by government where there is an expectation of compliance. It includes primary legislation and legislative instruments (both disallowable and non-disallowable) and international treaties. It also comprises other means by which governments influence businesses and the not-for-profit sector to comply but that do not form part of explicit government regulation (for example, industry codes of practice, guidance notes, industry-government agreements and accreditation schemes). This definition includes treaties, conventions, protocols, covenants, charters, agreements, pacts and exchanges of letters but excludes grant programs, government procurement of specific goods or services or government agreements unless these processes impose more general regulatory requirements on the organisations receiving funding or providing goods/ services (Australia Government 2010a).

Given the descriptive and exploratory goals of this Study, but its focus on the formal regulatory process, the meaning of the term " 'Regulatory Change" will be kept wide to refer to a change to any rule made by any Parliament or any Government or flowing from any such rule, but will exclude the more indefinite and vast area of "other means by which governments influence business". In this way, regulatory change is clearly distinguished from judge-made common law evolving case by case according to rules of precedent and confined to formal rule-making, but is otherwise unrestricted.

1.6.2 Impact

"Impact" means having a strong effect or influence (OED 2010). The term is firmer than Schumpeter's "emergence" or "arising", but shares its strength. To ensure a degree of structure in consideration of 'impact', it is useful to include the four possible impacts identified in the literature - direct, indirect, independent and unintended (Griffiths 1979).

The Australian Government's Best Practice Regulation Handbook 2010 defines it as either a positive or negative effect that covers items that can be readily quantified in monetary terms (e.g. service charges, subsidies, compliance costs) as well as items that cannot be readily

quantified in monetary terms (for example, restrictions on competition) (Commonwealth of Australia 2010a).

For the purposes of this Study, the term needs to be defined in a way that allows for maximum descriptive and explorative possibilities and must leave open the question of whether 'impact' is an effect or an influence, qualitative or quantitative, positive or negative and it must avoid elements of causation, whilst being sufficiently structured to accommodate explanations that might aid the evolution of a predictive model.

> "For a field of social science to have usefulness, it must have a conceptual framework that explains and predicts a set of empirical phenomena not explained or predicted by conceptual frameworks already in existence in other fields" (Shane & Venkataraman 2000, p. 217).

The term 'impact' as used in this Study means to a strong effect or influence, direct, indirect, independent or unintended.

1.6.3 Entrepreneurial Opportunity

The terms 'entrepreneurial opportunity' and 'entrepreneurship' are bedeviled with differing meanings. The entrepreneurship discipline has not even yet reached consensus as to its *raison d'etre*. The literature appears to generally agree that 'entrepreneurship' is a pursuit, not an outcome and that it is not created or determined by its results or identified according to performance, profit or success (Shane 2012, Stevenson & al 2000, 5, Timmons 1999). An "entrepreneur" is one who:

- passionately seeks new opportunities;
- pursues opportunities with enormous discipline;
- pursues only the very best opportunities;
- has an execution focus; and
- engages the energies of everyone in their domain (McGrath & Macmillan 2000, p. 2-3).

The emphasis on opportunity pursuit is reflected in this well-known definition of "entrepreneurship" as:

> "the pursuit of opportunity without regard to resources currently controlled" (Stevenson et al 2000, p. 5).

'Entrepreneurship' has been viewed as a process of discovery, knowledge and learning rather than an event or embodiment of a type of person (Hayek, 1948, Shane 2000, Shane & Venkataraman 2000, 17, Venkataraman, 1997). Shane & Venkataraman saw it as a nexus of opportunities and individuals to create new means-ends relationships, innovation and new combinations (Shane 2012, Shane & Venkataraman 2000). Alternatively it has been viewed as the work of:

> "an imaginative actor who … exploits … all means at hand to fulfill a plurality of … aspirations, many of which are … created through the very process of economic decision making and are not given a priori" (Sarasvathy 2001, p. 262).

Shane points to a mismatch between conceptual and operational definitions of entrepreneurship (Shane 2012).

Some adopt a simple common-sense definition of "entrepreneur" as a person who founds a new business venture (Aldrich & Cliff 2003, Gartner 2001, Shane 2008, p. 3). However, Shane, in his recent paper, notes that:

> "(F)irm formation simply represents a choice about how many people would like to exploit opportunities they have identified while working for others (Shane 2012, p. 3).

He regards "entrepreneurship" as a very common vocation and quite distinct from the work of typically creative people, such as artists, or socially messianic people, such as founders of new religions or social movements (Shane 2012, Shane 2008).

The common-sense use of a clear, objective measure, (ie new venture start), places attention at the point of 'start up', and thus squarely on the act of beginning an entrepreneurial act, ie at the very moment when a business creation occurs and an idea converts to action. It ensures focus on the shift from idea to action. It provides a fixed event at which the impact of a regulatory change can be examined. It encompasses both large and small ventures, offering

clarity and simplicity as well as an objective, clearly evidenced measure. It avoids the heuristic or psychological characteristics of individuals and helpfully separates commercial from social justice, human rights and spiritual goals, but, consistent with Schumpeter's notion, it does not omit community or not-for-profit new ventures or co-operatives.

"*Opportunity*" has been defined as a future situation both desirable and feasible (Stevenson & Jarillo 1990). Timmons considered that an "opportunity" has the qualities of being "attractive, durable, and timely and is anchored in a product or service that creates or adds value for its large and long-lasting buyer or end user" (Timmons 1999, p. 80-83). An idea is not an "opportunity", but an "opportunity" is created or built using ideas and creativity, which interact with the real world in real time, when a market window is opening not closing. Opportunity is objective, not subjective (Shane 2012, p. 16). The entrepreneur's skill is in recognizing "opportunity" when it appears and seizing it at the right time.

This thesis considers "*entrepreneurial* opportunity". It does not consider just any 'opportunity'. Whilst it might be a truism that all regulatory change creates opportunities for some people, an *entrepreneurial* opportunity goes beyond ordinary opportunity. Timmons illustrates 'entrepreneurial opportunity" as selecting objects from a conveyor belt that is moving through an open window, where the belt's speed constantly changes and the window constantly opens and closes (Timmons 1999, 80-81).Timmons illustrates "entrepreneurial opportunity" as selecting objects from a conveyor belt that is moving through an open window, where the belt's speed constantly changes and the window constantly opens and closes (Timmons 1999, p. 80-81).

The literature tends to consider "*entrepreneurial opportunity*" to be a new means-ends relationship (Legge & Hindle 2004, Shane 2012). Entrepreneurial opportunity and business ideas are different concepts (Shane 2012). Optimization of *existing* means-ends frameworks is not an "*entrepreneurial* opportunity" which is distinguished from the larger set of all "opportunities" for profit eg those arising from production cost or sale price adjustments. Entrepreneurial opportunities are situations, as Schumpeter described, in which it is possible to creatively recombine resources in a way that generates a profit, although recombination can be a fundamentally new means-ends relationship or a slight modification of an existing one (Shane 2012, 18). They consider that the existence of "*entrepreneurial* opportunity" depends on constant economic disequilibrium and asymmetries of information and is not limited to

private enterprise, but available to Government and not for profit groups. Schumpeter's five new combinations clearly evidence that a new means-end relationship has been created.

Taking into consideration all of the above, this Study combines Shane's definition of 'entrepreneurship' with Schumpeter's combinations. Casson used a similar definition, but required that the new combination be sold at or greater than its cost of production (Casson 1982 quoted in Shane & Venkataraman 2000). This Study, consistent with Schumpeter's approach, omits any requirement for profit in its definition. Consistent with the research intention to maintain a wide descriptive ambit, this definition includes both opportunity-focused and necessity-based entrepreneurship.

Thus, the term 'entrepreneurial opportunity' as used in this Study means "a new business venture for the introduction of new goods, production methods, markets, raw material supplies or organising methods".

1.6.4 Benefit Group

To ensure that the concept of the Benefit Group is properly linked with entrepreneurial opportunity, the notions of 'desirable' and 'feasible', described by Stevenson & Jarrillo (1990) and 'attractive', 'durable' and 'adding value' used by Timmons (1999) are linked with the regulatory schema. For this reason, the term "Benefit Group" as used in this Study means a group of persons to which the regulatory change grants a desirable, feasible, attractive and durable benefit that adds value.

1.6.5 New Venture Creation

New venture creation is generally understood within the literature to mean a new enterprise, industry or business and is so defined in this thesis (Stevenson et al 2000, Timmons 1999, 4-5).

1.6.6 NTAct Terms

The choice of NTAct as the studied regulatory change requires clarification of a number of key terms - "Aboriginal", "Australian", "Elder", "Indigenous" and "Indigenous Entrepreneurship". The Study remains sensitive to the fact that defining terms can create fragmentation across categories according to western scientific principles, with the risk of

isolating information, separating it from its original context and ignoring important similarities and differences (Nakata 2008, 186).

1.6.6.1 *Aboriginal*

A most fundamental concept, in a NTAct context, is 'Aboriginal'. The NTAct definition of "Aboriginal peoples" begs the question by defining it to mean:

> "… peoples of the Aboriginal race of Australia" (S253 NTAct).

"Aboriginal" or like term was not defined in *Mabo* or the NTAct 'test' cases such as *Wik* and *Ward* (*The Wik Peoples & Ors. v. The State of Queensland & ors* ; The Thayorre People v. The State of Queensland & Ors. (1996) 187 CLR 1; (1996) 141 CLR 129; (1996) 71 ALJR 173; [1997] 1 Leg Rep 2, B8/1996, 12 June [1996] HCA 40; 23 December 1996, *Western Australia v Ward* [2002]HCA 28; 213 CLR 1; 191 ALR 1; 76 ALJR 1098 (8 August 2002).

The High Court, in *Commonwealth v Tasmania* (1983), defined an Aboriginal or Torres Strait Islander as "a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he or she lives" ([1983] HCA 21 (1983) 158 CLR 1 (1 July 1983)). This decision was extended in 1995 in *Gibbs v Capewell & ors* with Drummond J's ruling that "either genuine self-identification as Aboriginal alone or Aboriginal communal recognition as such by itself may suffice, according to the circumstances" ([1995] 128 ALR 577 (1995) 54 FCR 503 (3 February 1995). In 1998, Merkel J defined Aboriginal descent as technical rather than real, thereby eliminating a genetic requirement and emphasizing community acceptance (*Shaw v Wolf & ors* (1998) 163 ALR 205, 211–212).

This Study adopts the High Court meaning in *Commonwealth v Tasmania* applying descent and communal recognition as an Aboriginal. It uses the terms 'Aborigine' and "Aboriginal" to refer to Aboriginal Australians.

1.6.6.2 *Australian*

The term "Australian" refers to all Australians whether Aboriginal or non-Aboriginal.

1.6.6.3 *Elder*

An "Elder" is a leader of a group of Aboriginals who form a clan, family or group of families known as a People. The Elder leads the group due to age or status and is a person thoroughly familiar with and deeply involved in all aspects of the People. The term 'Elder' as used in this Study contains no assessment of legal entitlement, under NTAct, traditional Aboriginal Law or western legal systems, nor does it investigate processes used by the People to appoint the person to the leadership position held. Although this Study concerns Elders both men and women, for reasons of privacy it always uses the male personal pronoun regardless of gender.

1.6.6.4 *Indigenous*

"Indigenous" is defined in the Australian dictionary, The Macquarie Dictionary, as:

> "originating in and characterising a particular region or country" (Macquarie Dictionary 2009, p. 850).

Thus, except when using "Indigenous Entrepreneurship", this Study uses the term "Indigenous" only in reference to the particular region or country of an Aboriginal or group of Aboriginal People.

1.6.6.5 *Indigenous Entrepreneurship*

The term 'Indigenous Entrepreneurship' is used internationally to describe entrepreneurial activity involving First Nation Peoples. This Study uses it interchangeably with Aboriginal Entrepreneurship without specific intention to refer to any particular country.

Some writers consider that "Indigenous Entrepreneurship" should exclude any business reliant upon Government funding (D. Foley 2000). However, Government funding is so ubiquitous among Aboriginal organizations that excluding it could result in skewed descriptions and, in any event, many non- Indigenous entrepreneurs avail themselves of various forms of Government support in most developed countries. Excluding Government funding does not, therefore, exclude comparison and it could be that applying Foley's criterion would empty the term 'entrepreneurship' of its meaning. In any event, given the descriptive and exploratory aims of this Study, a wider, more inclusive definition is necessary.

This Study defines 'Indigenous Entrepreneurship' as:

> "... the creation, management and development of new ventures by Indigenous people for the benefit of Indigenous people. The organizations thus created can pertain to either the private, public or non-profit sectors" (Hindle & Lansdowne 2005, p. 132)

It notes that "for the benefit of Indigenous people" means that both business profits and the benefit of being in business, belong to Aboriginals; rather than that the 'benefit' created by the business, eg its products or services, being available or sold only to Aboriginals.

1.7 LIMITATIONS

The study concerns only the Schumpeter model and is limited by a context of the key elements of that Model – Bahnbrechen and creative/destruction. Whilst these elements provided tremendously useful 'unpacking' of the Research Question, particularly with Baumol's suggested modification to account for 'allocation' of entrepreneurial activity, it is acknowledged that other models exist, including the widely used competition and equilibrium economic models that could also shed insights into the Research Question.

This is not a Study of First Nations' venturing or Indigenous entrepreneurship in general as such would need to draw upon the many tens of thousands of First Nations that peopled the world prior to colonisation and the situation of their descendant communities today. Not only would any attempt of this kind face a high risk of superficiality, but it would be seriously hampered by the paucity of existing factual, objective and scientific data, documents and information concerning Aboriginal venturing in Australia and the predominance of non-Aboriginal voice within that limited literature. There is an absence of data, information and statistics profiling Aboriginal entrepreneurship restricting comparisons before and after NTAct, between Indigenous and non-Indigenous entrepreneurship and across Indigenous entrepreneurship studies internationally. As clarified below in 1.8, the author is not an anthropologist or cultural studies expert, nor a person with any qualifications, expertise, experience or personal relationship with First Nations Peoples internationally. Such a Study would also risk diverting away from the Research Question as to regulatory impact upon entrepreneurial opportunity and onto a cultural enquiry.

Further, the thesis is not a treatise on the legal or jurisprudential intricacies of the NTAct. It is limited to examination of the impact of the NTAct transformative regulatory change upon entrepreneurial opportunity using the NTAct as a case study. This case study itself is limited

because the literature review providing its context cannot be fully framed given the paucity of existing factual, objective and scientific data, documents and information concerning Aboriginal venturing in Australia and the predominance of non- Aboriginal voice within that limited literature. The thesis is also not a study of regulatory economics, although elements of an economic perspective are necessarily included.

The usual limitations of interdisciplinary research associated with loss of specialization benefits may apply, although the Study contains well-defined boundaries to ensure coherence and clearly attends to improving one discipline by the study of the other (Posner 2009).

The Study is not concerned with large project-specific regulatory change or that which effects deregulation or privatization and it does not focus on compliance or enforcement. There are limitations associated with the particular provisions of the regulatory change studied.

As will be described in the Case Study (Chapters 4 - 6) the NTAct was found to substantially constrain the free market, conflict with principles of Liberalism and impose severe restraints on trade for the Benefit Group. Clearly, extrapolating results to circumstances of more conventional transformative regulatory change scenarios will require such unique features taken into account.

1.8 STANDPOINT CONTEXT

This paper is researched and written by a white Melbourne woman with 4 adult children, who has Masters and Post-Masters qualifications in Entrepreneurship and Innovation, decades of practical specialist legal experience including almost a decade of *pro bono* legal assistance to a remote Aboriginal community. She has expertise in property, environmental planning and land management and is an experienced business owner and social entrepreneur. She is not, to her knowledge, an Aboriginal or a member of any Aboriginal family and so is an 'outsider' looking into the world of those who fall within the NTAct Benefit Group (Martin 2010).

1.9 SUMMARY

Chapter 1 described the foundation for the Study. It introduced the Research Question and Schumpeter's conceptual model from which emerged three Research Propositions formulated to better describe and explore the impact of transformative regulatory change upon

entrepreneurial opportunity. The research was justified, its purpose described, the method briefly explained and justified, an Outline of the Study provided and definitions presented. On these foundations, the Study now proceeds with the research detail.

"When you want to say something you consider saying it in different ways, just as a composer would play in different keys, or different instruments. Little by little, and generally by a process of elimination, after trying everything else, I find the medium that suits me. Sometimes the same idea or subject appears in several different media"

Bourgeois 1981, 5-6

Chapter 2

LITERATURE REVIEW

INTRODUCTION

Chapter 2 examines the literature from which the Research Question arose. As discussed in Chapter 1, the Study is descriptive, deriving from an exploratory literature review crossing the disciplines of law, entrepreneurship and social sciences.

The review begins with Schumpeter's concept of "Creative Destruction" and then examines the nature of regulatory change, impact and entrepreneurial opportunity (2.1-2.4). This literature shapes **Research Proposition 1**.

The review then considers the literature relating to voice and social capital-trust and how they might affect the impact of regulatory change upon entrepreneurial opportunity (2.5). This literature shapes **Research Proposition 2**. Finally, the review considers that transformative regulatory change may impact entrepreneurial opportunity according to regulatory type (2.6). This literature shapes **Research Proposition 3**.

Each segment of the interdisciplinary literature reviewed in this Chapter is drawn into Key Elements, as an aid to data analysis, and formed into three parameters (2.7). The data analysis in Chapter 6 will follow exactly the order of these Key Elements. The sequence of the literature review is set out in **Figure 2** below.

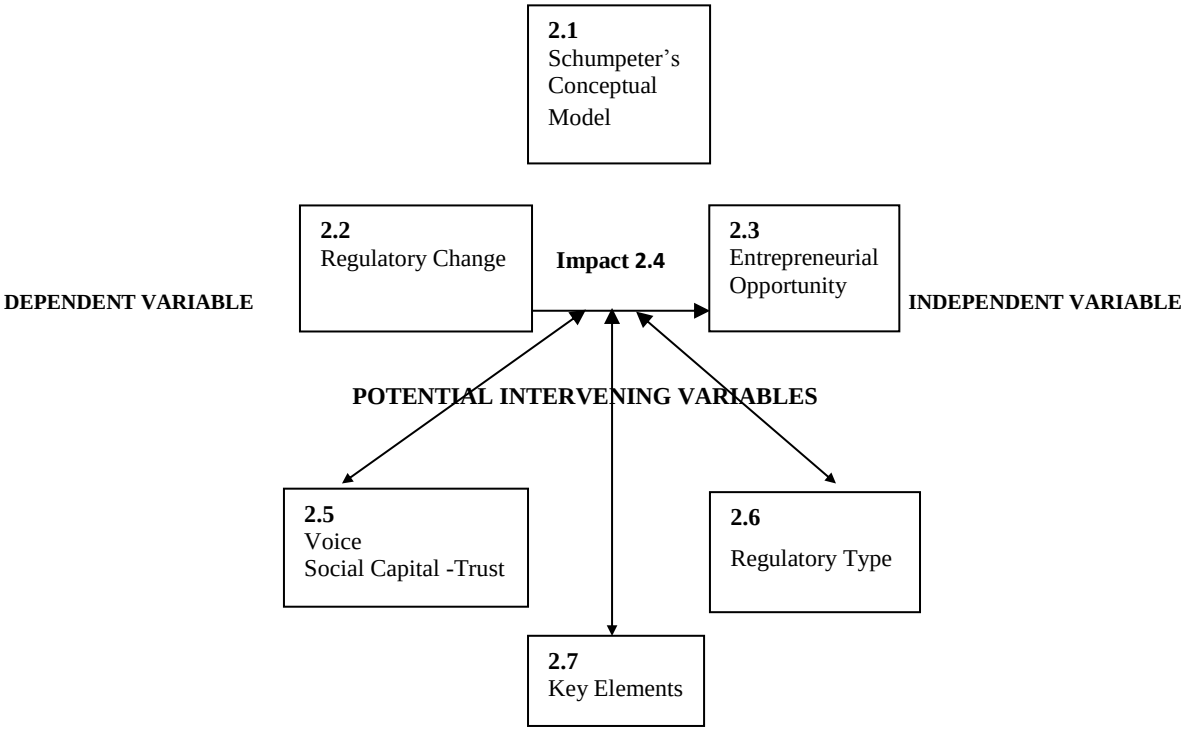

Figure 2: Sequence of Literature Review

Source: Researcher

2.1 SCHUMPETER'S CONCEPTUAL MODEL

Joseph Alois Schumpeter (1883-1950) was a lawyer, politician and entrepreneur (both successful and unsuccessful) before pursuing an academic career in economics, initially in Austria and Germany but finally at Harvard. Some consider that Schumpeter may be to capitalism what Freud was to the mind - "someone whose ideas have become so ubiquitous and ingrained that we cannot separate his foundational thoughts from our own" (McCraw 2007, ix). Schumpeter pioneered the study of entrepreneurship, bringing the term 'entrepreneurship' into general use among economists. He explored interrelations between law, literature, psychology, history and business, considerably advancing concepts of business strategy (Schumpeter 1954, p. 555-557).

Many Nobel Laureates in economics noted Schumpeter's influence (Hayek [1954] 1964, Kuznets 1940, North 1994, Samuelson 1981, Stigler 1954). The leading business writer, Peter Drucker, writing in *Forbes* upon the 100th anniversary of the births of both Schumpeter and John Maynard Keynes, expressed the view that Schumpeter, not Keynes, was the best guide to rapid contemporary economic changes (Drucker 1983). Extracts from Schumpeter's

writings remain part of teaching materials in entrepreneurship and economic courses worldwide and, whilst having strongest influence there, are also frequently found on curricula in sociology, political science and history (Bhidé 2000). Schumpeter's work remains of serious interest to, and seeded, the fields of Evolutionary Economics and Neo-Schumpeterian Economics which reject equilibrium as an assumed end economic state. With the ascendancy of equilibrium and perfect competition theory, economics tended to sideline Schumpeter, but his views moved to centre-stage in business management thinking (Kaufmann 1993, Nelson and Winter, 1982, Penrose [1959] 1995, Prahalad & Hamel 1990). In 2000, Business Week referred to Schumpeter as "America's Hottest Economist" (Whalen 2000).

2.1.1 *Bahnbrechen* – Creative Destruction

Schumpeter described entrepreneurial opportunity as arising from a gale that irretrievably breaks the existing situation, allowing creative destruction. It is from and by this that the new emerges. He saw organisations attempting:

> "to deal with a situation that is sure to change presently… to keep on their feet, on ground that is slipping away from under them" (Schumpeter [1942], 2006, p. 84).

This view of economics sees a constant state of disequilibrium punctuated by short-term equilibria (Schumpeter [1942] 2006). Entrepreneurship, according to Schumpeter, is a:

> "kind of change arising from within the system which so displaces its equilibrium point that the new one cannot be reached from the old one by infinitesimal steps" (Schumpeter [1911] 1934, fn.1, p. 64).

He called this process *Bahnbrechen*, literally path-breaking or routine disrupting, and regarded it as the seed of entrepreneurship (Schumpeter [1911], 1934, 1939, [1942] 2006). Schumpeter strongly believed in an ideological Vision guiding all choices (Schumpeter 1949, Schumpeter 1954).

He described the first step as **Creation**, the looking beyond what is immediately viewable and imagining. **Creation**, he believed, could shape long-term outcomes for a country, industry or firm by generating new conditions that never would have existed without it (Schumpeter

1991). Schumpeter's second step is **Destruction** – havoc wreaked in removing the obstacles in **Creation**'s way. Because change wreaks havoc on existing arrangements, powerful elements of society resist major innovations in order to preserve their culture and status (Oreskes & Conway 2010).

Schumpeter defined five types of '**new combinations**' or opportunities that could emerge, directly or indirectly, from a *Bahnbrechen*:

1. The introduction of a new good or new quality of a good;
2. The introduction of a new method of production;
3. The opening of a new market;
4. The conquest of a new source of supply of raw materials or half-manufactured goods; and
5. The carrying out of the new organisation of any industry, eg creating or breaking up a monopoly (Schumpeter [1911] 1934, p. 66).

Schumpeter's Bahbrechen model of Creation/Destruction was foundational to his broad views of entrepreneurship's fit within social, political and cultural settings, including regulation.

2.1.2 Schumpeter and Regulatory Change

Schumpeter enunciated a cautious role for regulatory intervention in the economic organism as capitalism is so innovative that it forever advances into grey legal areas, with business scandals likely to be endemic. Once a basic legal framework was in place, Schumpeter considered business should be largely self-regulating and did not require constant political interference (Schumpeter 1942 296-89). Schumpeter saw a great variety of possibilities beyond 'capitalism' or 'socialism', noting that even during laissez faire periods:

> "law, custom, public opinion and public administration enforced a certain amount of public planning" (Schumpeter 1943, p. 113-126).

Schumpeter considered that the primary reason why men submit to a common authority was the protection of private property. Cynically perhaps, he saw this lasting only until "Whig aristocrats and London merchants" thought otherwise – in other words, whilst those in power agreed to be regulated, with regulatory change arising from a rational capitalist social process

where the powerful created the rules they needed to achieve their private goals (Schumpeter [1942] 2006, Fn 18, p. 248). Schumpeter saw bureaucracy as persistently hostile to commercial self-government and a severe obstacle to orderly business progress, observing that:

> "the freer a system became – the more rights a government guaranteed to individuals – the greater the opportunity for unfettered entrepreneurship" (Schumpeter, [1942], 2006, p. 149).

Contemporary Best Practice regulators, wrestling to balance self-regulation with social mandates for public planning and emphasising industry self-regulation, align with this Schumpeterian view.

Schumpeter usefully analysed traditional patterns of human organisation prior to 1700 noting that, prior to concepts of private property or the rule of law, individuals had limited freedom to own, buy, sell or protect from robbery or corruption and this discouraged risk taking (McGraw 2007, p. 146, p. 148). He pointed to the regulatory change that allowed the first corporations as creating the opportunity for raising capital beyond the means of even a large group of wealthy partners (Schumpeter 1939, p. 244-247).

Schumpeter made frequently reference to the innovation and entrepreneurship associated with the North American railroad industry, the US '*Bahn*', that commenced in the 1840s, which by the end of 1890s linked every region of the country. Hundreds of innovations emerged following land grants to rail companies and pioneering homesteaders propelling new instruments of finance and, what Schumpeter calls, the first truly national markets. However, Schumpeter's account ignores the rigorously enforced regulation behind these industries which almost entirely ignored pre-existing North American Indian property law systems and removed property rights from those First Nation owners, whilst incentivating railway and other new ventures by granting and enforcing property rights to the new pioneers.

Schumpeter's other case studies reveal the same selective vision about regulatory systems. His interest in entrepreneurial innovations such as Richard Arkwright's power spinning looms and cotton production systems, made no reference to the impact of English textile import

regulatory change upon entrepreneurship among Indian nationals whose cotton and silk supply then became lost to European entrepreneurs such as the East India Companies (Schumpeter 1939, p. 272). Schumpeter's case studies appear to assume that a regulatory system is simply in place - and it is a European one ranging from the grant on 31 December 1600 by Queen Elizabeth I of a right in English merchants to trade in the East Indies to Parliamentary proclamations in1700 prohibiting the import of all dyed and printed cloth from the East and in 1710 a complete ban on the use or wearing of all printed calicoes in England. It was behind these protectionist barriers that England's mechanized textile industry grew and eventually crushed India's handloom industry (Robins 2003).

Although espousing morality in business, Schumpeter omitted reference to slavery laws and entirely ignored the impact of anything other than European regulation upon European business opportunities. Schumpeter's analysis overlooks the probability that entrepreneurial opportunity emerges from those freedoms and constraints which the State imposes which, in a colonial trading context, involved widely differing regulatory systems and regulatory types.

It could be that the hardships and disruptions First Nations experienced to their existing trading systems in North America and on the Indian sub-continent were simply '**Destruction**', the necessary removal of obstacles across the '**Creative**' path of European entrepreneurs. However, an alternative view might be that the first step of colonial '**Creation**' was in fact the Imperial regulatory change undertaken for internal political reasons and, enforced by superior armaments, which generated the new conditions that impacted the entrepreneurial opportunity that was simply then taken up. It could be that it was actually the voice of those in power at the heart of Empire, in creating the transformative colonial regulation that opened up the new conditions impacting entrepreneurial opportunity. Resistance or competition from the less powerful First Nation entrepreneurs was ruthlessly exterminated by the colonising States, rather than necessarily being evidence of an entrepreneurial achievement. Some might argue that both the US railroads and the Dutch East India Company are less examples of skilled entrepreneurship and more examples of regulatory capture where the Imperial regulatory agency, created to act in the public interest, acted to favour a particular commercial or special interest that dominated the regulated industry (Stigler 1971).

2.1.3 Schumpeter Revisited

In 1990, William Baumol, who previously distinguished between the entrepreneur-business organiser and the entrepreneur-innovator, re-examined Schumpeter's conceptual model through the prism of economic history. He concluded that the 'rules of the game' determined the allocation of entrepreneurial activity between productive, unproductive and destructive activity. From this, he suggested modifications to Schumpeter's model to take account of these 'rules' (Baumol 1990, p. 896-898).

In the same year, Douglass North described how the institutional environment determines the formal and informal 'rules of the game' which, whilst reducing uncertainty, constrain human action (North 1991). In other words, it is institutions that do the allocating described by Baumol. Regulation and government policy both occur within institutions and mould those institutions. They impact entrepreneurial activity by encouraging and facilitating some endeavours and discouraging others. Given the findings of both Baumol and North, it is hard to avoid the conclusion that regulatory change must impact entrepreneurial opportunity.

More recently, Shane observed that Schumpeter's work relied upon new technological opportunities and was based on the experience of large firms. Shane was intrigued by these observations because much research shows large established business unable to be entrepreneurial and reluctant to invest in any new business that could drive them out of business (Christensen & Bower 1996, Kelleher 2009a). From this, Shane pondered whether the firms Schumpeter described were unusual and that Schumpeter might be describing a very rare phenomenon (Kelleher 2009a). Large businesses have been found to focus on cost and quality innovations, but these are well within Schumpeter's concept (Cohen & Klepper 1996). An alternative possibility is that the unusual elements may relate to a transformative regulatory change. In other words, it may have been new 'rules of the game' that productively shifted allocations in the large firms Schumpeter studied away from destructive or unproductive activity allocations.

2.1.4 Summary: Schumpeter's Conceptual Model

In summary, Schumpeter's conceptual model of Creative Destruction, evidenced through five new combinations, anticipated that the powerful will create the rules they need and bureaucracy will be continuously hostile to commercial self-government. Modifications have been suggested to Schumpeter's concept to allocate entrepreneurial activity between

productive, unproductive and destructive activity according to the 'rules of the game'. There is also need to consider the institutional environment. Key elements of the literature concerning Schumpeter's concept are drawn together in **Figure 3** below as a base for analysis.

Creation/Destruction	
5 New Combinations	
Power	• The powerful create the rules they need
Bureaucracy	• Persistently hostile to commercial self-government
Activity Allocation	• Productive, Unproductive, Destructive
Institutional Environment	• Constrains Innovation

Figure 3: **Schumpeter's Conceptual Model**

Source: Researcher

2.2 Regulatory Change and Entrepreneurial Opportunity (Research Question)

Regulation of business is far from new. Existing since ancient trading civilisations, regulatory regimes have been fundamental to trade. Obvious examples include the use of gold as an international currency and standardised weights and measures.

Regulatory change has long created or enhanced opportunities. Eighteenth century English compulsory education laws are a simple example. Regulation can, in multiple ways, affect the development of certain preferences on an aggregate level and redistribute wealth among groups. Compulsory superannuation schemes demonstrate this. Whilst there continues a frequently articulated view that regulation is a barrier to business performance, increasingly there is acceptance of the need to balance business burden with the benefits of regulation (Levine 1975-6). The twentieth century saw increasing use of regulation within Western legal systems, classically through new systems requiring an administrative bureaucracy, committed revenue and elaborate operating schemes. The 'key message' of a recent Australian regulatory enquiry was that regulation is a key policy tool to achieve government social, environmental

and economic objectives (VCEC 2011a, p. ix). This Study considers the impact of transformative regulatory change on entrepreneurial opportunity asking:

"**Does transformative regulatory change impact entrepreneurial opportunity?**"

During the 1960s, Stigler observed that certain regulatory change was not having impact. Public utility regulation had little or no effect on electricity prices or rates of return to industry investors. Regulation of the Securities and Exchange Commission created few benefits from new stock issues (Stigler 1964, Stigler & Friedland 1982). Stigler postulated that various structural characteristics determine the strength of demand for regulation, with demand being stronger when the gainers are relatively few, expect to make large gains, have similar interests and can exclude others from sharing those gains (Stigler 1971). Other research showed that companies preferred direct regulation, even if inefficient, to cost-effective instruments, such as taxes, because competition is reduced by regulatory measures such as quotas restricting market entry and originating scarcity rents (Buchanan & Tullock 1975). Environmental regulation was found to disproportionally impact small manufacturing plants and groups did less well when they were, such as consumers, more diffuse in nature with each bearing only a small share of the regulatory burden but facing relatively high organising costs exceeding their expected gains (Macey 1988, Pashigian 1983, Shughart 1990).

By contrast, it was noted that innovative regulatory concepts such as emissions trading emerged from the deregulation body itself (McCraw 1984). Drucker conceptualised the market opportunities arising from regulatory change as a reaction to shifts in the relative costs and benefits of alternative resource use (Drucker 1985). Porter argued that regulation can stimulate innovation and produce competitiveness (Porter1990). Firms have been shown to use regulation as a shelter from competition and new entrants and seek to secure protections and capture regulators with, eg business-environment group coalitions (Vogel 1995).

Timmons identified regulatory change as one of only relatively few 'opportunity spawners and drivers', noting that regulatory change to medical, pension fund management, financial services, banking and tax laws had created entrepreneurial opportunities (Timmons 1999, 82-83).

Some researchers, such as Lyotard, saw regulatory change in terms of information, linking knowledge, society and the State as a means to an end. Lyotard saw innovation as a move (the

importance of which was unrecognised until later) played into the pragmatics of knowledge which then becomes manifested in the promulgation, or proposing, of new norms or rules that are always logically determined (Lyotard [1979]1984, p. 61). Shane and Venkataraman agreed that "regulatory … change offer(s) a continuous supply of new information about different ways to use resources to enhance wealth" (Shane & Venkataraman 2000, p. 221). Venkataraman saw regulatory change influencing the relative distribution of productive and unproductive opportunities across locations (Venkataraman 1997). Gans, Hsu & Stern 2002 found a relationship between regulation of intellectual property and the extent of entrepreneurial co-operation. Eckhardt & Shane (2003) observed that exogenous shifts in information influenced the volume, distribution and type of entrepreneurial opportunity and illustrated entrepreneurial opportunity flowing, not only from deregulation and privatisation, but from new markets created by anti-trust laws, purchasing guidelines and regulated returns on capital. It is hard to see how a regulatory change such as deregulation or privatisation, being deliberately designed to allow private enterprise solutions and/or directly create new private business, would not achieve that impact. However, some of the examples by Timmons, Eckhardt and Shane suggest a broader impact of regulatory change on entrepreneurial opportunity.

A 2008 special issue of the *Journal of Entrepreneurship Theory & Practice* examined the role of Government policy on productive, unproductive and destructive entrepreneurial activity. It summarised the effect of a number of regulatory experiences. Reducing financial constraints revealed only mixed effectiveness, as did measures to attract new venture capital. Taxation regulation had significance but appeared ineffective in lifting the overall level of entrepreneurship generally. Regulation of entry appeared to be important along with regulation directed to internationalisation of entrepreneurial ventures such as tariff barriers, export incentives or taxation regulation lowering trade barriers. Local regulatory intervention that was targeted to knowledge and information was shown to result in geographically clustered start-up increases in innovative industries. Examples included the creation of incubators, research parks, chambers of commerce, R&D subsidies, business-university knowledge linkages. Regulation targeted at knowledge was shown to work differently from regulation of traditional production factors such as land, labour and capital, with knowledge and knowledge acquisition uncertain, asymmetric, involving greater transaction costs and more difficult to evaluate (Audretsch & Feldman 1996, Minniti 2008). The editors of this

special issue concluded that Government policy can influence an institutional setting that encourages productive entrepreneurship (Minniti 2008).

Fundamental questions as to how and if government is able to positively impact entrepreneurial activity are far from resolved (Capelleras et al 2008). There appears to be routine use of regulation to attempt to correct alleged market failures including antitrust laws and various forms of public ownership (Minniti 2008). Regulation of the movement of international business through tariffs or tax regimes, training or capital investment subsidies has been found to stimulate entrepreneurship but policy strategies need to be tailored to the specific institutional context of each economic region (Djankov et al 2002, Keuschnigg & Nielson 2001, Wagner & Sternberg 2004). The regulation of land, labour and capital has been identified as working differently from regulation of knowledge growth. A significant positive relationship has been found to exist between tangible assets, such as land, and financial leverage for entrepreneurial opportunities. Research has identified that entrepreneurs frequently use property assets strategically into their business (Morrish, Levy & Dong 2009, Westgaard et al 2008). Regulation directly impacting land therefore indirectly impacts entrepreneurial opportunity.

Understanding of market rules and regulations, to anticipate changes, has been identified as important knowledge for new ventures (Davidsson & Honig 2003, Tihanyi et al 2000, Ucbasaran et al 2008,). This has led to serious examination of the skills required within new venture personnel composition to quickly bring vital knowledge, as ignorance of key legislation can render new ventures reliant upon external advisors. This is sometimes described as formal and informal social capital and management team diversity (Debrulle et al 2012). Regulatory knowledge has been reported as one of the most significant issues associated with internationalisation, given multiple and conflicting regulations, multiple government departments and localised regulatory compliance interpretation with younger firms more sensitive to such regulatory issues (Leonidou 2004).

Organisational researchers have shown how regulatory change can create organisational tension (Crew & Kleindorfer 2002). The external pressure caused by the regulatory change clashes with institutionalised norms and organisational cognitions that work to preserve the *status quo*. Institutional responses to regulatory change can vary from passive conformity to

active resistance (Burns & Scapens 2000, DiMaggio & Powell 1991, Malmstrom, Kallgarn & Johansson 2012, Scott & Davis 2007, Selznick 1957, Szabla 2007).

> "Institutions are the riverbeds in which regulatory processes flow.' (Radaelli 2005, p. 940).

Initially the regulatory change may be welcomed into the organisation, especially when the organisational norm supports the change. However, as its full implications come to clearly clash with institutional norms, organisational resistance tends to grow. Interpretation of the regulatory change becomes more free-flowing and can eventually become a perception that the regulatory change actually proposes nothing new or is merely a device confirming how it has always been done. This 'norming' process is described as conscious and unconscious rule modification, whereby initial supporters of regulatory change, even powerful and legitimate actors, ultimately do not dare or are unable to resist such societal or institutional norms causing operational rule modification. This regulatory change has been found to lead to formal compliance with no core change (Abraham, Sullivan & Griffin 2002, Stake 1986, Sullivan, Kelly & Gordon 2003). Such inability to change occurs in the face of the assumption that regulatory forces are extremely powerful and can easily overcome resistance (Arnold 2009, Brockner 1992, Hopwood 2009, McSweeney 2009, Oliver 1991, Sengupta, Abdel-Hamid & van Wassenhove 2008). This body of literature suggests that regulatory change needs support by norms and institutional cognition if it is to secure effective change (Malmstrom, Kallgarn & Johansson 2012).

Some researchers have explored the contextual parameters impacting the entrepreneurship environment itself and how they are influenced by culture and policy (Hindle 2010, Puia & Missis 2007). Comparisons are made between legislation which is not readily changeable and political or design parameters which might be changeable by the policy maker (Nielson 2012). For example, Chinese policy-making in the reform era responding to rampant speculation and 'real estate fever' resulted in regulatory change aimed at fostering growth of a real estate industry (Huang & Dali 1996). The act of regulatory change requires shifts and realignments across a wide range of fronts. Sensitivity is required to the manner of its original construction and development. Regulation involves alliances and linkages contingent on the peculiarities and limits of different states and their civil societies and belies any notion of unproblematic transfer of responsibilities between actors (MacKenzie & Martinez 2005). A

regulatory change can only be fully understood by mapping the complex interrelationship of spaces, spheres and actors of regulation. Regulatory change is also an element that some equate to sovereignty with "drug regulation ... virtually synonymous with national sovereignty" (Vogel 1998, p. 1).

Comparison of different regulatory approaches in transition economies moving to market conditions suggests that the type of regulatory instrument can be relevant to entrepreneurial outcomes (Ellerman 2010, Gernet 2005, Hoehmann et al 2002, Smallbone & Welter 2001). Market orientation has been found to be more important in turbulent regulatory environments experiencing frequent major discrete shifts than in calmer settings (Barreto 2010, Kirca, Jayachandran & Bearden 2005, Pettus, Kor & Mahoney 2009). Turbulent environments require continual product updates to avoid market disinterest or frustration, but this is not so important in less turbulent settings and the more responsive a start-up is to changes in its environment, the better is its likely short-term profitability (Jaworski & Kohli 1993). Prior experience in the Lithuanian black or grey market was found to signal entrepreneurial opportunity in legal businesses (Aidis 2007).

Regulation can enhance and signal expectations of quality that buttress regional branding and national/international competitive advantage by leverage of favourable regional regulatory change. Marked differences in the ability of producer and distributor to lobby regulatory change were identified as important by Australian wine entrepreneurs in disadvantaged regions, with the State referred to as "way behind the times with legislation" (Seynard et al 2012, p. 11). However, regulatory issues facing highly skilled outsourced professionals were identified as constraining entrepreneurial opportunity because the individuals slipped between existing regulatory frameworks (ICA 2011, McKeown & Leighton 2012, Phillips 2008).

Researchers of minority group entrepreneurs frequently referred to the impact of regulation. Immigrant entrepreneurs were assisted by regulation that allowed a mixed embeddedness within the host environment (Kloosterman & Rath 2001, Nieuwenhuizen 2003). Female entrepreneurs were negatively impacted by State welfare regulation that was oriented to a male breadwinner model (Anderson-Skog 2007, Kreide 2003, Mandel 2009, Nielsen et al 2010). Smuggling links were created between US Native American reservations and the tobacco industry to sidestep increased Canadian tobacco taxes (Kelton & Givel 2008).

In certain sectors, a perceived regulatory burden is addressed through its own entrepreneurial opportunity, with consultants available to "proof your firm" against regulatory change, by detecting, tracking and understanding regulatory change and providing early warning (for example MMC 2012). A recent study examined the role of such consultants within the internationalisation of natural health products and confirmed earlier work as to the importance of knowledge of the regulatory change itself (Bell & Cooper 2012, Davidsson & Honig 2003, Ucbasaran et al 2008). The consultants allocated most financial resources to a small category of incremental changes such as adjustments to formulations, labelling, testing and quality assurance. They used domestic and international networks to locate new knowledge which included not only regulatory knowledge but also knowledge of the customers and networks seeking products that met high regulatory quality and safety standards. It was the consultant's experience, networks and regulatory knowledge that was most valued by their clients in helping them overcome perceived regulatory obstacles (Leonidou 2004).

Energy efficiency regulation has been shown to lead directly to product innovation directed at achieving greater energy efficiency (Energy Efficient Strategies 2010, Commonwealth of Australia 2009b). Health safety was identified as requiring innovative regulatory approaches (Braithwaite 2005).

Finally, within the Australian Aboriginal context, a study ten years after regulatory change granting land ownership found significant social and cultural impact. The same regulatory change, examined a little later by the South Australian Centre for Economic Studies, reported impacts on entrepreneurial opportunities:

> "…there is scope for expansion and diversification in arts and crafts and some more short cultural tours. There are considerable untapped resources in mining and potential for growth in the pastoral industry. There may also be opportunities for building on the successes of small-scale hunting and food-preparation ventures. … (E)nterprises must be consistent with the highly mobile Anangu lifestyle and consider traditional obligations within the kinship networks. It is also difficult to raise venture capital when the land is not privately owned … Finally there is a need to increase the literacy, numeracy and business management skills of the community." (South Australia Centre for Economic Studies 1994, 6).

In summary, although the literature provides an unsystematic picture, it intriguingly and tentatively confirms that regulatory change impacts upon entrepreneurial opportunity. Drucker sees the impact as a shift in the relative costs and benefits of alternative resource uses. Porter argues that regulation can stimulate innovation and produce competition. Timmons sees it as an opportunity spawner and driver.

Lyotard, Shane, Venkataraman and Eckhardt link it with information. The ETP Special Issue identifies a benefit in directing regulatory change to knowledge growth noting differences from regulation dealing with land, labour and capital. Knowledge of regulatory change is important within particular industry sectors. There are links with culture and national sovereignty.

Regulatory change can achieve a 'token' acceptance but meet a passive resistance, which ultimately neutralises it to accord with existing norms. However, institutions are not only those moulded by or reacting to regulatory change, but also those framing it.

Regulatory change can be conceptualised as a flow of alliances and can buttress disadvantaged regions by creating standards of quality, nurtured through trusted networks and co-operation both advantaging and disadvantaging minority entrepreneurs. Turbulent regulatory environments require particular, highly market-oriented entrepreneurial focus.

The unsystematic picture from the literature does support Baumol's idea that the 'rules of the game' influence allocation of entrepreneurial activity to productive activity (rather than destructive or unproductive activity).

However, applying Schumpeter's conceptual model, analysis of the question needs separation of transformative regulatory change from incremental or minor regulatory change. The turbulence of the environment, as well as the nature, scope, form and type of the regulatory change appear relevant. Blanketing together all regulatory change may overlook key triggers for entrepreneurial opportunity.

Figure 4 below draws these Key Elements together as an aid to further analysis.

Driver
Information Source
Knowledge Regulation
Knowledge of the Regulatory Change
Institutional 'Normalising'
Flow of Alliances
Geographical Location
Regulatory Turbulence
Land cf Knowledge Regulation
Gainers Few: Like Interest

Figure 4: Regulatory Change and Entrepreneurial Opportunity

Source: Researcher

From the literature that directly concerns the impact of regulatory change upon entrepreneurial opportunity, the Study now overviews the broader literature concerning each of the components of the Research Question, ie regulatory change itself (dependent variable), entrepreneurial opportunity itself (independent variable) and impact.

2.3 REGULATORY CHANGE

The literature concerning regulatory change involves various perspectives on the legal setting – law, social, economic and regulatory (Bottomley & Bronitt 2006). It is intriguing to recall the creativity of the law itself as both a cultural institution and an invention of people, being both deeply conservative and a powerful maker of creative change (Gillies 2004, 1).

2.3.1 Law

The setting for regulatory change is the system of law within which it sits. The Rule of Law and principles of Liberalism are fundamental, within western legal systems, to the law's impact on any aspect of human endeavour. They are, therefore, essential to the exploration of the impact of transformative regulatory change upon entrepreneurial opportunity.

The Rule of Law is fundamental to western legal systems. It is the principle that no person, including the State, is above the law - and that society is ruled by law not men (Dicey 1959, p. 202-203). The Rule of Law embodies three key ideas:

- Government of any State should both be subject to laws and occur through laws;

- Law should be clear, practical and stable - the notion of *formal legality*; and
- Law should provide unbiased, public dispute resolution - the notion of *procedural legality* (Bottomley & Bronitt 2006, p. 323, McDonald 2004).

The Rule of Law expresses suspicion of the State and requires that Government takes place under law and though law, so that it can be predicted in advance and justified later. Flexible and collaborative regulatory regimes support the Rule of Law, but regulation is only one legal device to prevent arbitrariness (McDonald 2004).

The Rule of Law is itself based upon fundamental concepts of Liberalism, a legal concept that seeks as far as possible to leave the individual unrestricted in opportunities for self-expression and self-fulfilment. It contrasts with ideologies like 'absolutism', unlimited government and 'socialism' (Bottomley & Bronitt 2006, p. 18). Key elements of Liberalism include liberty (all people are by nature free) and negative liberty (the absence of restraint unless actively harming others). Liberalism holds that individuals come to society with fully formed identities and are entitled to equality, justice, rights and the assumption of rationality. The structure of modern Australian laws was formed at the height of classical Liberalism (Atiyah 1986, Bottomley & Bronitt 2006, 20, Cornish & Clark 1989). Legal rhetoric can espouse a Liberal philosophy but, in practice, systematically deny it:

> "The majestic egalitarianism of the law, which forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal bread" (France 1894, Ch. 7).

The Critical Legal Studies movement argued that there is a fundamental contradiction within Liberalism because it cannot generate a coherent code by which society should live (Unger 1989). Thus, MacKinnon argued that US obscenity laws, whilst they might purpose to prohibit pornography, rarely do so and, when this combines with judicial failure to define obscenity, demonstrate an epistemological process by which the legal standard for obscenity becomes a male standpoint (MacKinnon 1989, p. 197).

2.3.2 Social

Law has been described as a culture, arranged around a system of customary law rather than a rule-book, with internalised behaviour part and parcel of social structures and practices rather than imposed from outside (Laster 2001, Sarat & Felstiner 1995, 12, Simpson 1987, p. 362). According to this approach, law is only one, highly institutionalised, way in which social

ideas are expressed. The tribal society has been distinguished from a Liberal one by its sense of insiders and outsiders, comparing gemeinschaft or community bodies with gesellschaft or corporate societies (North 1991, Unger 1989**).**

Liberalism tends to diverts attention from other social identities such as race, gender or class (Bottomley & Bronitt 2006). Social theories of law highlight the role of power, a concept central to the social sciences. Law determines 'power over' and 'power to' as its institutions control individual power and legitimate the State and its bureaucracies to exercise power over individuals (Lukes 1978). Law *empowers* people with strong tools for use in everyday life but, in exercising power over them, *disempowers* them whilst providing s*ecurity and social peace* to protect people from unknown threats or uncontrollable political or military authority (Cotterrell 1995). The struggle for power does not end with creation of a regulatory change as regulatory defences and loopholes, as well as enforcement and budget allocations, impact the regulatory outcome (Aubert 1952).

There is compelling evidence that modern law can and does operate differently against disadvantaged members of society, for example prosecution of welfare fraud and street crime compared with tax or corporate crime (Brown & Hogg 1998, 95-98, Wells 2001, p. 63,). Feminist scholars argue that once a particular issue becomes regulated by the law, this legal depiction lays claim to becoming the truth and disqualifies other perspectives eg if foetuses are regulated to have legal rights, the abortion debate shifts (Smart 1990). As societal views do not remain static, an important aspect of the relationship between law and society concerns change. Law certainly can help mould social opinion bringing a community to accept propositions they original rejected, eg universal suffrage, but there needs to be a degree of societal support for such change. 'Traditional' theory is always in danger of being incorporated into the programming of the social whole. Critical theory, wary of syntheses and reconciliation, attempts to be in a position to avoid this danger.

Lyotard, in the 1970s, envisaged that regulation would increasingly be entrusted to machines, the key question being - *who has access to the information stored on these machines to guarantee that the right decisions are made?* He predicted that economic "redeployment" in the current phase of capitalism, aided by technological shifts, would change the function of the State, predicting that those controlling decision-making would be a composite layer of corporate leaders, high-level administrators and the heads of the major labor, political,

professional and religious organisations rather than the traditional political class (Lyotard [1979] 1984, p. 14-15).

The term "*moral entrepreneurs*" has been coined to describe a small influential group that creates a demand for legislation, makes "it their business to sew another patch on the moral fabric of society" by regulatory change (Becker 1963, also Dickson 1968). Former Prime Minister Rudd referred to political entrepreneurs (Rudd 2006). Whilst 'moral entrepreneurs' may soften up societal receptivity to regulatory change, some writers reinterpret their activity as a way of controlling specific ethnic, economic or racial minorities (Galliher & Walker 1978, Manderson 1993). Law can be used *instrumentally* by a dominant economic group as its instrument, manipulating it to serve its own economic and class purposes (Adler, 1989, Chambliss 1984, Chambliss 1964).

The symbolic role of law in government and society is regarded by some writers as one of its fundamental tasks (Arnold 1935, Carson 1974, Cotterell 1992, Gusfield 1963). Regulatory change has a symbolic role in reflecting certain values, ideals and ways of thinking.

Finally, the ideological role of law results in it being an authority for social values and ideals (Carson & Neneberg 1988, Hay 1975, Hunt 1985, Hyde 1983, Langbein 1983, Roshier & Teff 1980, Sumner 1979). The majesty of the law, as encapsulated in spectacle and elaborate ritual, allows judges an ideological platform for addressing 'the multitude'. The ideology of justice, with all men assumed to be equal, can allow the law to legitimise existing power arrangements. Mercy, through an elaborate hierarchy of patronage, can actually present a humane appearance, disguising power arrangements and protecting societal *status quo*.

2.3.3 Economic

In the latter part of the twentieth century, economic principles began to be used in the law to provide different perceptions and explanations to legal problems (Klevorick 1975). Economists originally viewed regulation as public interest rectification of 'market failure' because, if left alone, private markets could not be relied upon to allocate resources in a socially optimum way (Pigou 1932, Seidman & Gilmour 1986, Shughart 1990, Sunstein 1990). However, 'public choice' theory emerged in the 1960s challenging the public interest model of government and favouring deregulation and the minimisation of inefficient state interventions (Brennan & Buchanan 1985, Buchanan & Tulloch 1962 cf Posner 1974, Stigler 1971). The Virginia School considered the dynamics of interest-group lobbying and the

typology of regulatory behaviour using different interest-groups, viewing politicians as self-interested and maximising a trade in votes as units of political exchange (Buchanan 1984, Mueller 2003, Olson 1965, Wilson 1980).

> "Public policy makers are not benevolent maximisers of social value … but are instead motivated by their own self-interests" (Shughart 1990, 37).

The Chicago School considered the allocative efficiency of political outcomes, with legislation simply a commodity supplied by the State and allocated as demanded by private groups. They favoured deregulation and articulated the dangers of a captured regulatory agency that served the interests of its invested patrons with the power of Government behind it. Considering regulatory capture worse than no regulation whatsoever, they argued that regulatory agencies should be protected from outside influences as much as possible or not created at all (Stigler 1971; also Bernstein 1955, Huntington 1952, Laffont & Tirole 1991 and Levine & Forrence 1990). Politicians face an opportunity cost with support from a benefitted group offset by opposition from others, their goal being to maximise net political support (Peltzman 1976).

Critics of public choice theory consider that it denigrates democracy and observe that there is little evidence that either politicians or voters actually operate solely from self-interest (Farber & Frickey 1991, Ginsburg 2002). As American jurist Mark Kelman commented:

> "… (t)he very real corruptions of democracy we do indeed sometimes see are an aspect of the acquisitive capitalist culture they (ie public choice theorists) extol" (Kelman 1984, p. 68).

Economic concepts are used to reconceptualise legal analysis with notions of equilibrium and perfect competition theory ascendant. It is important to note that entrepreneurship theory generally seeks to shift focus away from an equilibrium perspective (Shane 2012). Rational Choice is an assumption that the individual acts rationally, is the best judge of his or her own welfare, maximises utility and responds to incentives (Posner 1998). Rationality assumes a good fit between means and ends when resources are scarce and assumes that as decisions repeat, people either learn or are driven out (Easterbrook 1989). Economists assume that rules influence pricing, causing individuals acting rationally to adjust their activities to avoid or reduce cost or obtain benefit. Changing laws alter constraints and rewards thus altering the

amount or character of the activity in question. Economists also assume that costs are crucial. Cost varies according to the trust between parties, the number of parties, their geographical distribution and the type of transaction. Two types of cost exist – *opportunity cost* and *transaction cost*. *Opportunity cost* is the value of the alternatives given up when a choice is made for one activity rather than another. *Transaction cost* is the cost of people transacting with each other, reducing with long-term arrangements (Williamson 1985, Williamson 1975).

A further important economic concept is efficiency which refers to the ability of markets in establishing a common price level and eliminating arbitrage. Thus, whilst lawyers assess in terms of justice and fairness, economists seek regulatory efficiency by assuming that efficient markets maximise welfare (Bottomley & Bronitt 2006, p. 333). Where the lawyer tends to solve a problem that has occurred, economists see the law as an incentive system impacting future actions. For example, tort law would be seen as incentivating future investments in safety (Veljanovski 1982, p. 30). Economists use money as a measure. They also look to the law's *marginal* effects, rather than its average or gross effects.

> "(T)o know whether the death penalty is a useful punishment, look at the change in the volume of murders that accompanies a change in punishment, not a whether there is "a lot" of murder with or without capital punishment" (Easterbrook 1989, p. 15).

Economists have not developed any well-structured theory of power, although they generally recognise monopoly power over free markets and the relative bargaining power of parties seeking to maximise benefits (Bartlett 1989). Some economists view the economy itself as a system of power, with Marxist economists identifying it as the locus of class struggle ensuring that the State remains obedient to ruling class interests (Collins 1989, Tool & Samuels 1989, Wells 2001). Other economists actively resist considerations of power and justice in favour of transaction costs (Williamson 1996). However, notions of power are frequently submerged. For example, resistance to State regulation of private economic activity encases assumptions as to the appropriate role of private power. This notion of public interest proceeds from a view that the distribution of resources in society should not be affected by the morally arbitrary natural endowments of ability, inheritance or physical condition (Dworkin 1978). The State is viewed as a productive entity that produces public goods, internalises social costs and benefits and redistributes income optimally (McCormick & Tollison 1981).

2.3.4 Regulatory

The final perspective on regulatory change concerns the regulatory change itself. Legal theorists identified a trilemma in any attempt to use regulatory change to impact social institutions or practices. The trilemma involves regulatory effectiveness, responsiveness and coherence (Parker & Braithwaite 2003, p. 127-129). *Effective* regulation is properly designed, employs appropriate regulatory strategies and is adequately enforced (Hutter 2001, Hutter 1997, Pearce & Tombs 1998, Tyler 1990). *Responsive* regulation is consistent with and supportive of pre-existing norms and social ordering in the target population and does not subvert or destroy them, necessarily 'building in' adherence to existing institutional norms (Parker & Braithwaite 2003, p. 128). Responsive regulation guards against regulatory capture by one 'high-stake' interest group influencing desired policy outcomes. *Coherent* regulation links with the underlying values of the legal system such as fairness, accountability, consistency and predictability (Australian Law Reform Commission 2002, Breyer 1983, Raz 1992). **Figure 5** below is one model of regulatory coherence.

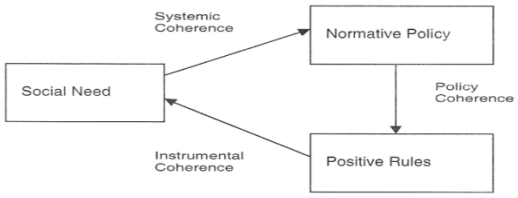

Figure 5: Regulatory Coherence Model

Source: Feaver & Durrant 2008

Coherent outcomes emerge when the Positive Rules, aligned with existing Normative Policy, respond to Social Need to reshape Normative Policy (Prosser 1997). Positive Rules that are not changed and Normative Policy that does not evolve to reflect shifts in Social Need eventually fail to be coherent (Ayers & Braithwaite 1992, Bertea 2005). Thus, in an ever changing society, regulatory change is fundamental to policy and system coherence when a rule produces its intended consequences with costs that equate to Social Need achieving Instrumental Coherence (Coglianese 2002).

The literature also identifies regulatory models and methods. There are two regulatory models – Deterrence and Response. The *Deterrence* Model, known as 'command and control', assumes an antagonistic relationship between regulator and regulatee, with the latter resistant to the regulatory change. It sees the State as the key source of regulatory power and

relies on a direct connection between regulation, threats of punishment and control. The deterrence model minimalizes societal factors, such as reputation and perceived legitimacy by industry, peers or public (Parker & Braithwaite 2003, p. 131). Deterrence also necessarily involves enforcement, with its associated costs and evidentiary and resourcing issues (Coffee 1981, Goldwasser 1999, Parker 2004, Parker 2003, Black 2001, Tomasic & Bottomley 1993). The *Responsive* Model assumes effectiveness by using a wide set of regulatory methods, with different regulatory strategies according to different actors and objectives (Ayres & Braithwaite 1992, p. 4). Its operation has been described as an enforcement pyramid with less interventionist, informal or self-regulatory mechanisms at the base, escalating to high interventionist, formal sanctions at the top. Most regulatory action occurs at the base, but sanctions can be escalated upon non-compliance which ensures compliance at the lower level (without sanctions) because higher order sanctions exist (Bottomley & Bronitt 2006, p. 322, Fisse & Braithwaite 1993, p. 143).

Alongside the two regulatory models are various regulatory methods. Conventional regulation method can be substituted with quasi-regulation, co-regulation, self-regulation, meta-regulation and even regulation without rules or non-regulation (Bottomley & Bronitt 2006, p. 314-318). Conventional regulation comprises detailed rules, promulgated by government, directing or encouraging certain behaviour and generally relying on monitoring, inspecting or policing with consequences for non-compliance. Despite the vast annual output of conventional regulation, this method is recommended for use only in "high risk, high impact public issues" (Commonwealth of Australia 1998, Appendix E, p. 14). It is inflexible, with a 'one-size-fits-all' approach that tends to respond insufficiently to diverse circumstances. In attempting to 'cover the field' comprehensively, it becomes complex incurring high systemic costs to monitor and enforce, with compliance often becoming mere 'lip service" as regulatees actively exploit loopholes and ambiguities to avoid core change, illustrating the institutional 'normalising' discussed in 2.2 above.

Quasi-regulation and co-regulation combine aspects of private and public regulation. Quasi-regulation includes industry standards or codes, accreditations and even guidance notes as the method by which Government seeks to influence business compliance (Commonwealth of Australia 1998, Appendix E, p. 9). Co-Regulation delegates to industry the power to create its own standards with specified parameters and minimum standards should industry fail to create its own. Co-Regulation is a first principle in Australia's approach to media and

communications regulation (Chapman 2008, p. 2). Self-Regulation sees regulation made solely by those in the field and assumes compliance, because those bound by it created it. Self-regulation, whilst more industry responsive, may be self-serving, with minimal, inadequately enforced standards that exclude new entrants, limit competition and secure unfair commercial advantage.

The advantages of co-regulation and self-regulation, compared with conventional regulation, include the opportunity to harness industry knowledge, achieve greater flexibility and reduce compliance or administration costs. Their drawbacks include the danger of regulatory capture and raised barriers to entry that restrict competition (ACMA 2010, Government of Victoria 2011, OECD 2009). Despite the drawbacks, since the 1990s, co-regulation and self-regulation have been key alternatives to conventional regulation and encouraged by Government policy as best practice (Government of Victoria 2011).

However, the suite of regulatory methods also extends to meta-regulation and regulation without rules. Meta-regulation is regulation left entirely to industry, with government's role being simply to regulate the regulators as layers of regulators each do their own regulating by regulating other regulators in various horizontal and vertical combinations (Braithwaite and Drahos 2000, p. 3, Parker and Braithwaite 2004, p. 284). This method tends to employ reputation, professional peer review and/or placing one institution over others (Wegrich 2008, p. 2). European Union 'Better Regulation' approaches increasingly employ meta-regulation with professional peer reputation applied often among bureaucratic groups (Wegrich 2008).

Regulation Without Rules can include the broad use of government powers to create a desired impact using alternative levels, for example consumer education programs. Levers can include rewarding good behaviour, research, public information and education campaigns, public statements of concern seeking to deter certain action, stakeholder management, collaborative partnerships and, in a targeted way, no specific action (ACMA 2010, Government of Victoria 2011). The key challenge with Regulation Without Rules lies in selecting the right lever.

Regulatory change regimes within existing Western legal systems claim to minimise and simplify regulation, place key emphasis on ensuring it is cost-effective (eg Better Regulation Commission (UK), Regulatory Flexibility Act 1980 (US)). In Australia, the Office of Best Practice Regulation (OBPR), within the Department of Finance and Deregulation, but said to

be independent of it, assists departments and agencies to meet best practice regulatory impact analysis and advises the Council of Australian Governments (COAG) in relation to national regulatory proposals. It functions appear to comprise risk analysis, cost-benefit analysis, assessments of compliance costs, assessments of competition effects and consultation, aimed at maximizing the efficiency of new and amended regulation and avoiding unnecessary compliance costs and restrictions on competition (COAG 2007).

In Australia, regulatory change occurs within a government institutional culture where notions of progress and an ideology of developmentalism tend to dominate. The line between government as regulator tends to blur with the role of government as development proponent, particularly in the resources industry and, can influence the control and use of Crown (Government) owned land. At the political level, Ministers tend to adhere to a development ideology requiring a good reason to hold back development. Decision-makers, sensitive to the economic benefits supposedly associated with development, operate within a set of assumptions that can, and frequently do, overlook, ignore or misinterpret alternative economic opportunities, particularly those associated with innovative, smaller or start up business (Chase 1990, Howitt 2001, Lane 1997, Lane & Cowell 2001, O'Faircheallaigh & Corbett 2005). Where a regulatory scheme creates a relationship, alliance or public-private partnership between government and another party, it is important to identify the complete suite of government roles at play and their boundaries.

Principles of good regulation insist that any regulation be transparent, accountable, proportionate, consistent and targeted (BIS 2011). However, "transparency" has been irreverently critiqued as "blame avoidance" by directing attention to who is monitoring and who is blaming those who are monitored. Performance indicators and benchmarks cast by various national or international policy elites can become the arms rather than the co-producers of the services monitored (Pollitt et al 2007, Wegrich 2008, p. 3). OECD principles include proportionality, with focus on regulations that have the largest impact and risks (OECD 2010). It is widely accepted that there is a critical need for business and other regulated sectors to be involved in any regulatory change, especially with decisions concerning priority-setting and post-regulation evaluation (VCEC 2011b).

In certain sectors, regulatory change is a sufficiently serious burden that staff or divisions are engaged to address such exogenous factors. This level of burden can lead to a view that

regulation excessively controls commercial behaviour (Bert-Jaap Koops et al 2006). In response to such concerns, individual government departments frequently dedicate considerable policy and voluminous reports to regulatory change processes and outcome measurement but with a cost focus that identifies, quantifies and weights regulatory costs. Regulatory impact assessment invariably focuses on regulatory burden, viewing reduction of regulatory burden as the route to enhancing innovation (VCEC 2011a p. 2, p. 6). For example, the Victorian Treasury's current on-line regulatory change measurement instrument, offered for wide use by regulators, has as its measure of regulatory change "the change in *costs* of a regulation" (VCEC 2011b, p. xix).

Exciting possibilities arise for innovation of regulatory type by network influence and ensuring information integrity.

> "(W)e live in a time of exponential change … Why would we think that any regulatory approach or model will prove immune and ultimately stable in such an environment? … The key role for the regulator will be to act as a network participant and influencer… working to ensure the integrity of the semantics of the net, not only with information but in terms of such things as reputation reporting and recommendations, so that such a complex, dynamic and automated markets can and will optimally self-organise…" (Chapman 2011, p. 18).

Given Jacques Monod's warning of the need for attention to the fundamental ethic upon which knowledge is based and the moral weakness of the value systems of modern societies, Chapman's reliance upon automated markets must be of concern (Monod 1971, 177). However, innovative possibilities for soundly based regulatory type resonate with Lyotard and Shane's focus on information and knowledge (Monod 1971, 177). However, they contrast markedly with Australian Government policy for regulatory innovation which extends only to market-based instruments, regulator compliance enquiries, removal of other legislative impediments, increased enforcement of existing provisions and extended coverage by existing legislation (ACMA 2010, Commonwealth of Australia 2009a, p. 8, p. 55).

In summary, regulatory practice must attempt to be effective, responsive and coherent with a potentially a key role for regulatory type in affecting any impact of transformative regulatory change upon entrepreneurial opportunity, including the use of conventional regulation for

'high risk, high impact public issues' and greater use of industry self-regulation and innovations in regulatory type. This literature shaped Research Proposition 3. **Figure 6** draws together the Regulatory Perspective and Key Elements.

Trilemma in Regulatory Practice	• Effectiveness/ Efficiency • Responsiveness • Coherence
Regulatory Type	
Regulatory Models	• Deterrence "Command & Control" • Responsiveness
Regulatory Methods	• Co-regulation/ Quasi-regulation • Self-regulation • Meta-regulation • Regulation without Rules
Innovative Regulatory Types	• Network Influence • Ensuring Information Integrity • Reputation Reporting

Figure 6: Regulatory Perspective and Key Elements

Source: Researcher

2.3.5 Summary: Regulatory Change

The four different perspectives upon regulatory change are important to understanding its impact *per se* and, for this Study, upon entrepreneurial opportunity. These perspectives involve the fundamental principles of Law, the Rule of Law and Liberalism, the differing perspectives of economics and social theory and the issues facing Regulatory Practice itself. These are illustrated as four Segments of a Regulatory Prism shown in **Figure 7** below.

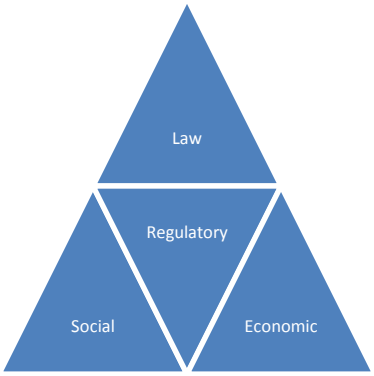

Figure 7: Regulatory Prism

Source: Researcher

Each perspective is shown as a Prism Segment and itself contains a variety of elements relevant to explanation and description of whether regulatory change impacts upon entrepreneurial opportunity. These Key Elements are drawn together in **Figure 8**.

LAW	SOCIAL	ECONOMIC	REGULATORY
Elements Rule of Law • Government Bound • Formal Legality • Process Legality Liberalism	**Elements** Principles of Liberalism • Individual and Group Power • Empower • Disempower • Security and social peace Culture • Class/Disadvantage • Customary Law Information Access • Moral Entrepreneur Instrumental Use • Symbolic • Ideological	**Elements** Rationality Equilibrium Allocative Efficiency Regulatory Capture Costs • Transaction • Opportunity Constraint & Reward system Marginal Effects Incentives Money as a Measure	**Elements** Trilemma in Regulatory Practice • Effectiveness • Responsiveness • Coherence Regulatory Models • Command & Control • Responsive Regulatory Methods Innovative Regulatory Types

Figure 8: Regulatory Prism Segments

Source: Researcher

From this overview of the multiple legal perspectives to regulatory change (the dependent variable of the Research Question), this review now moves to overview the literature concerning entrepreneurial opportunity (the independent variable of the Research Question).

2.4 ENTREPRENEURIAL OPPORTUNITY (Research Question)

As discussed in 1.6.3, entrepreneurial opportunity is not optimisation of existing means to end or marginal change (Legge & Hindle 2004). *Entrepreneurial* opportunity differs from other profit opportunity by redefining the logic of an efficient exploitation of a known means-end relationship (Kirzner 1997). Information about shifts in the potential value of resources to new opportunities takes time to disperse and may be resisted by existing businesses as threatening them (Chesbrough 2007, Kirzner 1997). Research into links between organisational theory and entrepreneurial research identifies that emerging organisations differ from existing institutions in areas of intention, resources, boundaries and exchange (Katz & Gartner 1988).

Alternative concepts, known as **discovery** and **effectuation,** currently influence thinking about entrepreneurial opportunity. For Shane & Venkataraman 'discovery' is the core determinant of entrepreneurial opportunity, with entrepreneurial opportunity viewed as an objective 'out there' stimulated by approaches that assist discovery eg R&D support. Discovery searches and finds the opportunity hidden away 'out there' and, in that way, impacts the 'out there' opportunity which already exists, influenced by prior knowledge and information. Thus, over 90% of entrepreneurs are working in, or just resigned from, similar businesses, frequently approaching the same or similar customers (Shane 2008, p. 48, p. 64-78). Two Discovery concepts exist – Simple Discovery and Creation Discovery. Simple Discovery sees an entrepreneur who wants a business seeking an opportunity 'out there'; discovering it and then deciding whether to exploit, with 'alertness' to information and knowledge most important (Venkataraman 1997). Ultimately, Shane rejected this Simple Discovery concept because it required that the opportunity be dependent on the individual's perception of it. He considered that an opportunity should be understood as something that objectively exists rather than something that is merely an individual's perception. The seventeenth century development of steam was not a mere perceived opportunity. Shane's alternative Creation Discovery concept, which is closer to Schumpeter's model, locates creation as the trigger propelling *discovery* of something that can become an *opportunity*. Opportunities are not all equal at the beginning, do not come from the same place, vary across industry and are interwoven with the nature of knowledge across society and culture. For example, the ability to send an email was not an opportunity for a caveman.

The alternative concept of entrepreneurial opportunity develops around the work of Saras Sarasvathy and centres on 'control'. The opportunity takes a set of means as given and selects effects that can be imagined or created from that set of means (Sarasvathy 2001, p. 244-245). Sarasvathy calls this notion 'Effectuation'. The means are simply – Who I Am?, What I Know? and Whom I Know?. Who I Am? comprises individual traits, tastes and abilities as well as the physical resources of the firm. What I Know? comprises knowledge corridors and human resources. Whom I Know? comprises social networks and organisational resources, involving socio-political institutions. Sarasvathy describes a chef creating a particular meal from a recipe (causation) and one creating a meal unpredictably from ingredients and utensils that happen to be in the kitchen (effectuation) (Sarasvathy 2001, p. 245). This concept, like Discovery relies on knowledge, but it is the knowledge one finds within or through oneself as the opportunity evolves organically from what is available, rather than being an objective 'out

there' awaiting 'discovery'. Where Shane's discovery notion of entrepreneurial opportunity rests on a logic of prediction and causation, effectuation rests on a logic of control.

> "The distinguishing characteristic between causation and effectuation is in the set of choices: choosing between means to create a particular effect, versus choosing between many possible effects using a particular set of means" (Sarasvathy 2001, p. 245).

Effectuation, which is excellent at exploiting contingencies, is embodied in four principles:

1. Affordable loss rather than expected returns;
2. Strategic alliances rather than detailed competitive analysis;
3. Exploitation of contingencies rather than pre-existing knowledge; and
4. Controlling an unpredictable future rather than predicting an uncertain one, with focus on controllable aspects (Sarasvathy 2001, p. 250).

The effectuation approach compares dramatically with models such as Porter's Five Force that seek to predict competitively (Porter 1980). Shane considered that Sarasvathy uncritically adopted Stephenson's definition of entrepreneurship – *pursuit of opportunity regardless of resources currently held* and urged setting data against the effectuation theory to secure evidence of some performance effect (Kelleher 2009a, Stevenson et al 2000).

Sarasvathy postulated that the opportunity created or imagined from a given set of means is influenced by acceptable risk and affordable loss. In an uncertain environment, an opportunity may only be an entrepreneurial opportunity if the risk is proportional to the opportunity (Eisenhauer 1995). Knight was the first to distinguish between *risk*, where the outcome is governed by known probabilities and is thus insurable, and *uncertainty*, where no previous trials have occurred and the outcome is uninsurable (Knight 1921). Some consider that the entrepreneur is never a risk-bearer and that entrepreneurial opportunity in no way depends upon any specific attitude toward uncertainty-bearing (Kirzner 1973). Some view entrepreneurs as creating risk rather than taking it (Kets de Vries 1977, p. 38). McGrath advocated that decision-making under uncertainty be managed by taking an option at the outset, but deferring full-scale commitment as long as possible in order to keep cost small until a future, when greater certainty exists (McGrath & Nerkar 2004, McGrath & MacMillan 2000). Risk perception may be influenced by power or access to power but it is unclear

whether a power-base strengthens entrepreneurial opportunity (Brindley 2005, Foley 2000, Peterson & Roquebert 1993, Slovic 2000).

Focus on the lone entrepreneur and individual heuristics are now strongly rejected in contemporary entrepreneurship theory (Shane 2012, Zachary & Chandra 2011).

Aside from the focus on Discovery and Effectuation, entrepreneurial opportunity is considered in relation to geographical location. Literature concerning regional advantages often develops around access to product and labor, but rarely around core geographical issues of geology and climate, even where agricultural industry is dependent upon weather (Bresnahan, Gambardella & Saxenian 2001, Diamond 2005, Porter 1980). However, strategic use of property through different business stages has been found to significantly and positively relate to entrepreneurial opportunity including financial leverage (Morrish & Levy 2012, Morrish, Levy & Dong 2009, Westgaard et al 2008). Property-related decisions are affected by competitive advantage and resource management (Heywood & Kenley 2008). Property has been shown to be fundamental to portfolio diversification due to inflation hedging benefit (Kallberg, Liu & Greig 1996, Seiler, Webb & Myer 1999). Regional disadvantage has been found not necessarily to disadvantage entrepreneurial opportunity (Seynard et al 2012).

Geographical proximity has been shown by many researchers to maximise information and knowledge transmission by intense cooperation over time among local actors along potential channels, with synergies arising from a homogeneous socio-cultural local population containing dense public and private partnerships and highly specialised, locally mobile, human capital spin-offs operating among local firms (Aydalot 1986, Aydalot & Keeble 1988, Camagni 1991, Capello 2002, 177-178, Feldman & Audretsch 1999, Keeble & Wilkinson 2000, Maillat et al 1993, Ratti et al 1997, Von Hippel 1994). Thus, Italian patenting ratios were noted to improve according to locational synergies, Cuban immigrant entrepreneurs located closely within a Miami enclave, small Swedish village start-up firms readily sourced local finance and UK female entrepreneurs chose well-known local opportunities (Brindley 2005, Capello 2002, Peterson and Roquebert 1993, Winborg & Landstrom 2001). However, as these close synergies and intense cooperations over time have also been found in studies of virtual teams and post-start-up firms, physical proximity may be simply providing fundamental trusting relational capital (Matlay and Westhead 2005, Winborg & Landstrom

2001). Such relational capital resides in untraded interdependence and trusting cooperation, with geographical location possibly a feature of deeper components of trust and socialised resource production more easily developed by proximity and frequency of contact (Capello 2002).

Finally, both Discovery and Effectuation concepts retain a freshness free of the role of government. Australian Innovation policy describes government's role as being to:

> "create the conditions for innovation by managing the economy responsibly, regulating effectively, and making specific investments in education, research and infrastructure – not least transport and communications infrastructure. It maintains a business operating environment, with the emphasis on open competition and the free flow of products, people and ideas, both domestically and internationally" (Commonwealth of Australia 2009a, Chapter 2, p. 18).

Government includes legislative, judicial and executive institutions, their bureaucracies and various departments. In practice, government is policy maker, economy manager, taxer and enforcer. It is a major employer and direct provider (or withholder) of monies through grants and pensions. Government can also be a major landowner, developer and entrepreneur itself. At any one time, several or all of these roles may be operating at once. Frequently, analysis of regulatory change mixes and confuses the multiplicity of these roles.

Government's role as entrepreneur itself has been identified in the literature as a "philosophical duel" between the 'pro-entrepreneurship-in-government" approach and the "administrative conservatorship" approach (Kalu 2003). The ***pro-entrepreneurship-in-government*** approach considers that innovation requires powerful stakeholders and the public sector, therefore, is potentially an extremely favourable alliance partner provided the necessary agility, speed, flexibility and communication can be guaranteed and trust-building models are used (Bjorkman & Sundgren 2005, Peled 2001, Vincent 1996 referring to Abad & Palacio 1994). The ***administrative conservators*** focus on accountability and are deeply suspicious of both entrepreneurial and bureaucratic integrity (Barrett 2004, Bellone & Goerl 1992, Eggers & O'Leary 1995, Kalu 2003, Osborne & Gaebler, 1992, Peters & Waterman 1982, Roberts & King 1996 'reinventors' cf Box, 1998, Diver 1982, Moe 1994, Stever 1988, Terry, 1993). The impact of Government programs to support entrepreneurial opportunity

appears patchy with criticism of UK programs for small and medium sized enterprises for promoting only financial success (Brindley 2005).

Where government assets, such as Crown land, are proposed for entrepreneurial activity, nervousness at "preservation of the commons" can see the administrative conservatorship approach dominate outcomes and remove a potentially powerful innovation partner. Where government seeks to co-venture in respect to its Crown land assets, duties of public trust and responsibilities for accountability and communication can, but need not, negatively impact entrepreneurial opportunity.

In summary, the literature concerning the independent variable, entrepreneurial opportunity, reveals theoretical uncertainty as to the relative influence of discovery and effectuation with risk, geographical location, networks and the role of government remaining also influential impacts upon entrepreneurial opportunity. These Key Elements are drawn together in **Figure 9** over.

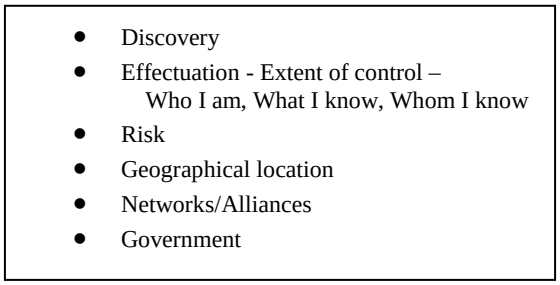

Figure 9: Entrepreneurial Opportunity Key Elements

Source: Researcher

2.4.1 Indigenous Entrepreneurship

As 1.6.5.5 details, the term "Indigenous Entrepreneurship" is used internationally to describe entrepreneurial activity involving First Nation's Peoples (Akerele 1995, Altieri 1987, Nakata 2008, Oldfield & Alcorn 1991, PCAST 1998). The literature concerning Indigenous Entrepreneurship describes and compares the many and vastly different First Nations' Peoples, including Canadian (eg Inuit, Koyukon, Gwich'in, Inupit Lower Tanana), Americans Peoples of the Caribbean (eg Taino, Galibi), Central and South America (eg Xinca, Pech and Tupi, Yora), Mexico (eg Chocho, Cocopa) and the United States (eg Cherokee, Sioux, Chinook), the Maori of New Zealand, the multiple Papuan, Fijian, Malaysian, Phillippines

and Taiwanese nations (Korowai, Ogea,, Penan, Mangyan, Puyuma, Tsou), Japanese (Ainu, Kyukyuans), Greenland (Inuit), Norway (*Sami) and the many native peoples of the multiple nations of Africa and Eastern Europe and the Middle East (Akerele 1995, Altieri 1987, Nakata 2008, Oldfield & Alcorn 1991, PCAST 1998).

Given the nature of the case study, this section of this thesis is included to provide a contextual overview to the larger and vast literature concerning these tens of thousands of individual First Nations Peoples, their cultures and trading traditions as well as their contemporary activity, including descriptions, examinations and comparisons of Indigenous entrepreneurship is an important area of anthropological and social research. However, as clearly identified in Part 1.7 above, this thesis is not a comparison of Australian Aboriginal and Indigenous entrepreneurship among any First Nations Peoples in general or among any one of these tens of thousands of First Nations Peoples individually. Nor is it intended to be a complete and comprehensive overview or analysis of Indigenous Entrepreneurship itself. These are important areas for study, but necessarily the subject of other research.

This thesis is only concerned with broad notions found in the literature concerning Indigenous Entrepreneurship that provide a useful context to the study of a western social phenomena (regulatory change) that might possibly impact upon entrepreneurial opportunity, where such study concerns a regulatory change identifying Australian First Nations People as its identified Benefit Group..

The Indigenous Entrepreneurship literature does highlight some distinct themes that focus upon reconciling tradition with innovation and how best to employ mutual cultural understanding to achieve optimum outcomes, with a need for cultural sensitivity and hard work. These features are also found in some entrepreneurial activity among Australian Aboriginals. This context is described in more detail below.

Anthropologists have articulated Indigenous culture as antithetical to entrepreneurship:

- “there is a sense in which the Dreaming and the Market are mutually exclusive” (Stanner 2009, 163):

- "those who remain closest to the classical traditions … may be those least likely to find engagement in the market economy … possible" (Sutton 2009. 67-8):

First Nation Peoples, including Australian Aboriginals, have also themselves articulated an internal split between self and community interest (Christo et al 2004, D. Foley 2002, Fredrick 2004, Pearson 2009).

However, there has long been recognition that innovation comes from outliers or the minority (3.2) and that Indigenous traditions potentially provide a unique foundation and inspiration for creative new entrepreneurial activity (D. Foley 2005/6, Jarvelin & Wilson 2003, Marrie 2007, Rowley 1970). For example, Indigenous knowledge of medicinal plants or food techniques has significantly reduced western scientific research costs and time, leading to development of essential modern drugs such as morphine, quinine, codeine and atropine (Akerele 1995, PCAST 1998). Likewise, much of the world's crop diversity is due to Indigenous farmers, following age-old farming and land use practices that conserve biodiversity (Altieri 1987, Oldfield & Alcorn 1991) These should offer entrepreneurial opportunities.

Furthermore, traditional Indigenous knowledge systems themselves are rare and unique – Indigenous notions of being in the world, connectedness to place, kin community, all species and the natural world. Their very different perspective of time and history offers innovative approaches to being in the world (Grieves 2004). However, the literature warns of regulation that encourages concentration of life industries into a few giant transnational corporations that strongly influence world seed and pharmaceutical development. Some writers note that such regulatory change can leave Indigenous Peoples paying for access to their own knowledge (Langton & Ma Rhea 2005, Marrie 2007, Shiva 1998).

Some writers urge consideration of what, within traditional Indigenous knowledge and trading, is **not** of interest and is **not** valued. Nakata invites attention to Indigenous endeavour that attracts no funding, is not published or investigated and remains marginalised or at risk of being written out or overlooked.

> "Knowledge recovery led by Indigenous communities would not look the same as that led by scientists, developmental technologists and conservationists – even when participatory … (because the 'recovery' process is) … a very partial enterprise, selecting and privileging some Indigenous knowledge while discarding and excluding others" (Nakata 2008, p 186-7).

The function of Indigenous language often has marked differences from western, documented trading systems. Often First Nations People may not speak English or other national language at all. They may speak it poorly or have differently nuanced meanings for words used in the majority language (Eades 1992, Manahan 2004, Trudgen 2000). For example, there may be no word for "wealth", "percentage" or "mortgage". Western law may be unable to evaluate or even describe Indigenous business value.

Accounting principles that form a fundamental of Western business and entrepreneurial management, evaluation and opportunity have been shown in the literature to fail Indigenous Peoples because even established Western commercial concepts may not even be understood, or may be misunderstood or meaningless and of no practical use (Manahan 2004, Trudgeon 2000). For example, conventional balance sheets and activity statements such as income/expenditure reports may omit Indigenous values, ignore Indigenous treasures and community liabilities, obligations and expenditures. They frequently would not include any mechanisms for building Indigenous cultural resources (Winiata 1988). Counting itself introduces a uniformity to Indigenous Peoples conceptualisation as different and changing. Numbers higher than very low numerals, eg 1, 2 and 3, may be unknown in Indigenous languages. Accounting refers to numerical, monetarised calculations and techniques that mediate relationships between individuals, groups and institutions as well as the accountability of relationships that result from these social relations (Neu 2000). Some writers regard accounting as a 'technology of Government' that shapes, normalises and instrumentalises conduct, thought, decisions and aspirations to achieve Government objectives (Neu 2000, 269, Miller & Rose 1990,8).

> "The core indigenous yin values of sharing, relatedness and kinship obligations inherent in indigenous conceptions of work and land, are incompatible with the yang

> values of quantification, objectivity, efficiency, productivity, reason and logic imposed by accounting and accountability systems" (Gallhofer & Chew 2000, 263).

Western law and accounting practices may be unable to evaluate or even describe Indigenous business value. Thus, acceptance of diversity and the absolute need to respect the right of the Indigenous minority to make its own decisions, is required within broad public policy considerations (Legge & Hindle 2003).

Given significant economic and social deprivation, strong linkages between Indigenous communities and welfare dependency as well as the extent and influence of government policy concerning these minority groups, the literature recognises that stimulation of Indigenous entrepreneurship needs to respect Indigenous traditions as well as empower Indigenous people as economic agents in a globally competitive modern world (Legge & Hindle 2003, 379).

2.5 IMPACT

As discussed in 1.6.2 above, this Study defines "impact" to mean having a strong effect or influence (OED 2010). The concept is firmer than Schumpeter's "emergence" or "arising". It is not narrowed to causation or effectuation. The Study now examines the literature concerning impact including legal implementation theory, Regulatory Impact Assessment (RIA) principles, the role of 'actors' and predictive computer modelling.

The legal implementation literature assesses the impact of regulatory change by distinguishing direct, indirect, independent and unintended effects (Griffiths 1979). *Direct* effects occur when the primary audience at whom the rule is directed either conforms with it or it is comprehensively enforced, eg a drink driving regulatory change results in fewer people driving over prescribed alcohol limits. *Indirect* effects are the consequences of compliance and often represent the true aim of the regulatory change, but can be difficult to both predict and measure eg drink driving regulation reduces car accidents and injury costs. *Independent* effects occur independently of conforming behaviour, often linking with the symbolism and/or ideology of the regulatory change, regardless of its actual operational achievements eg drink driving regulation promotes the popularity of a Government by creating an impression of concern about road deaths. *Unintended* effects overlap with the two previous categories,

but include unproductive or destructive behaviour, eg drug prohibition laws that result in organised crime drug syndicates.

Long-term impacts can be perceived as chaotic and unpredictable (Guastello 1995). They also undergo operational influence as rules are implemented, interpreted, used and/or avoided and these influences can be as much a function of power relations as those leading to the regulatory change itself.

> "The goals embodied in a policy mandate typically undergo some change during the implementation phase. They might have been ambiguous and therefore might have required, or at least permitted, further definition. Or they might have been based on a very weak consensus, hastily, and perhaps insincerely, contrived during the contest surrounding the adoption of the mandate" (Bardach 1977, 85)

Clearly impacts can be far from straightforward and dramatically shaped by apparently extraneous conflicts and pressures, reflecting the wide range of societal inputs from diverse interest groups (Grabosky & Braithwaite 1986). Defining a 'successful' outcome and causation may be difficult or impossible, particularly where legislative intent may be obscure (Bottomley & Bronitt 2006, p. 226).

Despite the limitations and reservations considered above, RIA is now a framework used by many 'Better Regulation' programs internationally (Australian Government 2010a). The RIA framework in Australia arises from recommendations of the Hilmer Report in 1993, the same year as NTAct (Commonwealth of Australia, 1993). Curiously, the Commonwealth Government's current Best Practice Regulation Handbook uses the word "entrepreneur" only once to state that competition policy and reliance upon the market will increase entrepreneurial incentives. New ventures are not mentioned at all. The Best Practice Handbook does not require any consideration of the impact of any regulatory change upon entrepreneurial opportunity.

An underlying rationale of Best Practice Regulation policy appears to be that a bureaucratic review, with varying elements of consultation, focusing on cost/benefit and potentially risk assessment, will overcome regulatory failure. Two differing views exist as to what the rationale objectives actually are. One view is that regulatory tools should improve the overall quality of regulations generally by regulatory design, stakeholder input, systematic search for

alternatives and cost/benefit and/or risk assessment for each option. The alternative view is that better regulation seeks to reduce unnecessary 'bureaucratic' regulatory burdens by reducing regulation, compliance cost or complex standards. The latter is said to be associated with the business community, with the former supported by advocates of social regulations (Wegrich 2008, 2009). RIA should present decision-makers with the important issues they need to address but there is concern, certainly in the EU, at what has been termed a quasi 'scientific' economic solution that silences debate from any other perspective to a given political problem (Radaelli 2005, p. 938).

Conventional economic analysis of the case for proposed regulatory change relies heavily on comparing social surpluses yielded by long-run equilibria with the different regulatory options available (Dorfman 1978, Quinn and Trebilcock 1982). However, this can ignore the cost of implementing each option and events during the process of transition that may reshape the equilibrium. It also ignores the established fact that a capitalist system cannot reach an equilibrium state and views of Schumpeter that:

> "Capitalism, then, is by nature a form or method of economic change and not only never is, but never can be stationary" (Schumpeter [1942] 2006, 82).

Accurate RIA, at minimum, requires clarification of precisely for whom the impact is being assessed (Radaelli 2005, p. 929).

It is clear that whether impact is assessed broadly or narrowed to a cost/benefit analysis, there is an influential role for actors in 'constructing' or translating stakeholder concerns into practical legal approaches or acting as gatekeepers to entitlements (Wells 1962). They are 'filtering agents' contriving claims and/or defences, constraining, adapting or modifying apparent regulatory purposes and such modifications are not arbitrary. Some consider that these actors:

> "...favour the wealthy, the powerful, because they are produced by pressures put on the law's interpretative institutions by those seeking to preserve and enhance their power and having the resources to do it" (Kidder 1983, p. 136).

Whilst bureaucrats are one such set of actors, lawyers are another. They may simply not draw certain rules or entitlements to stakeholder attention, due to ignorance, misunderstanding, disapproval or self-interest. Lawyers tend to act for economically strong clients who pay them

well to learn about new regulatory changes so as to reduce their burden. Lawyers for consumers tend to become less familiar with the changes despite the large number of regulatory beneficiaries. This is because, as each transaction is small, fees need to stay low or the cost outweighs any potential benefit, lawyers are infrequently engaged. Macaulay studied consumer protection law and concluded:

> "the lawyers studied seem to be responding predictably to the social and economic structures in which the practice of law is embedded. … (I)n practice, justice is rationed by cost barriers and the lawyer's long-range interests" (Macaulay 1979, p. 161).

Judges, in interpreting disputes concerning regulatory change, determine its impact. The enforcement agency is also influenced by the power-differential between it and those with whom it deals (Frug 1989, Roshier & Teff 1980). Actors dealing with relatively powerless stakeholders in an expanded sphere of control tend to adopt a more punitive approach than where stakeholders can exert power over the enforcer (DeMichiel 1983, Gabosky & Braithwaite 1986, Gunningham 1987, Hopkins 1989, Tomasic 1980).

Agency dynamic concepts such as adaption, evolution, fitness and inter-dependence provide a framework for understanding impacts (Fuller, Warren & Argyle 2008). Generating legitimacy with external stakeholders sheds light on foundational causal structures extending to broader trust building activities (Delmar & Shane 2004, O'Connor 2004, Tornikoski & Newbert 2007). The influence of key actors on entrepreneurial growth involves patterns of social time, involving the actors themselves in the analysis and interpretation (Fischer et al 1997, Fuller, Warren & Argyle 2008, Luhmann 2003, Maturana & Varela 1980, Romano & Ratnatunga 1996, Teubner 1984).

Modelling arising from agent-based systems can now aid thick descriptions of complex causality, including agent types, qualities, objectives and activities (McKelvey 2004). While complex systems might exhibit chaotic behaviours and limited predictability, emergent long-run structure within the system can now be measured in a suitably defined state space (Guastello 1995). Agent-based modelling explores interactions between populations of actors and environmental forces using computer simulations beginning with a set of predefined agents (the foundation groupings and ontology eg entrepreneurs, organisations, customers) and the rules for their operation (Holland 1998). Algorithmic rules derived from a network of

agents interacting in a self-organising fashion over a period of time can progress to a long-run structural order with a self-organisation system found well suited to modelling disequilibria dynamics (McKelvey 2004). The exponential growth of computational and programming ability and its application to complexity theory may now begin to make such modelling of 'actor'/ causal/ predictive impact feasible, provided the ontology is sufficiently formulated, described and validated.

Thus, in summary, the impact literature illustrated various understandings of the nature of 'impact', direct, indirect, independent and unintended, the role of 'actors' as gatekeepers, the influences of varieties of groups and interests as well as the impact assessment itself and the difficulties of causal linkages. Application of computational and programming advances to offer potential for predictive modelling. These elements were drawn together in **Figure 10** below.

Form	Direct, Indirect, Independent, Unintended
Actors	Gatekeepers: Filtering Agents • Bureaucrats • Lawyers • Judiciary • Enforcers
Influence	• Causation? But for? • Variety of Groups and Interests
Link	• Regulatory Purpose and Outcome
Complexity	• Modelling Complexity and Chaos

Figure 10: Impact Literature Key Elements
Source: Researcher

2.6 THE RESEARCH QUESTION AND THE LITERATURE REVIEW

This literature review has now considered the literature of the Schumpeter conceptual model and various subsequent modifications suggested to it to account for activity allocation according to the 'rules of the game' and theory identifying the strength of institutional 'norms'. It then reviewed literature that directly considered some aspect of the impact of regulatory change upon entrepreneurial opportunity finding an unsystematic picture including various regulatory change impacts, institutional 'norming' and flowing alliances, the influence of information and knowledge, links with turbulence and sovereignty and the function of property-related regulation. From this kaleidoscope, the literature concerning

dependent and independent variables was overviewed. This revealed fundamental legal principles of the Rule of Law and Liberalism that not only influenced legal perspectives, but filtered through economic, social and regulatory practice perspectives. Economic perspectives influenced by 'public choice' theorists emphasised rationality, constraints and rewards and efficiency with emphasis on predicting outcome and observing marginal effects. Social perspectives introduced power, culture, information access and symbolic ideological roles of the law. Regulatory practice involved the trilemma of effectiveness, responsiveness and coherence, the 'command and control' model, various regulatory methods and calls for innovations. Finally, the literature concerning impact extended impact beyond cost/benefit to direct, indirect, independent and unintended impacts as well as the need to target for whom and why the impact is being assessed. It identifies operational impacts and actors, noting predictive possibilities through emerging computer and chaos modelling. This is the intricate and complex setting of the Research Question and Research Proposition 1.

2.7 VOICE AND SOCIAL CAPITAL-TRUST

However, as the literature review above revealed the impact of regulatory change may be affected by voice and social capital-trust. This Part now examines the literature specific to these potential intervening variables and this literature shaped Research Proposition 2.

Schumpeter noted that, as the size and complexity of a community increased, individual voice became more removed with a select group articulating electoral opinions (Schumpeter 1947). Schumpeter placed less importance on voice in a modern democracy, whilst recognizing a form of 'social capital' among the "Whig aristocrats and London merchants" whom he saw submitting to a common control as it suited them. However, as discussed in 2.2 above, the literature frequently references to community shared values and benefits (Aydalot 1986, Camagni 1991, Gordon 1993, Knack & Keefer 1997, Maillat, Quevit & Senn 1993). Theorists across the disciplines of jurisprudence, regulatory theory and entrepreneurship generally agree that effective regulatory schemes engage stakeholders (however narrow this group may be) in a dialogue in which their voice is heard and listened to and this dialogue influences the existence and form of regulatory change (Ayres & Braithwaite 1992, Braithwaite, Walker & Grabosky 1987, Habermas [1981] 1984, Meidinger 1987, Paternoster &. Simpson 1996, Reiss 1984, Shover, Clelland and Lynxwiler 1986).

2.7.1 Voice

Voice is part of an individual's physical body, a body that elicits excitement and admiration, attraction and desire, envy or distaste (Sinclair 2001, p. 2). Voice, therefore, is not only engraved by external social pressures but is the very constitution of nature itself (Grosz 1994). Authority is partially constructed by voice and voice projection with those speakers who powerfully use direct, assertive and rational speech, being regarded as more trustworthy, dynamic and competent (Sinclair 1998, Laster 2001, p. 264). However, even fragile or tentative voice can be extremely powerful eg the voices of abused institutionalised children that triggered transformative regulatory change (Edney 2006, HREOC 1997, The Commission to Inquire into Child Abuse 2009). Such effects contrast starkly with the ostensibly rational and predictive goals of both law and economics, which display "a disembodied and estranged relationship to the world" (Kerfoot & Knights 1996, p. 83, also Haraway 1990, p. 222, Haraway 1998, Sinclair 2001).

Release of individual creative power has been found to necessitate speaking, being heard and receiving acknowledgement, with cognition and the discourse carried on by the mind with itself having a major role in shaping imagery (Cooperrider 2001, Freire 1970). Meaningful change has been shown to arise from processes that begin with articulation - and then reconfigure and cross-appropriate (Spinoza, Flores and Dreyfus, 1997).

Those whose views are heard and listened to influence regulatory change with voice playing an essential role in shaping the normative legal order (Macdonald & McMorrow 2007). Consensus also accords weight to voice being alternatively viewed as knowing intellects and free wills in dialogue or, the reverse, manipulations legitimating systemic power (Habermas [1981] 1984 cf Luhmann 1969, [1993] 2004). Lyotard emphasised the importance of legitimatising prescriptive utterances pertaining to justice, because distributing roles in the social process limits the possibility that language games can be unified or totalised in the meta-discourse (Lyotard [1979] 1984).

In Australia, there are clear points of entry to regulatory change processes, from lobbying prior to the initial Bill through comment at the various Committee Stages. The influence of voice possibly contributed to J.P. Morgan's $6M derivatives' loss in May 2012. During a fifteen month consultation period concerning changes to banking regulation, the US regulator held 93% of its meetings within the financial industry, including 27 with J.P. Morgan, and only 7% outside, leading to inclusion of a loophole for J.P. Morgan (Foroohar 2012). By

contrast, voicing past trauma has driven positive regulatory change (Herman 1997, HREOC 1997).

Legitimacy in regard to who is allowed to speak on any particular subject determines not only the debaters, but what the debaters treat as relevant. Silence includes not only not speaking or being heard, but also self-silencing. Those silenced not only have considerably less influence, but what is excluded becomes irrelevant (Foucault (1982). Negative impacts upon organizational performance were recorded when voice was silenced, but seemingly small change – listening and pro-actively ensuring that individuals did not self-silence – had profound positive effect (Hazen 2006, Sawicki 1991). A normative position tends to silence and marginalise 'outlier' voices, reproducing existing obstacles and discriminations that perpetuate barriers to wider societal change (Ahl 2006, Bruni, Gherardi & Poggio 2004, Foley 2005/6). Silence can also exist in non-language:

> "There is no space in this sanctimonious clag for the light of the imagination. There is no room for feeling properly felt. ... They are ritual words" (D. Watson 2002, p. 52).

Dead language or a "conversation of blah, blah, blah" also sees creative opportunities lost or obscured by sanitised "triumph" language such as "lasting relationship", "real progress", "sub-outputs within key success areas" and "on the ground" (Ritter 2009, 40-41). However, even beneath dead language, there may be a shared world of positive inside information among those actually involved in the process (Langton & Palmer 2003). Mindset Theory postulated a deep level "group think" behind normative "cultural meaning" (Kripke 1982, Lawrence 1987, Wittgenstein 1985). Wittgenstein considered such knowledge as communicated in some non-propositional form (Wittgenstein, 1958).

Narrative and story appear to be one of the all-pervasive ways by which humans organise the world and make meanings that unfold in and through time (Brooks 1996). Narrative is a principle of organisation that transfers loose talk into coherent discourse and, by turning it into a story, clarifies an abstract analysis (Prosser 2009). Dominant narratives are not called stories - they are called reality with on-going regulatory and social arrangements formed by persuasive, cumulative and systematic stories (MacKinnon 1996). The narrator of a story or event brings a set of pre-suppositions and expectations that influence the hearing and which remain important to any regulatory change to which individuals or societal organisations 'give voice' (Scheppele, 1989, p. 2090). Lawyers tend to adopt a narrative that their own legal

system is universal, or at all events the culmination of a chain of development which other less advanced systems are still undergoing (Wooton 1995). People often tell stories in order to attempt to "make sense of law and to organize experience ... [a]nd these stories are telling" (Scheppele 1989, p. 2075).

Storytelling within regulation and law is located in a culture of argument and persuasion (Gewitz 1996, p. 5). Stories can have a role in convincing and persuading politicians of the need for regulatory change or persuading ordinary citizens to favour a particular regulatory change. Stories can be a powerful means for revisiting assumptions underlying legal and political discourse (Delgado 1989, Farber & Sherry 1996, Ross 1990).

> "Instead of telling power it is wrong, tell a story. No offense. Avoid finger pointing. Power and powerlessness can both be right. ... a survival strategy when one dare not argue …. So it came out as story, howling and broken ... nerves exposed, inelegant by comparison with glossy abstractions" (MacKinnon 1996, p. 233).

Story is important to entrepreneurship. Narratives of discovery, knowledge and learning form fundamental bedrocks to entrepreneurial opportunity (Hayek 1948, Kirzner 1997, Shane & Venkataraman 2000, Venkataraman 1997). Stories can be a powerful means for destroying a bundle of received wisdoms and creating new ideas with discourse more vivid than textbooks (Delgado 1989, Kurzban, Tooby & Cosmides 2001, Prosser 1997). They contain potential to shake the foundations of the dominant narrative to such an extent that they impel conditions that might be described as *Bahnbrechen*. Storytelling invites both teller and listener to create change by confronting messy, complex realities in a way that promotes communication and thinking (Hill 1979). Stories are crucial in constructing a sense of the self in circumstances where traditions have crumbled or hopes risk being forgotten (Arendt [1951] 1973, Arendt 1968, Arendt 1965, Hinchman & Hinchman 1994). The inner story, the personal dialogue, functions as an inner dialectic between positive and negative adaptive statements, providing a guiding imagery (Cooperrider 2001). The story of a particular organisation, be it symbolic, political, responsive or hierarchical, shapes and invigorates its culture, thereby impacting entrepreneurial opportunity (Bolman & Deal 1997).

In summary, the literature concerning voice reinforces its potential influence in any impact of transformative regulatory change upon entrepreneurial opportunity. Schumpeter saw

regulatory change determined by a select group, whilst others see it influenced by a wider socialised community of shared values. Voice is a personal, physical and emotional force contrasting with apparently rational elements of law and economics. It is important to creative activity and entrepreneurial narratives. It particularly shapes legal order through articulation and contest. Outlier voices can influence regulatory change but their silencing risks narrowing the societal dialogue by rendering their concerns not only not heard but irrelevant. Figure 11 draws together these Key Elements.

Voice	• Language • Story
Silence	• Silence • Self-silencing

Figure 11: Voice Key Elements

Source: Researcher

2.7.2 Social Capital – Trust

Social Capital refers to the collective value of all social networks and the inclinations that arise from these networks to do things for each other (Putnam 2000). It is the shared norms or values that promote social cooperation and may be the disposition to network, rather than the actual networks (Fukuyama 1995). Social capital may be less a community value than an individualistic investment in social relations due to expected returns in the marketplace (Lin 2001).

A key element in social capital is trust, the willingness of a party to be vulnerable to the actions of another party, based on the expectation that the other will perform a particular action important to the trustor, irrespective of the ability to monitor or control that other party (Mayer et al 1995, p. 712). Social capital, including personal and commercial relationships, repeat interactions, shared routines and shared information, facilitates the trust from which networks and alliances can build thereby influencing any impact of regulatory change upon entrepreneurial opportunity. Social capital and trust are considered separately below. Social capital is a stimulant of entrepreneurial opportunity, with social relations extremely important to entrepreneurs and their businesses (Cooper 2001, Davidsson & Honig 2003, Hoang & Antoncic 2003,). It builds on shared intelligences from widely distributed points:

> "We always think of intelligence as a centralized thing … that there's a little person inside our brain running things. But it's more likely that intelligence is decentralized and distributed" (Maes 1997, p. 10, also Putman 1995).

Network theory draws attention to gradual learning and interaction within networks aimed at developing valuable market information and knowledge that otherwise would take a long time and much expenditure (Chetty & Campbell-Hunt 2003, Chetty & Wilson 2003). Networks can greatly improve international performance (Blomstermo et al 2004). Social capital both stimulates entrepreneurial opportunity and shapes the way entrepreneurship develops (Fukuyama 1995). One element of Social Capital is a concept known as Social Licence:

> 'the degree to which a corporation and its activities are accepted by local communities, the wider society, and various constituent groups' (Gunningham, Kagan & Thornton 2002, 6).

Hard headed, entirely rational decisions enable a business to be seen as modern and responsive, whilst reducing costs and regulatory risks so that apparently socially responsible corporations are actually targeting increased returns (Davis 2002).

> "Competition is so intense that most corporations cannot accomplish social ends at a cost to their consumers or investors ... Even if individual consumers or investors believed in the virtuousness of a particular sacrifice, absent laws requiring all companies and therefore all other consumers and investors to forebear as well, the individual's action would have to (have) effect" (Reich 2008, para [10]).

Thus, acts of corporate virtue cannot survive contemporary market realities unless they contribute to profit. Trust is a social mechanism for risk reduction (Florin 1997, Mayer, Davis & Schoorman 1995). Where there is no risk, there is no need for trust (Gambetta 1988, p. 222-224). The more trust there is, the more there is likely to be trust, but trust is depleted through non-use. It is vulnerable and, once destroyed, difficult to rebuild (Axelrod 1984, Dasgupta 1988, Gambetta 1988, Hirschman 1970). Deep distrust or deliberate trust destruction becomes very difficult to invalidate through experience and can become self-fulfilling (Pagden 1988). As behaviour spreads through learning and imitation, sustained distrust leads only to more distrust.

Economic literature and early entrepreneurship theory tended to treat trust as background, "an ever-ready lubricant" to voluntary participation in exchange, with competition the dominant strategic paradigm (Dasgupta 1988, p. 49, Ghoshal & Moran 1996, Rumelt, Schendel & Teece 1991). However, contemporary views consider that co-operation produces greater benefit than competition in many circumstances (Fukuyama 1995).

Trust is a perception of the trustor. There may be varied levels of trust for various trustees and the context within which trust is granted is important. For example, one may trust a mechanic to fix a car but not make a nuclear bomb. Reputation ties in closely with trust, as it is determined by *perceived* integrity rather than actual integrity (Gambetta 1988, p. 218, Mayer et al 1995, p. 717- 724). A virtual trust model devised to enable computer systems to identify trusted financial customers used reputation sourced from the media as the trust indicator (Abdul-Rahman 2004; also Klout 2012 www.klout.com). Reputational measures explored by others include the opinions of venture capitalists, business contacts and business journalists (Hidayat 2012, Larson 1992, Reddan 2012, Termins 2012).

Trust must be built between people at all levels within organisations in order to achieve trust between those organisations. Only people can trust each other. Interorganisational exchanges are embedded in societal exchanges, reinforcing the need for new organisations to build such links, with trust increasing according to proximity to the centre of a cluster (Poppo & Zenger 2002). As new ventures emerge, they intricately interweave among competitors, industries and institutions with trust crucial to start up success (Aldrich & Fiol 1994).

Risk and trust assessments can alter due to changes such as regulatory change, which may alter the balance and vulnerabilities of one or both parties (Mayer et al 1995, p. 725). Operational alliances in seven highly successful entrepreneurial companies, showed fragility to changed external context (Larson 1992). Parties may seek to reduce risk by entering contracts but these can highlight risks, including very remote ones, and result in reduced trust and increased cost (Macaulay 1963, p. 57). Poppo & Zenger studied contracts in large corporate information service exchanges, concluding that firms invest in relational governance only when significant hazards are present (Poppo & Zenger 2002, p. 710-713).

Alliances are a particular form of trusting agreement, where each party contributes to creating joint value by joint decision-making in ongoing management and joint sharing in value add

(Bamford, Gomes-Casseres & Robinson 2003, p. 12-13). New forms of international alliance were shown to demonstrate four structural characteristics of success – social networks, repeated interactions, shared routines and shared information (Florin 1997, GS1 Australia, 2012, National Distributor Alliance 2012). Trusting arrangements maximize alliance outcomes and comprise a centrepiece of corporate strategy and competitive advantage. Collaborators have been found to have outperformed their competition in terms of both revenue growth and average operating margin (Pederson 2006, referring to the 2006 CEO Global Study (IBM 2006)).

Alliances between differently scaled organisations tend to be vulnerable, often resulting in gain to the large and loss to the small (Todeva & Knoke, 2005, Yang & Yong 2001). Thus, commercial practice suggests that an alliance between a very large party, eg a multinational or government and a tiny partner or socially disadvantaged group, is inherently imbalanced and that the small party can expect disbenefit, unless elements are built into the alliance design to redress the imbalance. In some cases, it is poor or damaged relationships between firms that cause alliance failures (Bamford, Gomes-Casseres & Robinson 2003, sourcing Ertel, Weiss & Visioni 2001).

To summarise, the literature concerning voice and social capital-trust confirms that they both have potential to shape and influence any impact of regulatory change upon entrepreneurial opportunity. These core elements of social relations, fundamental to networks and alliances, are shown to have great significance. Well-developed inclusive structures, in which participants are encouraged to have a voice and which adopt procedures perceived to be structurally and interactionally fair, are best to engender trust in and between organisations and such elements are, thereby, likely to affect the impact of regulatory change on entrepreneurial opportunity. This literature shaped Research Proposition 2. **Figure 12** draws together these Key Elements.

Trust	• Network • Alliance
Structure	• Fair • Individual to individual
Address Imbalance	

Figure 12: Social Capital-Trust Elements
Source: Researcher

2.8 KEY ELEMENTS OF THE LITERATURE

This literature review sets the context from which the Research Question and the three Research Propositions emerged and were shaped. Using Schumpeter's conceptual model as its base, the review examined the kaleidoscope of literature concerning the possible impact of regulatory change upon entrepreneurial opportunity. It then examined in depth the literature concerning regulatory change, entrepreneurial opportunity and impact setting out key elements for testing in this Study. As this literature review revealed possible roles for the intervening variables of voice, social capital-trust and regulatory theory, the literature in these areas was examined and overviewed shaping Research Propositions 2 and 3. This examination identified key elements for testing in this Study. Each part of the literature review was grouped according to its key elements. The various key element tables, created as the literature review evolved, were grouped to form:

1. A Key Indicia Matrix (KI Matrix). This Matrix derived primarily from the entrepreneurship theory and other literature focussed to entrepreneurial opportunity.
2. A Regulatory Prism. This Prism and its Elements derived primarily from the regulatory and legal literature.
3. Impact Elements. These derived from impact features identified across the literature.

SUMMARY

This extensive literature review crossed the disciplines of law, entrepreneurship and the social sciences. It provided background to Schumpeter's conceptual model of *Bahnbrechen* and Creative/Destruction. It examined literature concerning the potential impact of regulatory change on entrepreneurial opportunity. It overviewed perspectives of regulatory theory and current debates in entrepreneurial opportunity theory. The literature highlighted the importance of alliances and networks and this review extended to elements of societal dialogue, including voice and social capital-trust. The literature also revealed the grab-bag of regulatory types and the possibility that different regulatory models or methods might impact differently upon entrepreneurial opportunity.

In this way, the literature shaped the Research Question and Research Proposition 1 as well as the possibility of the two intervening variables voice and social capital-trust, which shaped Research Proposition 2, and regulatory type, which shaped Research Proposition 3.

"By dragging a child into a topsy-turvy world ... the child becomes interested in creating such a topsy-turvy world for himself in order to become more effectively the master of the laws governing the real world"

Vygotsky 1971, 257

Chapter 3

METHODOLOGY

INTRODUCTION

Chapter 1 identified the Research Question and described three Research Propositions arising from intriguing possibilities within the literature. Part 1.4 of Chapter 1 overviewed the Study method. Chapter 2 extensively reviewed the literature from which the Research Question and the three Research Propositions arose. Chapter 3 now builds on these earlier Chapters to describe and justify the philosophical choices of this Study, its design and methods, the procedures and tools used to collect the data from the research sample and, finally the data analysis technique and conclusions.

In considering methodology, a key question was – *What do I want to know?* The researcher wanted to know:

"*Does Transformative Regulatory Change Impact Entrepreneurial Opportunity?"*.

The next questions then were - *How do I best explore that? What is the data that can answer the question? How do I gather that data?* and *What data issues arise?*. With data in hand, the ultimate question was – *How Do I Make Sense of the Data?*

The sequencing of the methodological examination in 3.1-3.6, moved from the broad knowledge questions to the details of data collection and, from that, to data analysis. **Figure 13** below describes the sequence:

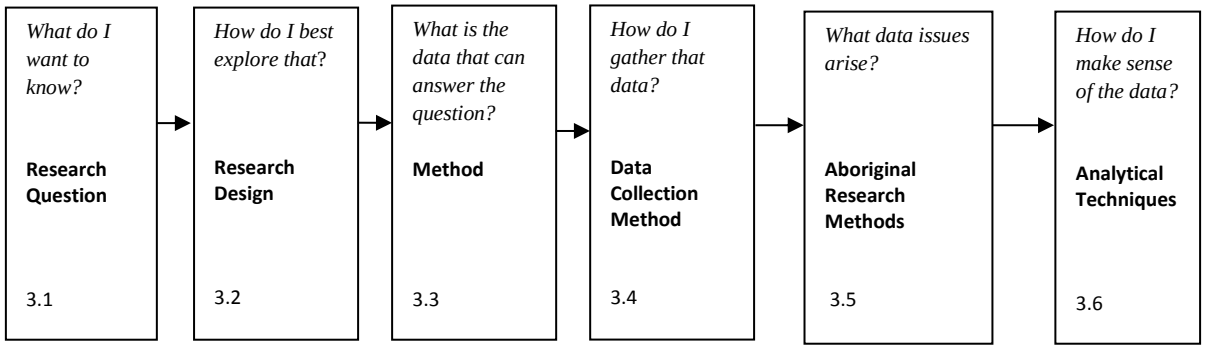

Figure 13: Sequence of Methodology

Source: Researcher

The report writing, ethics considerations and methodological limitations were 3.7-3.9, with conclusions summarised in 3.10.

The researcher was conscious of the need to attend carefully to the research philosophies and analytic approaches applicable to each of the research disciplines. Further, as NTAct was the transformative regulatory change under study, Aboriginal research methodologies required consideration.

3.1 RESEARCH QUESTION- *What Do I Want to Know?*

The first key methodological question was – '*What do I want to know?*'. The Research Question encapsulated this as:

"Does Transformative Regulatory Change Impact Entrepreneurial Opportunity?"

In framing this question, it was necessary to examine core philosophical choices as a bedrock for quality research, including sound research design and selections of tools, methods and techniques (Easterby, Thorpe & Jackson 2008). Choices involving the relationship between theory and data have been hotly debated for centuries. Whilst research theorists have not adopted consistent classifications, most accept a primary dichotomy between phenomenological and positivistic approaches (Bryman 1992, Creswell 2003, Easterby, Thorpe & Jackson 2008, Guba & Lincoln 1994, Gummerson 2000, Hammersley 1992, Hussey & Hussey 1997, Patton 1990).

The *phenomenological* paradigm, seeking to understand subjective human behaviour, focuses on meaning rather than measurement. It is interpretative, considering that beliefs determine what should count as facts. Its typical cultures of enquiry include narrative (story, biography, autobiography), hermeneutics, grounded theory, ethnography and action research). By contrast, the *positivistic* approach, derived from the natural sciences, seeks to independently observe events within a system, focusing on measuring cause-and-effect relationships and, constraining beliefs. It is quantitative and its typical culture of enquiry includes numerical surveys, experiments, meta-analysis and other statistical analysis (Collis & Hussey 2009, Easterby, Thorpe & Jackson 2008).

Within legal research, the discipline of jurisprudence examines the theory and philosophy of law. The term derives from the Latin words *jur* (law) and *prudentia* (knowledge) (OED 2010). Jurisprudential debate has seen a broad philosophical divide between legal positivists and those adopting a wider sociological and practical context. *Legal positivists* treat the legal system as a normative order. Thus, thinkers such as Austin reject morality and justice and adopt a strong 'command and control' approach to law (Austin 1832). Kelsen, influenced by Kant's theory of knowledge, concludes that a "norm" is an "ought" proposition and law is a system determining that a human "ought" to behave in a particular way (Kelsen 1967, Kelsen 1961). Many of those who seek to limit the role of the regulator, see regulation as solely an "ought".

Critics of legal positivism argue that a 'norm'-based view of the legal system mistakenly treats law as rational, deductive and value-free and ignores unstated assumptions underlying law-making. They reject notions of jurisprudence as science and notions of legal realism in court-made law. Critical legal theorists identify unarticulated injustices. Structuralists, deconstructionists and post-modernists deny objective truth and view knowledge as culturally conditioned (de Saussure 1915). Many such theorists reject the exclusion of morals, ethics and justice following the excesses of arbitrary rule-making by Stalinist and German National Socialist regimes which actually satisfied positivist views. Notions of freedom are also articulated, for example Dicey's exposition of the Rule of Law and freedom of person, property, contract and public assembly (Dicey 1959). Some legal scholars, influenced by Foucault, examine interactions between language and power but they, in their turn, are vigorously, even viciously, challenged by positivist and other theorists and largely ignored by practitioners. More recently, natural law theorists shifted thinking to the social nature of man

as law's foundation, rather than the classical thinking of a divinely orientated natural law articulated, for example by Plato, Aristotle, Cicero and Thomas Aquinas.

The overlap of philosophies of law and innovation or creation are well described in the work of Lyotard who sees the system dragging humanity after it, dehumanising it in order to rehumanise it at a different level of normative capacity (Lyotard 1984 [1979]).

Emerging from the complexities of such a philosophical base, the Research Question was framed so that, whilst directed, it was not intentional. It did not seek to control or even save something by recording it. Its aim was to notice, witness and describe what was happening so as to understand human behaviour and focus on meaning. Its ontological assumptions involved the dichotomy that, for the researcher, ontological assumptions tended to be post-modern, but for the sample researched in the Case Study, were more post-colonial. Because it considers the interaction between law and an element of society, the Research Question was framed so as to remain open to forces underlying law-making. It allowed for a critical and critical realist theory approach, whilst seeking to avoid excessive deconstruction (Miller & Tsang 2011). This reflected the researcher's basic value that morality, ethics and justice, whilst distinguished from law, cannot be, and in fact, are not separated from it. The axiological and ideological values informing the work were to some extent drawn from the critical discussions and emancipatory conclusions found in critical theory but assumed a relativist perspective, viewing reality in terms of multiple constructions (Adorno 2006, Adorno & Horkheimer 2002, Fay 1996).

The researcher's epistemological approach was that of an 'outsider' observer, drawing upon lived experiences rather than abstractions. It recognised that a personal relationship between researcher and those studied would be important, but that retaining the balance of an impersonal relationship in other aspects, within an interpretivist approach, would allow the bringing in of many different aspects and interpretations of difference. That said, the researcher brought considerable experience in both law and entrepreneurship and this knowledge was used as a starting point from which, informed by the philosophical analysis, the Research Question was developed (Punch 2005).

Finally, the choice was made to use narrative and aesthetic language, rather than either numeric or non-verbal symbolic text. Emphasis was to be placed upon the voice of those most informed, both individual and collective. The researcher's voice was primarily impersonal.

Despite the clarifications detailed above, the researcher remained aware that methods and instruments of western science include information fragmentation and isolation across categories. This fragmentation can result in knowledge becoming embedded in local meanings and contexts, but separated from its original context and turned int0 an entity to be studied, worked on and developed and thereby becoming integrated, transferred and ultimately changed (Nakata 2008, 186). The danger is that:

> "(T)aking 'validated' nuggets of … knowledge out of its cultural context may satisfy an outside researcher's need, or even solve a technical problem in development, but it may undermine the knowledge system itself" (Eyzaguirre 2001, p. 1).

Thus, whilst there is value in integrating scientific and traditional knowledge, it is important to interrogate distinctions in a critical way because a simple separation may ignore both similarities and substantial differences.

3.2 RESEARCH DESIGN - *How Do I Best Explore That*?

The second key methodological question was - '*How do I best explore that?*". Research Design is the overall configuration of a piece of research: what kind of evidence is gathered, from where and how it is interpreted in order to provide good answers to the Research Question (Easterby, Thorpe & Jackson 2008).

This researcher chose to explore the Research Question using Schumpeter's *Bahnbrechen* conceptual model, assisted by the three Research Propositions arising from the literature. Models simplify in order to enable a better understanding of the real world:

> "Because legal and economic processes are complex … [m]odels break up phenomena into more manageable portions by abstracting those variables that are believed to be a significant influence … and subjecting them to deductive reasoning based on a set of accepted axioms" (Veljanovski 1982, p. 19-20).

Propositions or predictions must then be compared to actual behaviour and experience.

One approach when judging the merits of a conceptual model requires the study of all situations, including extreme conditions or outliers (Jarvelin & Wilson 2003). In considering the best way to explore the Research Question in this Study, the use of outliers and extreme conditions was considered to be a useful to judging the merits of Schumpeter's model. Thus, an utterly transformative, creative/destructive regulatory change impacting a nation's most disadvantaged people precisely fitted this approach.

Criteria used to critically evaluate a model include comprehensiveness of content, logical congruence, conceptual clarity, level of abstraction, applicability to praxis and cultural perspective (Brathwaite 2003, Creswell 2003, Hutson 1993). Conceptual models are broader than theories although both set their preconditions and provide methodological tools. Whilst a conceptual model is more abstract than theoretical, and a theory may be derived from a model, the model's framework is derived deductively from the theory (Brathwaite 2003, Creswell 2003).

A key issue representing the split between *positivism* and *phenomenological* paradigms concerns how the researcher should go about the research. In phenomenology, the approach known as Grounded Theory sees the researcher developing theory through a comparative method by looking at some event or process through different settings, with two main criteria for evaluating theoretical quality being:

- first, it should be sufficiently analytic to enable some generalisations. It should be possible for people to relate the theory to their own experience, sensitising it to their own perceptions;
- second, starting with a theory about the nature of the world, it should then seek some data that confirms/disconfirms the theory (Glaser & Strauss 1967). Some scholars criticise Grounded Theory because of a lack of clarity and standardisation of method, but this emerges largely from a positivist philosophical perspective on 'truth' (Thorpe & Holt 2008, p. 6).

3.2.1 Background

Research design must attend throughout to issues of the value, truthfulness and soundness of the study. It is about organising research activity, including data collection, in ways that are most likely to achieve the research aims.

There are many potential choices to make when developing a Research Design and little guidance as to the ideal for any particular situation. Very many of these choices are allied quite closely to the different philosophical positions described above. Awareness of these is helpful in soundly basing research, as well as ensuring that different elements of research design are consistent with each other.

Shane urged careful attention to research design emphasising that, in examining entrepreneurial opportunity, it is important to be clear as to the sample created – what it does and does not represent. One must control for the opportunity and deal with variance in the opportunity by either holding the people constant over time or holding the opportunity constant and changing the people to examine difference (Shane 2012).

To examine the impact of regulatory change upon entrepreneurial opportunity using Schumpeter's conceptual model, it was essential to locate a regulatory change that, as closely as possible, reflected the *Bahnbrechen* at the heart of Schumpeter's concept. Such regulatory change needed to contain both Creation and Destruction within the provisions of the regulatory change itself and, be a regulatory change that fundamentally transformed, in a major fashion, a legal position or a legal right. Regulatory change that merely created incremental or minor change, or merely addressed existing process, was considered unlikely to be sufficiently instructive. The researcher searched for such a *Bahnbrechen* or transformative regulatory change.

The literature, including Schumpeter, had identified the significance of property, land security and geographical location to entrepreneurial opportunity (2.1 and 2.2). If the concept were correct, a transformative regulatory change that incorporated entitlement to a new property right with reduction of existing rights would be expected to impact entrepreneurial opportunity. Initially, the researcher considered regulatory change that permitted State acquisition of land. However, whilst containing the powers of *destruction* of an existing right

by transfer to the State, such regulatory change did not *create* anything, new save a compensation mechanism.

Large or specific project regulatory changes were considered. Specific project type regulation can ensure lifetime protection for major industries, eg Roxby Downs (Indenture Ratification) Act 1982 (SA) secures Australia's (indeed the world's) largest uranium mine. Similarly, the Portland Aluminium Smelter Act 1980 (Vic) and WesternPort (Steelworks) Acts 1970 protect aluminium and steel works. Such legislation is invariably created through a political and economic process in which industry works closely with the regulator around a shared vision of economic opportunity that is to be shaped and protected into the future via regulatory change. It generally involves an existing very large corporation, concerning a new plant or location for a business activity that is not new *per se*.

The researcher considered profound regulatory changes internationally such as those throughout former Communist countries transitioning them to a western market economy. However, these were introduced at times of such massive local and international social, political and economic change that their complex exogenous environment might blur analysis of regulatory impacts.

However, as the veil of Communism was lifting in Eastern Europe, in Australia at the same time, a profound transformative regulatory change was enacted - the Native Title Act (NTAct). This regulatory change arose directly from a decision of the High Court of Australia. This decision was one of the most influential decisions in Australian legal history. NTAct, whilst certainly politically controversial, was much more isolated from massive local and international social, political and economic societal shifts than transition economy regulatory change. NTAct was essentially enacted to regulate the 'flow on' effects of the High Court decision. For the first time in the Australian legal system, this regulatory change *created* an entirely new property right – native title – and *destroyed* Crown monopoly rights in Crown land. NTAct contained potential to create any of Schumpeter's five new combinations: new goods, new markets, new methods of production, new access to raw material and new organisations. It was a transformative regulatory change that, on its face, created a highly beneficial exogenous change. The Benefit Group was clear - native title Claim Group. This offered the research 'control' (holding opportunity constant) suggested by Shane. It enabled control of the many factors usually associated with regulatory change

(change of Government, political instability or regime change) and, although globally unique, this regulatory change had the core elements from which to extrapolate relevant generalisations and offered an excellent option for exploring the Research Question. From the study of NTAct, it would be possible to ask:

'*does transformative regulatory change impact entrepreneurial opportunity?'*.

In order to provide sufficient context for consideration of the Research Question, it was important to draw together a description of the background to the regulatory change, a broad overview of its provisions and commentary from the literature as to its opportunities and threats, as well as the background entrepreneurial setting of its Benefit Group to identify relevant unique characteristics. Chapter 4 provides the context to the NTAct *Bahnbrechen* regulatory change.

3.2.2 Justification of the Research Design

The Research Design used literature to frame the question, guide action and make sense of the data. The design sought, by a mix of deductive, inductive and abductive logic, to draw out meaning and connections from the data so as to make strong connections between theory and data. Research Proposition 1 sought to establish whether there was regulatory change impact upon entrepreneurial opportunity and develop Schumpeter's conceptual model by identifying correlations. It did this, within a phenomenological framework, relying on qualitative methods and interpretative, contextual materials to reveal empirical evidence for new insights into the Research Question. Research Propositions 2 and 3 sought to further understand such impact. Research Proposition 2 sought to describe and identify whether voice or social capital-trust affected the impact of regulatory change upon entrepreneurial opportunity. Research Proposition 3 considered the influence of regulatory type on the impact of regulatory change upon entrepreneurial opportunity.

Research Proposition 1

Research Proposition 1 posited that:

> **"Transformative regulatory change, in the form of the NTAct, impacts entrepreneurial opportunity, in the form of new venture starts, among the category of persons benefitted by the regulatory change i.e. native title claimants"**

The veracity of this Research Proposition was tested by contrasting the dependent variable, *transformative regulatory change*, with the independent variable, *entrepreneurial opportunity*.

This Study selected regulatory change (NTAct) as the dependent variable. The Benefit Group of NTAct regulatory change was the Claim Group. The independent variable (entrepreneurial opportunity) was measured by new venture start. Shane considers entrepreneurs to be "people who found new businesses" (Shane 2008, 3). The research, examining a sample from within the regulatory Benefit Group, studied the experience of different native title claim groups and differences between these groups (Shane 2008, Kelleher 2009a). This involved a description of their experience with NTAct and its impact upon entrepreneurial opportunity, with focus on key elements of analysis derived from the literature review and described in Schumpeter.

Research Proposition 2

Research Proposition 2 posited that:

> **"The impact of transformative regulatory change upon entrepreneurial opportunity is affected by voice and social capital-trust"**

The veracity of this Research Proposition was tested by contrasting the dependent variable, *transformative regulatory change*, with the independent variable, *entrepreneurial opportunity*, observed against the intervening variables of *voice and social capital-trust*. As with Research Proposition 1, it was demonstrated by selection of the NTAct regulatory change and used new venture starts among the Benefit Group as evidence of entrepreneurial opportunity. Elements of the intervening variables were the focus of particular exploration and description and used as descriptors with the data examined against these elements.

Research Proposition 3

Research Proposition 3 posited that:

> **"Transformative regulatory change impacts entrepreneurial opportunity according to the type of regulatory change"**

The veracity of this Research Proposition was tested by contrasting the dependent variable, *transformative regulatory change*, with the independent variable, *entrepreneurial*

opportunity. In this Proposition, it was *regulatory type* that was the intervening variable. Thus, NTAct was examined and assessed against the Regulatory Type elements identified from the Literature Review.

3.3 METHOD – *What is the Data that Can Answer the Question?*

The next key methodological question was - '*What is the Data that Can Answer the Question?"*. This proved to be a complex question involving early exploration of a variety of options that ultimately proved impossible or inappropriate.

3.3.1 Quantitative Exploration

The researcher expected at the outset to find a dramatic impact of regulatory change on entrepreneurial opportunity, with a large amount of data and many new ventures. Nearly two decades had passed since enactment and she was confident that across widespread areas of Australia she would find that its impact had been very positive. Her view reflected widely held views among white Australians not directly involved with Aboriginal people or native title itself. She sought the objective evidence that would confirm this finding, adopting a positivist philosophy and intending to use a quantitative methodology. She sought Aboriginal business statistics from the Australian Bureau of Statistics (ABS), intending to compare this data according to postcode with the locations of completed 'successful' native title determinations. However, it emerged that native title determinations used lengthy survey co-ordinates and mapping descriptors that were difficult to fit with postcode areas. Further, at that time, ABS did not collect statistics on Aboriginal business and, even had it been possible to somehow extract the data from ABS business statistics, postcode number was too large a grid when compared to the then relatively tiny parcels of land that emerged as the extent of native title grants. Although substantially greater areas now exist, at the outset of this research, the parcels were pinpricks on the Australian map. It also emerged that, whilst earlier researchers had pointed to these important statistical gaps, they had not been addressed (Commonwealth of Australia 2009c, Foley & Hunter 2008, Taylor 2002). These calls for addressing such gaps highlight the difficulties they present for comparative studies or contextualising new research.

Examination of an initial sample of native title determinations revealed that it was not possible, from the public record, to gain an accurate picture of the post-NTAct scenario.

Many Determinations simply recited Final Orders without details and it became clear that the operation of NTAct, rather than "giving land back" by recognising native title, operated so as to tie recognition determinations into agreements which were noted publicly but not routinely available (Corbett & O'Faircheallaigh 2006, O'Fearcheallaigh 2007 O'Faircheallaigh & Corbett 2005). Even where agreements were publicly available, it was extremely difficult from the document alone to identify precisely where the land was located in relation to ABS statistical area and whether, and to what extent, an Aboriginal new venture had actually begun following execution of the agreement.

From this it became clear that such quantitative research, difficult in itself, would provide no accurate answer to the Research Question. It also demonstrated that the Research Question itself was an emergent one, even within the native title field, as even the most basic, preliminary data and measures did not yet exist (Davidsson 2005). At best, such research would provide only past data, but little insight into the impact of the regulatory change upon entrepreneurial opportunity. The researcher, from this early exploration of quantitative methods, gained a sense that something more subtle was at play. There had to be some explanation for why, after substantially more than a decade, it had been considered unimportant to compile even basic statistical or survey co-ordinate data relevant to either Aboriginal business or native title outcomes. There was such a paucity of research, data and measures that human behaviours and societal attitudes appeared to be at work. The researcher was drawn to the conclusion that the appropriate research method needed to get behind such behaviours and attitudes, to secure sufficient understandings and meanings to address the Research Question.

Further, in reflecting upon the philosophical purpose of the research itself, the researcher clarified that her aim was to explore and describe what had been written and documented relevant to the Research Question and, particularly, to listen to experiences of the impact of regulatory change upon entrepreneurial opportunity and describe what she found. A key principle of this Study was to keep the space for insight open and avoid points of reference against which knowledge would be judged 'right' (Morgan 1983). The research goal was to describe, explain, explore and, if possible from analysis, apply the data by way of practical guidelines (Blaikie 2009). Mathematical explanations of cause-and-effect relationships would be unable to explain. At best they would provide a compact description of any underlying

model and, within this research setting, could prove misleading (Alizadeh & Riege 1997, Hofer & Bygrave 1992).

The purpose of research can be explanatory, exploratory, descriptive, analytical or predictive (Collis & Hussey 2009, p. 3-4). *Exploratory* research seeks to define the nature of usually ambiguous problems, aiming to identify patterns and develop, rather than test, hypotheses. *Descriptive* research is used to identify and describe characteristics of a population or phenomenon. *Analytical* (explanatory or causal) research extends descriptive research by analysing and explaining why or how the subject of the descriptive research occurs, seeking to understand phenomena by discovering and assessing the relative importance of causal relationships. *Predictive* research extends causal research by forecasting the likelihood of the event occurring in the future, aiming to generalise by predicting phenomena (Hussey & Hussey 1997, Patton 1990, Zikmund 1994).

In this Study, with such a paucity of measurable data, exploratory and descriptive research would better lead to understandings of whether transformative regulatory change impacts upon entrepreneurial opportunity.

3.3.2 Qualitative Explorations

By choosing qualitative explorations, the researcher sought to unlock a rich and deep understanding of human behaviour associated with the phenomena and the complex associated human and societal intertwinings and linkages involved with it. It was considered that to best unlock and explain meaning, the actual experience of those most closely involved needed to be actively heard in order to achieve accuracy and ensure that no 'normative' or restrictive description crept into the analysis. Thus, the key experience to unlock was that of the regulatory change Benefit Group - the native title claim groups themselves.

Initially, the researcher proposed an action research methodology, working with an Aboriginal Claim Group and/or their existing lawyers as their claim progressed or a new venture was initiated. In this way, she would engage with the Benefit Group in an inductive and deductive process of reasoning and analysis involving an action, then reflection, evaluation and new planned action. However, over time, it came to be obvious that this would not only be intrusive, but entirely inappropriate. As discussed above, the very Research Question itself appeared to have received limited consideration in the entrepreneurship literature and virtually

none in the legal. Further, there was limited published information concerning the impact of the NTAct on economic outcome and almost none as to its impact on entrepreneurial opportunity. From an early stage, the researcher was surprised to find that the experiences of those involved in the NTAct process did not appear to have been recorded. This came as a shock to the researcher who had assumed that those charged with responsibility for the administration of the regulatory change would be monitoring its impact and were suitably resourced to do so. This assumption (again shared by very many Australians) proved to be profoundly incorrect and preliminary research indicated very negative and sad experiences.

> "It's just a river of pain, a river of hopelessness" (Kelleher 2010, p. 5).

Benefit Groups were heavily burdened with their Claims, facing oppressive time and financial constraints, not only in NTAct matters but also cultural heritage, housing, education and community concerns. The entire native title system was openly acknowledged, including by those charged with and resourced to undertake its administration, to be suffering from serious underfunding (French 2008). After only limited research, the researcher learnt that NTAct was actually burdensome, time-consuming, expensive and stressful. Clearly, any action research project would not only be premature, but discourteous and potentially arrogant. It was inappropriate to seek to engage with native title claimants (in the reflective process of reasoning, analysis, reflection and evaluation required for action research) when, not only did the basic regulatory and entrepreneurship theory still require exploration and description, but the impact of NTAct on Aboriginal economic outcomes, let alone entrepreneurial opportunity, appeared unknown for native title claimants. This was the primary reason for the researcher's decision to reject action research. However, Professor Shane's reservations concerning blurred distinctions between consultancy and research were also considered (Kelleher 2009a).

Experimentation was briefly considered, especially given its potential benefit to entrepreneurship scholarship (Acs et al 2010, Davidsson 2005, Kelleher 2009a, Schade & Burmeister-Lamp 2009). However, this was rejected due to difficulties of creating real life simulation of regulatory change as well as ethical issues involving Aboriginal native title claimants.

Ethnography might potentially have been an appropriate alternative method because it seeks to describe the nature of those who are studied and this Research Question potentially involved the nature, culture and day-to-day business setting of the Benefit Groups. However,

it was doubtful whether the researcher had appropriate professional expertise to be describing the nature of anyone, be they entrepreneur, native title claimant or otherwise. This method appeared somewhat presumptuous and potentially disrespectful and, almost certainly, would have rendered the researcher a nuisance to those native title claimants being researched. Importantly, by its focus on the nature of those studied, it harkened to the out-dated heuristic approach to entrepreneurial opportunity. For these reasons, an ethnographic method was rejected.

3.3.3 Case Study

The above process confirmed that both quantitative research and a number of qualitative research techniques were unsuitable. What was needed was rich, descriptive data that required listening to the voice of those closest to the impact of the regulatory change itself. This was best done using extrinsic case-based research that involved a Research Question, a puzzlement, a need for general understanding and a sense that one may get an insight into the question by studying a particular case (Stake 1995). Case-based research is appropriate for practical business situations such as entrepreneurship, because as a contemporary phenomenon, it fits into dynamic changing real-life contexts, with unclear boundaries of people, period, place and process (Hine & Carson 2007, Yin 1994). Using alternate and multiple sources of evidence, the researcher adopted a middle ground between inductive and deductive elements of theory-testing, beginning with the initial theory and confirming it, but leaving final theory testing to later researchers (Carson 2001, p. 96).

The case study is efficient where general conclusions can be drawn from a limited number of cases. It is also useful for the 'landmark' case, such as a leading court determination or to describe a unique solution to a particular issue. Its key advantage is 'holism', the ability to study different aspects of a phenomenon in relation to each other and within its total environment (Stake 2000). For this reason, it is particularly desirable for studying processes occurring within entities and for exploratory research.

The case study is an optimum technique when working with reality rather than abstracts, because it recognises the complexity of social truths and conflicts between perspectives, whilst maintaining an action orientation emphasis. It facilitates an in-depth appreciation of phenomena, described through narrative, within their natural context and includes the perspective of the various participants (Brigley 1995, Leedy 1997). It is also particularly

attractive where the researcher's own knowledge and experience can assist in developing generalised positions (Hofer & Bygrave 1992).

The case study has been identified as particularly appropriate for the study of entrepreneurship because:

1. The state of learning concerning entrepreneurship is pre-paradigmatic and research should focus on theory construction not verification. Case study assists theory-building, because it enables flexible interaction between data and theory;
2. Entrepreneurship is, by its nature, better understood by giving voice to those living through the phenomena and listening to and interpreting precisely from their experiences and beliefs (Perry, Alizadeh & Reige 1997);
3. The heterogeneity of the phenomenon recommends close up information to enable valid abstractions and generalisations (Davidsson 2005, p. 3)
4. Entrepreneurship research is not where it needs to be in regard to reliable and valid concepts and measures (Busenitz 2003, Crook et al 2010, Davidsson 2005);
5. Entrepreneurship often concerns events that are infrequent, unanticipated and/or extraordinary (Davidsson 2005, p.3).

These features of case study method confirm its appropriateness to achieve exploration and description required as a base to build elements for measurement (Perry, Alizadeh & Reige 1997).

The limitations of the case study method are that it produces purely 'local' knowledge, even if that knowledge is internally valid. It lacks statistical validity and the representativeness required to test a hypothesis or extrapolate generalisations. As it is hard to replicate, it is also vulnerable to unreliability (Gummerson 1991, Patton 1990, Susman & Everard 1978, Yin 1994). While this will remain a limitation of this Study, the principles of triangulation were applied to minimise these limitation. These are discussed in 3.3.3.1 below.

Having chosen the case study method, attention was required to concepts of validity, reliability and generalizability, which also involve some theoretical debate. According to the phenomenological viewpoint, these concepts require full access to data, knowledge and meanings to ensure that similar observations could be made by different researchers on different occasions. It is only through deep access to knowledge and meanings that ideas and

theories generated in one setting will apply in others (Easterby-Smith, Thorpe & Jackson 2008).

The researcher was at all times driven by Professor Shane's view that it was necessary to do correct research, no matter how difficult, rather than compromising the required research to fit what was convenient (Kelleher 2009a). Attention was given to data selection, as well as issues of sampling for creating and recording the data.

In order to completely resource and inform the Case Study enquiry, its first phase was to contextualise the regulatory change under study within its entrepreneurial setting. This comprised a description of the regulatory change, comprising NTAct's background, rationale and key provisions together with an overview of the extensive literature concerning its opportunities, threats, strengths and weaknesses. From this, the Case Study enquiry also required an overview of the broad entrepreneurial setting within which the regulatory Benefit Group might experience impact. This first, contextual phase of the Case Study formed Chapter 4. Informed by this wider discourse, the Case Study proceeded to data collection in Chapter 5 using Documentary Review and Interviews and analysis in Chapter 6.

3.3.3.1 *Triangulation*

Triangulation is the accumulation of complementary data sets using multiple different approaches and techniques in the same study in order to improve the validity and reliability of a case study. It can include any or all of the following - the same method of data collection on different occasions or by several different researchers from different sources. Triangulation diversifies data so as to develop multiple theories about the same Research Question (Easterby-Smith, Thorpe & Jackson 2008).

This Study sought to enhance its validity and reliability using triangulation. It used data collection at different times and incorporated the work of other researchers.

The Documentary Review involved two different data sources, collected at different times for entirely different purposes. The four earlier case studies were undertaken between 2007 and 2010 by four separate researchers for a variety of differing purposes. The Judicial Record comprised an entirely separate data set that extended over NTAct's life for purposes of judicial administration with data not considered in the earlier case studies.

The Interview data was collected on different occasions from four different and geographically diverse Benefit Groups.

In all, data was collected concerning six native title Claim Groups. Thus, this Study draws on data collected from more than one researcher across six diverse Groups, using multiple different approaches and techniques, comparing and contrasting data sets, so as to develop a typology guiding general theory to explore the Research Question and Research Propositions.

Each of the data collection techniques is detailed below – 3.3.3.2 (Documentary Review) and 3.3.3.3 (Interview).

3.3.3.2 *Documentary Review*

Documentary review is a method which informs enquiry and resources self-education (Collis and Hussey 2009; Neuman 1997). This method recommended itself because the Study involves elements of law and jurisprudence, requiring analysis of legislation and case law. Law is formulated and announced in writings which "sometimes exhibit a density, complexity and open-endedness comparable to what one finds in literary works" (Posner 2009, 1). The documentary review technique, hermeneutics, is critical to opening up questioning as to what was said and not said, who was saying what and in what way and, in this way, achieving deep richer understanding. It offered an important tool for exploring the possible influences of the intervening variables given their intricate links with societal dialogue and communication.

Hermeneutics is a tradition that enables one to interpret text and, through literal and purposive approaches, frame an understanding of assumptions, prejudices, presuppositions and silences. Its origins lie with the Greek god Hermes, messenger to the Gods who invented language and speech to mediate between them (Couzen-Hoy 1981). It derives from the Greek word for 'translate' or 'interpret' (Grondin 1994). Some scholars argue that law constitutes a particular form of hermeneutics with interpretation central to legal theory and practice (Dworkin 1997, Dworkin 1996, Dworkin 1986, cf Bork 1996, Fish 1995, Fish 1982).

Earlier hermeneutic approaches focused on interpretation with variations of emphasis and whether the text, or any part of it, could be understood without reference to the entirety. Contemporary hermeneutics shifted to encompass not only the written text, but everything involved in the interpretative process, including historical and social forces, verbal and nonverbal communication as well as pre-suppositions, pre-understandings, the meaning and

philosophy of language and semiotics as well as experience, reflection and new perspectives (Gadamer 1975, Grondin 1994, Ricoeur 1975 [1978]) Contemporary approaches value the interaction and communication of the whole discourse or world-view from which any given text originates (Habermas [1981] 1984).

Hermeneutics has become a cornerstone of critical theory to aid identification of less obvious interactions and proscribing practices in discourse so as to differently perceive points of departure and ontological and epistemological premises (Bell 1995, Bell 1997, Foley 2006, Haggis 2004, Huggins 2009, Moreton-Robinson 2003, Moreton-Robinson 1999).

Nevertheless, as Derrida warned, the more that meaning is sought in a text, the more the text deconstructs itself into other possible meanings, thus perpetually deferring the meaning (Derrida [1967] 2011, Derrida [1967] 1974, [1967] 1978). Some thinkers who seek a direct non-mediated way of *being* in the world, rather than simply a way of *knowing*, find it provides more existential understandings (Heidegger [1927] 1962). However, it has also been observed that no-one can ever step outside one's tradition, but being alien to a particular tradition is a condition of understanding (Gadamer 1975).

This Study remained particularly alert to Aboriginal voice wherever expressed, even if only as a sideline, in using the hermeneutic method. For this reason, whilst drawing extensively on the enormous volume of substantial and excellent non-Aboriginal text, this Study extracted Aboriginal commentary which, given its scarcity, resulted in *proportionally* less focus on non-Aboriginal comment. It also tended to record and describe Aboriginal commentary, rather than attempting to deconstruct its meaning.

3.3.3.3 *Interviews*

The Interviews enabled the Study to verify outcomes from documentary review and ensure comprehensive descriptions by the Benefit Group itself as to the actual lived experience of the impact of the regulatory change upon entrepreneurial opportunity. Not only is this important to validity and reliability, but as the 'voice' literature confirmed, listening influences what is considered relevant to the debate with potentially profound effects (2.7.1). The Interview technique sees the researcher research by entering the field and gathering information, identifying themes from those experiences and creating a description of the identifying themes that form a 'pattern model' of explanation.

3.3.4 Summary: Method

This Study compares and contrasts data collected across three quite differently constituted data sources prepared at different dates, by different researchers for different collection purposes and encompassing six markedly diverse Benefit Groups. From this, multiple points of theoretical and practical guidance can be expected to be developed about the Research Question.

3.4 DATA COLLECTION METHOD – *How Do I Gather that Data?*

With selection of the case study method and collection techniques, attention turned to gathering appropriate data. Those chosen for study were not selected by statistical determination or random sampling but using purposeful sampling which includes many strategies. This Study selected as most appropriate the two known as maximum variation and extreme cases (Carson et al 2001, Eisenhardt 1989, Patton 1990). The number of cases was not itself crucial but the significant feature was the ability to import a 'replication logic' sufficient to justify generalisation. Relevance rather than representativeness was the criterion for case selection (Carson et al 2001, Stake 1995). The study operated above the minimum sample size of two and below the maximum of fifteen which scholars of case study method consider acceptable (Eisenhardt 1989, Hedges 1985, Miles & Huberman 1994, Patton 1990). Geographical diversity also gave confidence for analytic generalisation (Miles & Huberman 1994). The use of six different native title Claim Groups enabled identification of aspects unique to any one Group with the evidence from multiple cases permitting cross-case comparison that was generally more compelling (Yin 2009). Depth of information, rather than breadth, was pivotal to fuller and deeper understanding of issues and subtleties (Glaser & Strauss 1967). Aboriginal commentary received comprehensive attention.

The six cases represented all but one of the Australian States and one of its Territories, across wide geographical areas. At selection, the Groups included small and large claim areas, city, rural and remote locations and a mix of completed and uncompleted claims across a range of entrepreneurial stimulants and constraints, ensuring representation of a cross-section, displaying both stimulating and inhibiting factors, relevant to entrepreneurial opportunity. As stated above (3.3.3.2), this Study highlighted the Aboriginal voice, even where only a side-

reference or comment in passing, as a way of attempting to ensure a balance of input into the Research Question.

3.4.1 Documentary Review

This Study's Documentary Review involved two discrete forms of data– four Earlier Case Studies (ECS) and the Judicial Record.

3.4.1.1 *ECS Data*

Each ECS examined enterprise in a Benefit Group following a native title claim and was chosen because it described enterprise ramifications for Aboriginal groups after a native title determination, including descriptions of business venturing arising from a native title determination process and a journey to a successful native title determination in terms that related to its commercial outcome (Memmott 2010, Memmott & Blackwood 2008, Sullivan 2007, Weir 2009).

3.4.1.2 *Judicial Record*

The Judicial Record was obtained for all six groups studied in any other way in this Study ie via ECS or Interview. This was not a general or jurisprudential study of the Judicial Record or native title law. Its purpose rather was to explore the 'seed' point at which the regulatory benefit triggered and from which any 'impact' would take legal root.

Federal Court Rules permit a person who is not a party to a proceeding to inspect an originating application or cross-claim, a pleading or its particulars, a statement of agreed facts, an interlocutory application, a Court judgment or order, a notice of appeal or cross appeal, an affidavit accompanying a native title application, an extract from the register of native title claims received by the court from the native title registrar, reasons for judgment and various procedural documents (Rule 2.32(2) Federal Court Rules 2011).

The NNTT maintains three public registers for all Claims being for Approved Determinations, Registered Native Title Claims and Indigenous Land Use Agreements and maps relevant to claim, determination and ILUA areas (ILUA).(S194 NTAct). Online searches may be made of the Tribunal's databases which contain summary information of applications, determinations, registration test decision, future act application, future act determinations and ILUAs.

3.4.2 Interviews

All Interviews were with an Elder of the Claim Group. The Study did not seek to address the methodology used to appoint the Claim Group Applicant(s) or grant status to the Elder and the research made the assumption that such factors did not impact research outcomes. Careful attention was required as to how to secure interviews at all, and in order to optimise effective, rather than, 'token' dialogue. To ensure that, as far as possible, there was a direct and independent relationship between the interviewees and the researcher, contact with non-Aboriginal people, eg their advisors, anthropologist, archaeologists, community workers or self-styled 'trusted outsiders', was kept to an absolute minimum. The researcher sought an Aboriginal narrative that, when analysed, would enable a fuller understanding of the Research Question than ever provided before.

It seemed that no one had previously actively asked these interviewees about the NTAct experience and certainly not in regard to its impact upon entrepreneurial opportunity. The voice of Aboriginal people provided important new data that went well beyond data available from the documentary review.

In this Study, Interview means a semi-structured conversation formed by a common set of questions to which answers are secured (Carson et al 2001, Yin 2009). The structure of the generic probe questions used the relevant elements emergent from the literature, with interviewees directed towards the experiences of their Claim Group. The limitations of questionnaire-based research are well known – interviewees' answers may not reflect their actual behaviours or attitudes as the questions may provide limited opportunity to probe, beyond the answer, to more subtle dimensions. To avoid this, the generic probe questions were used but with attention paid to the particular stimulating or constraining factors which the interviewees mentioned as significant during their interview (Carson et al 2001, p. 101, Easterby-Smith, Thorpe & Jackson 2008).

Interviews started in a general way as inductive, seeking to encourage the interviewee to express views. Only one interview was conducted with each respondent. Each interview was recorded in its entirety by use of a digital recorder and interviewees were provided with transcript and, once analysed and written, the researcher's draft findings. There was ample opportunity for the interviewee to further respond to both. Analysis of the interview involved

deductions and inferences made, from the expressed view of the interviewees, that confirmed, disconfirmed and offered conclusions as to the Research Question.
These narratives uniquely embodied the concrete experience of individuals and communities and provided a resonant context for assumptions behind judgement. Some scholars, particularly of legal theory, highly value such narrative (Brooks 1996, p. 16).

> "Narration need not be theoretical, but it forces the theoretician to theorise *about something concrete*. If its form is simple, it can be used to convey highly complex contents … as it forces us to transcend that analytic stage, at which we stop too often, and to move towards synthesis" (Bertaux 1981, p. 44).

The validity, meaningfulness and insights of this Study were significantly enhanced by the uniqueness, first-time-askedness and information richness of these interviews, particularly within the setting provided by the documentary review data. Rather than increasing sample size, emphasis was placed on the researcher's observational and analytical focus (Patton 1990, Carson et al 2001).

3.4.2.1. Interview Field Protocols

The researcher interviewed four Elders. Although men and women were interviewed, for reasons of privacy, the Study used the male personal pronoun regardless of gender.

The process which led to the selection of the interviewees aimed at replication, but also as discussed below (3.5) took account of Aboriginal research method and the establishment of relatedness. The interviews were administered by the researcher in person, in two cases 'on country' within the claim area, in another very close to 'country' and one in a capital city. The formal interview was scheduled to occupy one hour.

The field protocols aimed to increase the reliability of the case studies (Perry & Coote 1994, Yin 2009). Relevant stimulants and inhibiting factors received special scrutiny by using semi-structured interviews that achieved greater rigor than possible with open questions and assisted analysis and constant comparative coding (Glaser & Strauss 1967).

Whilst the interview encompassed the pre-prepared 'probe' questions, these framed the edge of a free discussion as it was clear from the outset that a 'systematic' interview working through each of the questions in their order, with a predetermined time to each, would be both

impossible and unproductive. These interviews were better described as conversations with the interviewee managing the dialogue beyond both the general topic and the 'probe' questions (Cherry 2005). All interviews actually exceeded one hour.

In two cases, the interviewee deliberately arranged a third party from outside the Claim Group to sit in on the interview and, in both instances, actively drew this person into the interview. It is not clear why this occurred. The researcher sensed that it may have reduced the pressure and stress that the issues raised in the interview might cause to the interviewee. Alternatively, or additionally, it may have been that Aboriginals culturally use the group as an integral part of the knowledge passing process or to assist the Elder work through complex ideas.

3.5 ABORIGINAL RESEARCH METHODS – *What Data Issues Arise?*

The regulatory change chosen for study raised particular methodological features generally overlooked outside cross cultural research, but worthy of broad methodological consideration to avoid unrecognised assumptions. Martin's work on Aboriginal research methods provided excellent guidance to notions of research as ceremony and relatedness, involving important processes for gaining access and becoming known (Martin 2008).

3.5.1 Research as Ceremony

Martin studied the ontology, epistemology and axiology of her People, the Noonuccal People of Quandamoopah in south-east Queensland. Her work reveals that Aboriginal research or new knowledge acquisition is ceremony and consists of a number of discernible phases, each with protocols to be observed and honoured (Martin 2008, Wilson 2009).

This Study confirms Martin's findings which certainly reflected the author's experience. For example, one Elder whom the researcher had known for a long time, approached his interview with many of the elements of ceremony. He was careful as to when and where the interview would proceed. It occurred in a simple, open air, informal place on his country at a familiar location by the campfire, a place where stories are told and issues of concern are raised and debated. The situation was sheltered and comfortable, with the billy boiling and a cup of tea in hand. The day chosen by the Elder, despite the researcher's many earlier requests, was just before the end of the researcher's six days on country in connection with an unrelated project. The Elder and the researcher had known each other for some nine years. Both had known for

months the request for and purpose of the interview. Nevertheless, the interview did not begin without the Elder engaging in banter unrelated to the known interview topic, but of a kind that demanded that the researcher wait and once again demonstrate respect. It was being made quite clear to the researcher that a kindness was being extended to her, in allowing her to ask questions and be given new knowledge and that this interview was a privilege arising from the relationship, which she should not assume or presume upon too far. It operated to equalise power between interviewee and researcher.

3.5.2 Relatedness

Given this concept of ceremony, Martin recommends certain research methodologies for western researchers wishing to undertake research with Aboriginal people, identifying the challenge as being to engage:

> "an interface where conceptual, cultural and historical context converge, or come alongside each other, based on different forms of relatedness to knowledge, to research and to self" (Martin 2008, p. 7).

She urged the researcher to work from a relatedness so as to neutralise power over those being researched by adopting a stronger dialogic and self-reflexive researcher role (Martin 2008, p. 6 - 8). She identified the use of "Storywork" as a culturally safe, respectful and relevant research method based on Aboriginal epistemology, axiology and communication protocols (Archibald 2001). Storywork is not just a method of collecting data, but a discourse where relatedness is engaged and maintained. It is not interviewing or narrative inquiry and goes beyond the dialogue to the processes engaged to gain access and become known to the research participants. This conceptualisation posits a further reason why two interviewees in this Study introduced a third party. It may have been a means by which to facilitate and extend relatedness with the researcher. Western case studies also contain 'ceremony' and 'relatedness' built on 'getting to know' and modes of access but these are invariably assumed or ignored in 'objective' method descriptions, overlooked in data quality assessment and may influence conclusions.

Martin framed Seven Research Rules for western researchers ensuring Respect for:

- Aboriginal *Land*: which also encompasses respect for the *Waterways, Climate, Animals, Plants* and *Skies;*

- Aboriginal *Laws*: to give honour to the Aboriginal Elders as keepers of their Ancestral laws;
- Aboriginal *Elders*: as the ultimate authority;
- Aboriginal *Culture*: as Aboriginal Ways of Knowing, Ways of Being and Ways of Doing;
- Aboriginal *Community*: acknowledging this as a form of relatedness amongst Aboriginal *People;*
- Aboriginal *Families*: respecting the autonomy and authority of families;
- Aboriginal *Futures*: acknowledging the relatedness of past and present in forming a future and accepting personal responsibility for this relatedness (Martin 2008, p. 6-7).

3.6 ANALYTICAL TECHNIQUES – *How do I Make Sense of the Data?*

With the data collected, the final key methodological question surfaced - *When I have the data, how do I make sense of it?*

Analysing qualitative data presents peculiar problems, with little consensus among scholars even as to the meaning of 'analysis', let alone strategies and techniques and no analytic conventions corresponding with those for analysing quantitative data (Coffey & Atkinson 1996, Robson 1993). The aim of qualitative data analysis is a search for general statements about relationships among categories of data to build grounded theory (Marshall and Rossman 1995).

Narratives can be analysed according to thick and thin descriptions or whether they are open, axial or selective. Some researchers seek to quantify their qualitative data by turning the narrative textual information into numerical data (Hussey & Hussey 1997). Quantifying techniques such as content analysis or repertory grid constructs are sometimes used and non-numerical methods advanced (Coffey & Atkinson 1996, Miles & Huberman 1994). Themes can be constructed, with epiphanies, logic trees and computerised text analysis evolved (Cherry 2005).

This Study did not use formal quantifying techniques, considering them inappropriate analytical tools for the data collected. It considered that such quantifying processes risked loss of depth and richness and, potentially loss of meaning through fragmentation and categorisation (Nakata 2008). It adopted informal quantification to secure meaningful

information and any potential loss of quantitative rigour and data replication needs to be noted as a possible Study limitation (Dey 1998, Miles & Huberman 1994).

3.6.1 Overall Approach

The three data sets were individually described and explored, to derive key identified themes, recurring ideas and patterns relevant to the Research Question and Research Propositions with broad reference to key elements of the literature. ECS and Judicial Record data were not supplemented by any other written materials. The Interviews were supplemented by data including Annual Reports, Management Plans, Government Industry Forecast Reports, strategic and/or review reports, websites, press reports and other available documentary material concerning the Elder, his People, their native title claim and business venturing. Each interviewee also either gave or referred to additional documents which were carefully examined after the interview. This was consistent with Martin's approach to Aboriginal research relatedness and guidelines for western researchers (Martin 2008, p. 4).

The final phase of the Case Study, its data analysis, comprised Chapter 6. The analytic approach to each individual data set was slightly different. Only ECS data could be readily analysed by a manual open-coding process. The Judicial Record provided rich but patchy data, with major gaps. Interviews became stories in their own right. 'Carving them up' placed their richness and quality at risk and threatened data validity. After several attempts to apply some form of constant comparative coding approach to extract patterns and themes along the lines of the other datasets, the better method for individually analysing the Interview data proved to be considering each story intact one by one and then, after taking out irrelevant or background material, merging the four stories. What emerged then was a unique, complex and rich 'combined narrative' that could be analysed according to its own emerging logic, the key themes of which were not reflected in either of the other data sets.

Woven throughout the analysis of the individual data sets were considerations of consistent attention to value, truthfulness and soundness as well as how the researcher, by personal biography, relationship or otherwise, might be shaping events and meanings or altering daily life and whether the setting and sampling remained soundly tied to its rationale. Patterns common to and unique to each data set were recorded and then brought together, suggesting ways of evaluating the Research Question and the three Research Propositions for further testing back through the data.

After analysis of the individual data sets recorded common patterns, all three data sets were combined, reduced, grouped, restructured and decontextualized, in order to derive overall themes and patterns. The aim at this point was to search for categories that were internally consistent and generated from noted regularities but distinct.

In approaching analysis of the combined data and its cross-analysis, it was initially proposed to identify a series of codes by means of a manual open-coding process, with coding focussed on the data's relevance to each of the dependant, independent and intervening variables, as well as the emergent themes from each data set. The aim of this process was to further note and conceptualise relevant phenomena, collecting examples, and analyse them as a whole for commonalities, differences, patterns and structures, expanding, transforming and re-contextualising to facilitate more diverse analytic possibilities (Glaser & Strauss 1967).

The main qualitative software analysis package used in Australia is NVivo. Use of this package was examined, but as the Case Study involved three differently collected data sources this was difficult. In particular, as much of the legal and other documentary data was paper based and lengthy, this made using NVivo impractical for the purposes of analysis. The files would have needed to be scanned and imported into the program. Being so large, the researcher was advised that very likely NVivo 9 would have become unstable with the amount of imported information. Whilst it was subsequently reported that NVivo 10 is much more stable and less prone to crashing, this version was only released in June 2012, by which time the analysis was complete.

The researcher then searched for suitable analytical tools or techniques but could find none, as the literature revealed only limited research at all into the sequelae of regulatory change. New tools were framed from the Key Elements recorded throughout the literature review to aid further data analysis. These were:

1. a Key Indicia Matrix (KI Matrix) derived primarily from entrepreneurship theory and the literature focussed on entrepreneurial opportunity;

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

3. Impact Key Elements derived from the impact factors across the literature.

As predicted by tenets of grounded theory, analysis iterated between the literature and the data, evolving and broadening throughout the study to embrace a wider variety of responses (Glaser & Strauss 1967). Thus, the researcher began with the KIMatrix but found that, whilst illustrative of entrepreneurial features of the combined data, it insufficiently addressed the Research Question. The researcher then returned to the literature seeking out elements of enquiry from which the data could be further interrogated. This led to formulation of the Regulatory Prism and its Elements. When this tool iterated from the literature was applied to the combined data, it most effectively drew out new and valuable patterns and themes, enabling further rich analysis. However, even this did not completely explore impact, so there was a further return to the literature from which the Impact Elements emerged and around which the data was once again interrogated, revealing final shards of important insight.

Interrogating the data using these tools considerably deepened the analysis, providing opportunities for alternative explanations and disconfirming as well as the search for internal and external divergence (Guba 1978). Each phase of data analysis entailed data reduction to measurable chunks and interpretation to bring meaning and insight, with care to guard against losing the serendipitous finding. As patterns and themes emerged from the analysis using these tools, relationships were considered between the different categories. These were not the exhaustive and mutually exclusive categories of the statistician. Apparent patterns were critically challenged through cross analysis of the combined data and reconceptualization with a confirming/disconfirming stage, involving a search for alternative explanations (Carson et al 2001, Eisenhardt 1989, Marshall & Rossman 1995, Yin 2009). The most plausible alternative explanations were assessed. The decontextualized data was reviewed to re-contextualise, using a systematic procedure based on both predetermined and evolving themes and patterns, aided by the Key Elements analytic tools that emerged from the literature. Classifications were crossed with one another to generate new insights, including ‘holes’ in the already-analysed data (Patton 1990). This iterative process searched for internal and external convergence, enabling an evaluation of credibility, usefulness and centrality to evaluate the data and confirm that it was illuminating the Research Question (Guba 1978). It was a vibrant process of induction from the data, by participants in their language and those created by the researcher, to arrive at salient, grounded categories of meaning (Patton 1990). Theoretical sensitivities evolved, as described above, between the initial approach to the study and its analysis phase (Glaser 1978).

From this analysis and cross analysis, described in Chapter 6, important outcomes emerged. These were then synthesised with the contextual first phase of the Case Study, described in Chapter 4, to form insightful, new outcomes from which conclusions were made.

3.7 THE REPORT – Choice of Words

Finally, in the choice of appropriate words to reflect the nature and complexity of the data, the Study utilised the interpretative act, lending meaning by shaping and forming the analysis into the report document itself. Van Maanen identified three different genres in qualitative writing:

- *realist tales* that describe a third-person account in a voice with clear separation of researcher and researched;
- *confessional tales* that describe a highly personalised account in a voice with emphasis on the author's powers of observation and disciplined field habits; and
- *impressionist tales* that describe the researcher's experiences in the field in a voice that blurs separation of researcher and researched (Van Maanen 2011).

Consideration was given to the form of writing that would best reflect the data's quality and significance. The *realist tales* genre was selected, with occasional use of *impressionist tales*.

3.8 ETHICAL CONSIDERATIONS

Ethical considerations arose from the nature of business research as well as research with Aboriginals. The ethical implications of business research included issues such as informed consent, privacy/ confidentiality and deception/misrepresentation.

Methods for informed consent involved adherence to University Ethics protocols, incorporating its additional principles for Aboriginal research. All interviewees were told of the research purpose and the breadth and nature of its enquiry. They were informed that they could withdraw at any time. No respondent was personally identified and responses were confidential. Active steps were taken to ensure privacy including, after analysis, the mixing of data in the writing. The Human Experimentation Ethics Committee of RMIT University approved this research.

Methods for addressing privacy and confidentiality involved participant anonymity and data confidentiality (Reynolds 1982). Although Documentary Review necessarily concerned information already in the public domain and to which issues of privacy did not arise, methods for addressing deception or misrepresentation involved cross-checking data against the publicly available documentary record.

3.9 METHODOLOGICAL RESEARCH LIMITATIONS

The study was limited because the absence of relevant statistical data prevented quantitative verification (Commonwealth of Australia 2009c, Foley & Hunter 2008, Taylor 2002). As with all case study research, despite its use of triangulation, this Study carries risks to validity and reliability by its small sample group. The absence of any robust longitudinal data was an additional limitation. Also as it did not apply quantifying techniques, it may risk loss of quantitative rigour and data replication (Dey 1998, Miles & Huberman 1994). These limitations also present additional limitations in contextualising new research and comparative studies, including differences before and after NTAct, between Indigenous and non-Indigenous entrepreneurship and across Indigenous entrepreneurship studies internationally.

Finally, the western scientific method, by its fragmentation across information categories and isolation of knowledge and data, presents risks that such knowledge may thereby be significantly changed.

SUMMARY

The Study adopted a phenomenological paradigm. It selected NTAct as the transformative regulatory change for study, gathering qualitative data using a Case Study with a sample size of six. The first phase of the Case Study contextualised NTAct within its entrepreneurial setting. The second phase collected data derived partly from Documentary Review (of four Earlier Case Studies and, for all data sets, the Judicial Record) and partly from four Interviews. Careful attention was paid to Aboriginal research methodology. The third phase analysed the data individually and then combined it for cross analysis, including decontextualisation and recontexualisation, aided by the Key Elements tools derived from the literature, to evolve themes and patterns. The overall outcomes and conclusions derived from

this extensive analytic process were then synthesised with the broad context of NTAct and its entrepreneurial setting, leading to new insights and outcomes. This Case Study, data collection and data analysis provided deep rich evidence with which to address the Research Question, providing multiple exciting and important new understandings.

"Of troubles none is greater than to be robbed of one's native land"
Euripides, Medea, line 650-651

Chapter 4

CONTEXT TO NATIVE TITLE ACT

INTRODUCTION

As described in earlier Chapters, the Native Title Act (NTAct) is the transformative regulatory change examined in this Study. The choice of this regulatory change was made from many that could have been selected, for example, Eastern European transition legislation, Thatchers privatisation laws or specific project regulation. The selection process is explained in 1.2, 1.4 and 3.2.1 above and is a research tool for examining the larger issue. Thus, this thesis is not a study of NTAct, beyond its ability to shed light upon the broad Research Question, ie the impact, if any, of regulatory change upon entrepreneurial opportunity.

The regulatory setting and the regulatory schema are themselves extremely complex. It is important to properly understand this background as context to the data collected and analyzed later in this Study. Chapter 4 provides the first phase of this Case Study by reviewing the contextual literature.

In its first section, NTAct's key features are described. It uses a SWOT analysis to filter the strengths, weaknesses, opportunities and threats of NTAct as revealed through the contextual literature. The second section of this Chapter, despite the limitations presented by the absence of statistical data and information, provides a broad overview of business venturing among Australian Aboriginals, again using a SWOT analysis. The final part of the Chapter addresses

the intervening variables to consider contextual literature relevant to Aboriginal experiences of voice, social capital-trust and regulatory type.

4.1 THE NATIVE TITLE ACT (NTAct)

NTAct is the subject of a vast academic and popular literature. No similar transformative regulatory change impacted other Indigenous Peoples internationally. This review of the literature concerning the context to NTAct begins with a historic background, details of the *Mabo Case,* emergence of NTAct and its key provisions. Then, drawing together the extensive commentary and multitudinous views of the literature, it uses a SWOT analysis of NTAct's strengths, weaknesses, opportunities and threats to conclude with links to Schumpeter's conceptual model.

4.1.1 Aboriginal laws

Prior to English occupation of Australia, Aboriginals operated pursuant to a jurisprudence contained in a system of Laws based on a Law of relationship.

> "Situate yourself inside yourself – as the site of law. This must be done to begin to gain any understanding for *feeling lawfulness*. It will be shown how *feeling* (and not emotion) internally galvanizes a person's relationships with other life forms. From this it will be demonstrated how intrinsic the feeling of lawfulness is to the law of relationship and how the law of relationship helps balance energies. Where the feeling of legality, rather than the governance of men is crucial to, as much as a result of, the enactment of the law of relationship" (Parker 2012).

The law of feeling and relationship is intrinsic. Rights and responsibilities are very sophisticated. Advanced Aboriginal legal thinking, in common with many First Nations Peoples, adopts a jurisprudential philosophy that is radically different from western legal systems.

4.1.2 Legal Setting and *Mabo*

Compounding the clash of jurisprudential settings, Australian settlement was itself unique and dramatically different from that of other colonized First Nation Peoples, being quite distinct from the treaty making and overt war setting experienced by Native American Indians of the

north, central and south Americas and the Maori of New Zealand. It ignored the very existence of Aboriginals.

> "The six colonies established on the Australian continent were the only colonies in the history of British colonialism founded without any recognition of the rights of the indigenous peoples to their lands and without any treaties" (Brennan 1998, p. 5).

In 1770, as England raced France for additional territory and wealth opportunities, British sea captain, James Cook, sailed west from New Zealand reaching the southern coast of New South Wales on 20 April 1770. He then sailed north, landing at Botany Bay, a harbor several kilometers south of Sydney Harbour on Australia's east coast. He then charted the Australian coast to the north tip of Queensland. Without more ado, following secret instructions from the British Admiralty, presumably pursuant to emerging European international law principles, on Possession Island on 22 August 1770, he "hoisted English Coulers" and, with three volleys of small Arms, declared the entire coast and adjoining seas to be a British possession (Lord High Admiral of Britain 1768)

Immediately prior to this action, Australia comprised multiple sovereign nations not dissimilar to the national configurations in Europe at the time, each with clear boundaries, different languages and differing laws. These nations had a degree of commonality across the continent, including established arrangements for trade and passage according to their differing individual national laws. Religion was extremely important to all the sovereign nations in both Australia and Europe at the time, but in Australia, without exception, every square meter of land was regarded as sacred.

Upon Cook's return to England, the British Government determined to initiate settlement at Botany Bay. Its instructions to the First Governor on 25th April 1787 were:

> "…You are to endeavor by every possible means to open an intercourse with the natives and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them. And if any of our subjects shall wantonly destroy them or give them any unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment" (King George III 1787, p. 14).

Considerable "interruption in the exercise of their… occupations" did, in fact, occur over following years, decades and centuries. Aborigines were dispossessed parcel by parcel as British settlement expanded. Dispossessed under the new regime, Aboriginals were excluded as voters under it and could not assert their interests within it. Regulation of land ownership and resource management by the settlers was based on the fictional principle that the land belonged to no-one prior to European settlement (Chase 1990, Chesterman & Galligan 1997, Howitt 2001, Kidd 1997). Constitutional change in 1967 brought little alteration to Aboriginal ability to assert rights to land and continued possession.

In extremely limited ways, some elements of Aboriginal law received some regulatory attention, although no recognition of the plurality of these laws has ever occurred. The 1836 Letters Patent, creating the province of South Australia, recognized and protected Aboriginal right to land through the common law and may have recognized a plurality of laws (Berg, 2010, Berg & Bell 2012). Other land right examples are the Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 (SA) and Aboriginal Land Rights (Northern Territory) Act 1976, both of which recognized Aboriginal rights to land but did not acknowledge any force in the Aboriginal Law of the People, with the latter imposing a threshold criterion.

However, in 1992, the High Court of Australia determined that Australian common law recognized Aboriginal 'native title' in land in the case of *Mabo* (*Mabo & Others v Queensland (No. 2)* [1992] HCA 23; (1992) 175 CLR1). This case, known as *Mabo*, was of such significance that it became a household name in Australia. It may be difficult for those outside Australia to understand the turbulence which this decision created and how transformative it was. Aboriginals' very existence had been denied and their native land was largely lost to them. *Mabo* thus fundamentally created a sense of chaos in those who enjoyed property rights over land and those entitled to the new rights. Politicians and bureaucrats struggled to articulate a coherent policy response (Goot & Rowse 1994, Ritter 2009). In some instances, existing legal arrangements were adjusted in anticipation, eg South Australian pastoral leases were altered State-wide to remove long-standing provisions recognizing Aboriginal rights to access and hunt on their traditional land (The Minister for Lands 1990). Large sectors of the community raised alarm that their freehold title was at risk – 'no swimming pool is safe'. There was a sense that *Mabo* could impose land tenure uncertainty

throughout Australia pending resolution of what would be an extensive volume of native title litigation.

As *Mabo* created the opportunity for every Aboriginal Nation that could meet *Mabo* principles to secure Orders recognizing their native title. It was also obvious that it would impose a considerable burden on the Court and litigation stresses upon Aboriginal Plaintiffs (French 2008). The mining industry and the then opposition Liberal and National parties denounced any regulatory change that would directly codify the *Mabo* principles arguing that it would be unworkable because mining, mining exploration and pastoral industries would now have to account to Aboriginals. The alternative view was that regulatory change would fetter the High Court's vision for development of a native title jurisprudence informed by Aboriginal Australians (Berg & Bell 2012). As predicted by Schumpeter, the change wreaked havoc with existing arrangements and powerful elements of society resisted it in order to unashamedly preserve their existing interests.

NTAct was a regulatory response by the Keating Labor Government of the day to the circumstances following *Mabo*. It offered an alternative to the Court Applications commenced by Aboriginal Peoples immediately following *Mabo* and that would have continued in vast numbers into the future, involving extensive Court time, expense to Aboriginals and others whilst creating potential land tenure uncertainty pending resolution. It also provided a process that may have weakened rather than confirmed the native title rights recognised in *Mabo* (Berg & Bell 2012).

NTAct created three major creative/destruction shifts in the Australian business environment. First, it "created" the new native title property right and, thereby, destroyed the Crown's monopoly in its land. Second, a determination recognizing native title required the creation of a new Aboriginal land holding organization, known as a Prescribed Body Corporate (PBC). Third, as native title rights affect Crown land, NTAct created a form of public-private partnership between Government and PBCs in respect of native title land. Finally, it created an obligation to negotiate with native title Claim Groups about any act that in the future could potentially affect native title rights, including any new development project. The NTAct terms such an act a 'Future Act'. These changes were unprecedented, world-first, highly controversial and transformative.

It is difficult to conceive of any regulatory change of a more profound transformative character in any western democracy in contemporary history. It has been equated with titanic English power shifts when the incumbent monarch conceded Parliamentary power to the people (D. Foley 2010). A reverse equivalent might be the Communist land nationalization programs. NTAct was not simply a regulatory change benefitting Aboriginals. It forced a ceding by the Crown (a Destruction) of its monopoly ownership and control of land and created new rights in that same land in favour of the Benefit Group. It also created new judicial and administrative regimes. There was nothing incremental about this regulatory change. An entirely new 'means–end' now existed. The rail lines were irretrievably broken – a regulatory *Bahnbrechen* had occurred.

Although NTAct was significantly amended, and narrowed, following the first High Court 'test' case after its enactment, and subsequently otherwise amended over time, none of the Creation or Destruction described above was altered.

NTAct obviously also slotted into the warp and weft of various existing regulatory schemes including the Racial Discrimination Act 1975 and the Land Rights Acts referred to above, as well as the Australian Constitution. It also came to form a base for complementary State native title schema as well as subsequent State and Federal regulatory change, eg Traditional Owner Settlement Act 2010 (Vic).

NTAct, therefore, provides a significant research constant against which to consider regulatory change impacts upon entrepreneurial opportunity. If Schumpeter is right, it is the very kind of fundamental shift in the exogenous business environment from which one might expect entrepreneurial opportunity to emerge. NTAct's Preamble includes:

> "(Aboriginal peoples) have been progressively dispossessed of their lands. This dispossession occurred largely without compensation … (NTAct, 1)
>
> "The people of Australia intend … to rectify the consequences of past injustices… and to ensure that Aboriginal peoples … receive the full recognition … to which … their prior rights and interests … fully entitle them to aspire." (NTAct, 2)

> "Governments should ... facilitate negotiation … in relation to … proposals for the use of (claimed) land for economic purposes." (NTAct, 3)

A Preamble has been held to be a "continuing declaration of moral foundation" (*Sampi* v. *Western Australia* [2005] FCA 777, para 942). Also, described as a 'foundation principle' of NTAct was that traditional owners would receive similar advice and representation as that available to development proponents (Australian Government 2008).

NTAct contains three key outcomes that directly affect the Benefit Group:

1. Securing Claim – the process by which the Benefit Group must seek to secure that benefit (S13, Parts 3 & 4 NTAct);

2. Post-Determination – the procedures specified after a claim results in native title recognition, including a requirement to establish a Prescribed Body Corporate (PBC) as the native title holding entity (Part 2 Divisions 6 & 7 NTAct);

3. Agreements – before and after Determination recognizing native title (Part 2 Division 3, Part 3 Division 2, Part 8A NTAct).

NTAct also contains provisions concerning extinguishment of native title and validation of past acts (Part 1 Divisions 1-2B), creation of the native title registrar, National Native Title Tribunal (NNTT) and representative bodies (Rep Body) (Parts 5, 6 & 11 NTAct), the native title jurisdiction of the Federal Court (Part 4 NTAct), the new registers (Parts 7-8A NTAct), recognized and equivalent State and Territory bodies (Part 12A) and a Parliamentary Joint Committee on Native Title and the Land Account (Part 12 NTAct) which ceased operations on 23 March 2006 (Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account 2000).

The three segments of direct concern to the Benefit Group are shown in the diagram in **Figure 14** and each of these segments is dealt with separately below.

STAGE 1
1ST Benefit Group
Native Title Groups

STAGE2
2ND Benefit Group
Government

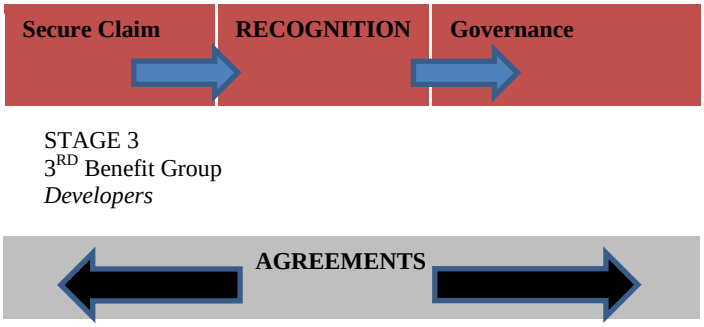

Figure 14: Key Segments of Native Title Act

Source: Researcher

4.1.2.1 *Segment 1 – Securing Claim*

The Federal Court and the NNTT are the judicial institutions established to determine claims (Ss 81 & Division 5 NTAct). Throughout Australia, National Native Title Representative Bodies (Rep Bodies) represent Claim Groups according to a specified area, usually a regional geographical location (Part 11, Division 2 NTAct). A native title determination application is made to the Federal Court (the claim) and after notice of the application is given, "a person who wants to be a party" must notify in writing and will become a party (Part 3 Division 1 NTAct). An interim process certifies the claim for registration. There are provisions for mediation, case management and other interim applications. A successful claimant receives a 'Determination of Native Title'. This is often celebrated with fanfare and media publicity. It generally involves prior execution of one or several agreements between Aboriginal people, Government and third parties. These agreements are known as Indigenous Land Use Agreements (ILUAs). Adopting *Mabo* principles, a claim cannot succeed if native title is deemed to be extinguished.

> "What a remarkable coincidence that, since 1788, actions by the British, State, Territory and Commonwealth governments have 'extinguished' native title in all the prime-land, settled areas of Australia. This 'extinguishment' is without a single cent of compensation payable, despite the fact that vast wealth has been taken from the lands in question over the past 200 years" (G. Foley 2007, p. 138).

4.1.2.2 *Segment 2 – Post-Recognition*

As part of native title Determination, a Prescribed Body Corporate (PBC) must be created to hold the land on behave of the Benefit Group, called at this point the "common law holders"

(Part 2 Division 6 NTAct). This provision in effect creates a public-private partnership or alliance, between the PBC native title holder and the Crown land owner in regard to ongoing management, future use and development and available entrepreneurial opportunity.

4.1.2.3 *Segment 3 - Agreements*

NTAct created a framework within which the Claim or Benefit Group could negotiate future use and development within its claim (S24AA (1) & Division 3 NTAct). Much of the literature considered this to be NTAct's key benefit, because it created a deep-rooted expectation that agreements would contain at least the potential for direct or indirect economic benefits to Aboriginal people (Smith 1997, Ritter 2009, 58-9). Agreement-making is an element of the NTAct's Preamble. It certainly was initially a source of hope and an important political narrative.

However, both the regulatory provisions and their operation severely interfere with free market and competition principles. NTAct provides that the Benefit Group must trade – it cannot walk away from any transaction proposed by another party concerning its land, a 'future act' (S31 (2) NTAct). If it fails to negotiate an agreement within 6 months of notification of a 'future act' (or earlier if expedited by Government (S32)), an 'arbitral body', usually NNTT, will decide the matter (S35 (1) NTAct). (Note: an amendment Bill at exposure draft stage proposes to extend this to eight months, Native Title Amendment Bill 2012, S7). The parties must negotiate their trading agreement in 'good faith' and Aboriginals cannot simply refuse or 'veto' the proposition (S31(1)(b)NTAct).

> "The indicia of good faith negotiation are all centred on the parties meeting, discussing, compromising and actively engaging in discussions." (*Cox v. Western Australia* (2008) 219 FLR 72 para [90]).

The 'arbitral body' has interpreted these 'good faith provisions to require that the conditions requested by the Benefit Group be 'reasonable'. However, although NTAct specifically allows for trading terms referenced to development profits, income or production, the 'arbitral body' almost invariably determines that Aboriginal insistence upon such conditions is not validated (S33 (1) NTAct,). Analysis of agreement-making under NTAct reveals that development almost inevitably secures approval, even with no evidence of its impact, in the face of Aboriginal

objection and often without even modest conditions sought by Aboriginals (Bartlett 2004, Corbett & O'Faircheallaigh 2006). Aboriginal arguments that the terms presented to them are 'far from reasonable when one considers the enormity of the project and the effect it will have on them and their native title rights' are generally unsuccessful. The 'abritral body' has determined it will avoid assessing the trade terms themselves (*Xstrata Coal Queensland Pty Ltd & ors. v. Albury & ors* (2012) [2012] NNTTA 93 (23 August 2012), *Cox v. Western Australia* (2008) 219 FLR 72, *The Griffin Coal Mining Co Pty Ltd v. Nyungar People* ((2005) 196 FLR 319, cf *Western Australia v. Dimer* (2000) 163 FLR 426). The 'arbitral body' limits itself to determining whether the proponent did "receive and consider fairly, dispassionately and proportionately any proposal from a native title party for a payment of the type outlined in s 33(1), but without an obligation to 'capitulate in order to reach agreement'"(*Cox v. Western Australia* (2008) 219 FLR 72 at [38]). It approaches such matters on the basis that it will only consider the fairness of an agreement if the offer was so manifestly unfair as to be a 'sham' or upon evidence that it is so unrealistic that the proponent is not negotiating in good faith (*Xstrata Coal Queensland Pty Ltd & ors. v. Albury & ors* (2012) [2012] NNTTA 93 (23 August 2012), *Cox v. Western Australia* (2008) 219 FLR 72 at [201]).

Some of the literature argues that NTAct is simply creating a consumer transaction (Ritter 2009). However, the consumer can decide not to purchase a consumer item, whereas the native title group is denied even the very right **not** to trade should it so wish. To convert to the consumer analogy, the Group **must** enter the shop and **must** give up something valuable in return for a can of Coke that it may, or **may not, want** or value. If the consumer refuses to enter the shop, the Court will take their money (ie what they value) anyway and may force them to take the Coke or something else they value even less.

Despite the 'foundation principle" that Benefit Group would receive 'similar advice and representation', it is widely acknowledged that what is available to Aboriginals is vastly less than what is available to Government and third party commercial interests (Australian Government 2008, Blowes & Trigger 1999).

The 'right' to negotiate process has been critiqued as fitting within a political tradition, ascendant in the post-Cold War era, favouring Harvard style 'principled negotiation'. Such an approach encourages parties to forget their 'rights' and instead attempt to reconcile their 'interests' with the 'interests' of other stakeholders. It assumes some degree of equality of

power or ‘stake’ that will enable parties to settle differences through ‘neutral’ processes. The Harvard style is less adapted to circumstances of substantial inequality, particularly circumstances where, if one party puts aside its ‘rights’, it is left with nothing (Burnside 2009, also Hamilton 2006). Aboriginals invariably simply seek to protect their country for future generations, provide schooling, health and roads to their People and generally have no land development plans. A negotiation approach that requires them to put aside their limited, hard-won rights and reconcile their ‘interests’ with the ‘interests’ of a well-resourced, Government-supported tangible development project creates unfair pressure to surrender some part of their native title for a much needed, but possibly small short-term, gain for their people (Wooton 1995, p. 116).

4.1.3 Regulatory Impact Assessment (RIA)

Australia’s National Competition Policy was released in 1993, the same year as enactment of the NTAct. 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 NTAct as “not commenced”. In the 2002-2003 report, it becomes listed as “Not commenced/seeking to delist” and, in the 2003-2004 and 2004-2005 reports, an annotation is 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 contains no mention of NTAct (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 contain no mention of NTAct (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 search of this Register for the terms 'native title', 'indigenous' and 'aboriginal' yielded no RIS, exemption or any other document relating to NTAct 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 NTAct and regulations as "Management of land tenure", noting that reveiw 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, recently released for public comment, contains no mention of NTAct (Productivity Commission 2012).

The Australian Government has adopted a three-tiered system for assessing all regulatory and quasi-regulatory proposals (Australian Government 2010a). 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 NTAct. 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 NTAct in recent years (Walker 2012).

4.1.4 NTAct SWOT

To assist in bringing the vast literature critiquing NTAct into focus, the writer used a SWOT analysis. The SWOT is a business analytic tool developed in the 1960s that provides a useful practical means for contextualizing external and internal environmental elements (Bradford 2000, Humphrey 2005, Morrison 2012). Clearly, it applies only to NTAct the sole regulatory change under evaluation. It presents external **opportunities** and threats in relation to internal strengths and weaknesses within a concise statement designed to be a springboard for future strategies enabling **opportunities** to be seen strategically. Although derived from the context literature above, there is the possibility (noted at 3.1) that the SWOT is influenced by the researcher's critical. This SWOT is **Figure 15** over.

4.1.4.1 *Strengths*

NTAct strengths include the **creation** of a new legal right, which is widely regarded as a significant strength that would not exist but for this regulatory change.

It enables Benefit Groups to voice their connection to land with Government funded support acknowledging the value of their traditional stories, knowledge and culture and, through public telling, going some way toward righting past injustices. Recognition of native title has personal and emotional implications that are major strengths.

> "It's the final recognition that I am who I am in the sense that I've been saying and our parents told us and other people told us … " (Weir 2009, 24).
>
> "This feeling that we have now that we're recognised, it does give you a sense of pride … to be recognised by the Federal Court is justice at last, I see it [as] justice at last." (Weir 2009, 34).

Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) reported that native title recognition:

> "has been a strong influence on the increased engagement of Indigenous peoples in the Australian economy and in the development of new enterprises. … Discussions with PBCs revealed that enterprise development, economic development and improving the economic wellbeing of individuals within the groups are key aspirations for native title holders" (AIATSIS 2008a, p. 1).

The vocabulary of rights also offers absorption within mainstream and the possibility of agitating, from within it, a social change - whether given, taken or smuggled (Pritchard 1995).

Benefits include the market reassurances to non-Aboriginal parties that can rebound to provide additional Aboriginal benefit, cumulatively increasing entrepreneurial activity. Aboriginals who may previously have been viewed as a difficult commercial 'externality' are now 'controlled' by a formal process removing uncertainty and potential market failure. Some consider that in this way, a native title market should be more familiar than strange "by

STRENGTHS	**WEAKNESSES**
New Legal Right	Diverts Public Debate
Recognition	Complexity
Voice	Rep Bodies
Claim Alone Generate Benefits	Inadequately Resourced
Segment 1 – **Securing Claim** • Potential Benefit From Process • Telling Traditional Stories, Knowledge and Culture • Public Testimony/ Being Heard • Righting Injustice	Segment 1 – **Securing Claim** • Stressful: 'Divide & Conquer' • Delays: Burdens • Evidentiary Proofs • Cultural Difference
Segment 2 – **Post Orders** • Recognition • Absorption into Mainstream on Own Terms • Market Reassurance • Some Benefit – Land, Security, Money	Segment 2 – **Post Orders** • Recognition Gives Little • Mountains of 'Red Tape' • PBC Operations • Limited Real Economic Gain
Segment 3 – **Agreement** • Rights Exist By Lodging Claim • 'At Table' by Right • Good Agreement Elements	Segment 3 – **Agreement** • Resources Inadequate • Inadequate Economic Development Initiatives • 'Good Faith' Provisions operate unfavourably • Rights traded away on Government Obligations • Flawed and Unequal Partnerships and Alliances

OPPORTUNITIES	THREATS
Recognition	Government Passivity
Leverage	Minimal Initiative
Negotiation	'Seed' support directed inappropriately
Alliances	
Segment 1 – **Securing Claim** • Claimant status	Segment 1 –**Securing Claim** • Extinguishment Risk • Cultural Transformation: Lost Uniqueness • Knowledge/ Language Not Captured
Segment 2 - **Post Orders** • External Recognition • Third Parties Forced to Communicate and Trade • Public-Private Partnership/ Alliance with Government	Segment 2 – **Post Orders** • Investment Disincentives/ Charity status • Talking to 'empty halls' • Entrepreneurial Disincentive
Segment 3 – **Agreement** • Chance for a Deal • Other Parties Must Communicate and Negotiate • Commodity Trading Concept • Other - Flow On Opportunity to Unsuccessful/Non-Claimant Groups - Compels Government Initiatives	Segment 3 – **Agreement** • Limited or negative impact • Inadequate 'deals' • Unequal bargaining • Worn Out: Spread Too Thin

Figure 15: SWOT Analysis of NTAct

Source: Researcher

crystallising customary Indigenous interests as property that could then be traded to developers" (Ritter 2009, p. 49-50).

The requirement for negotiation between Aboriginal Peoples, Government and third party commercial interests is frequently recorded as transformative in itself and a major strength.

> "It is this presence at the table as a holder of rights rather than a beggar of favours that makes the difference..." (Chaney 2002, p. 5).

Essentially NTAct agreement characteristics are that it contains no perverse incentives, is sufficiently flexible for diverse outcomes, meets intergenerational needs and excludes matters that are Government responsibilities (National Native Title Council 2008, p. 3).

4.1.4.2 *Weaknesses*

Rather than its strengths, it is the weaknesses of NTAct that dominate the literature.

> "All of us know the limitations of the native title process … as the wheels of a bureaucracy the size of the Queen Mary come to grips with the concept of traditional ownership..." (Weir 2009, p. 30).

Some writers consider that, since NTAct, Aboriginal voice opposing "the theft of Aboriginal" land is now quiet, with loss of broad public support for full land rights and a general sense that *Mabo* and NTAct have addressed these concerns (Watson 2007, p. 28).

Almost all Aboriginals concerned with NTAct, as well as many of the professionals working with it, find the document impractical and complex. Among Aboriginal communities, simply downloading a copy of the Act, let alone comprehending its two hundred and fifty three sections and Schedule of forty six clauses, and its five hundred and seventy two pages of controls (omitting the vast provisions of the regulations) is an insuperable information barrier. NTAct is produced in the English language and its Benefit Group in all but limited instances lacks legal training, often lacking sophisticated reading and comprehension skills and sometimes using English as their fourth or fifth language. Even highly educated and articulate Aboriginals, like most non-lawyers face massive difficulty in 'taking in' the provisions of complex regulation or its associated legal documentation, eg ILUAs. Even within the legal profession, the degree of complexity of NTAct is reflected in the fact that it is now regarded as its own specialized area of practice, with its own law journals (eg Native Title News, a subscriber service offered by Lexis Nexis (Lexis Nexis 2012), lawyers websites claiming particular expertise and informal expert practitioner groups in existence.

Delays in the hearing of native title cases are legion, with rights denied because key witnesses do not live long enough to provide evidence. This clashes dramatically with strong case management principles of the Courts in core jurisdictions:

> "to facilitate the just resolution of disputes ...as quickly, inexpensively and efficiently as possible" (eg *Federal Court Act 1976*, S37M (1) (b)).

A judicial view concerning case management delay is clear and might usefully be applied to the native title jurisdiction:

> "The proceedings reveal a strange alliance. A party which has a duty to assist the court in achieving certain objectives fails to do so. A court which has a duty to achieve those

> objectives does not achieve them. The torpid languor of one hand washes the drowsy procrastination of the other. Are these phenomena indications of something chronic in the modern state of litigation? Or are they merely acute and atypical breakdowns in an otherwise functional system? Are they signs of a trend, or do they reveal only an anomaly? One hopes for one set of answers. One fears that, in reality, there must be another" (Heydon J para 156 in *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27).

Increasingly, it seems that astute Claim Groups seeking opportunities deliberately keep themselves completely outside the native title system (personal communications Berg 2012, Adelaide, 16 May, Hughes 2012, National Native Title Tribunal Conference, Townsville, 5 June). Benefit Group concern at the operation of Rep Bodies is repeatedly expressed (public discussion at National Native Title conferences 2012 and 2010). Frequently these Rep Bodies actively oppose Benefit Group Applicants or select to side with particular sections within the Group, for example one particular family group.

Despite NTAct's 'foundation principles', resources to Indigenous groups for expert advice, representation and services are severely limited. Over a decade ago, a review of native title representative bodies concluded that they were not "capable of professionally discharging their functions ... within the current funding framework" (Rashid & Corrs Chambers Westgarth 1999). Some Claim Groups meet this resourcing difficulty by allowing a third party commercial interest to meet their legal and other expenses, but this tends to compromise negotiations. There is a scarcity of lawyers competent in the field and capacity is uneven as between regions and among the professionals themselves. Large law firms frequently have an actual or perceived conflict of interest with their existing client portfolio (Wooton 1995). Even good-willed *pro bono* lawyers may be unable to sustain the long-term, intensive commitment to such cases. The Native Title Payments Working Group gave up years ago concluding:

> "the Australian Government is unlikely ever to make *adequate* provision" (Native Title Payments Working Group, 2008, p. 3).

The system is deeply complex. Procedural perambulations baffle all parties and magnify the time, cost and effort of claims (AIATSIS 2008a). Again, over a decade ago, it was recognized that engaging seriously with the process of statutory recognition and protecting traditional rights left Aboriginal communities with little time for actually enjoying them (Solomon 1997). Aboriginals will not consider delegating responsibility for protecting the viability and sustainability of traditional land and waters (O'Faircheallaigh & Corbett 2005, Randall 2003, Brody 2000). Claims registration, intended as quality control to limit parties in development negotiations, often becomes a major, stressful and divisive barrier (Smith & Morphy 2007, 15-16). Overlapping claims reflect the complexity and sophistication of Aboriginal law as well as 'divide and conquer' techniques used by those opposing native title claims in seeding ill-founded overlapping claims (Smith & Morphy 2007, 1-2). AIATSIS highlighted increased levels of conflict and stress arising from NTAct involvement (AIATSIS 2008a, Smith & Morphy 2007, p. 12). Some Aboriginal communities have been in a state of near constant negotiation since first registering NTAct claims in the early 1990s (Ritter 2009, p. 10).

Practical barriers include legal processes that are culturally alien. Some Aboriginal perspectives can be dismissed as irrational relics of an earlier age. This effectively 'silences' as irrelevant the alternative jurisprudence and knowledge which renders Aboriginal interests. 'Expert' assessments frequently carry this weakness eg the impact assessment of the Moomba pipeline (Lane & Yarrow 1998). Aboriginal knowledge can be:

> "downplayed as it is experiential, intuitive and holistic, denying neat boundaries between the physical, cultural and spiritual" (O'Faircheallaigh & Corbett 2005, p. 633).

Translation of Aboriginal concepts into native title concepts can be difficult or impossible (Mantziaris & Martin 2000). The accuracy of translation is itself an ideological question (Sontag 2002). Aboriginal language is more vulnerable to forcible transformation in the translation process than the other way around (Asad 1986, Lahn 2007, p. 135). Invariably, replacing an Aboriginal term with an English term obscures its meaning within its own cultural context. Even a prepared written witness statement may incorrectly presume equivalents of meaning. English terms commit Aboriginal witnesses to legal concepts whose

meaning may be invisible to them and potentially in conflict with what they actually wish to say. Such invisibility may only emerge in cross examination leading to apparent differences between the witness' written evidence and oral testimony, casting doubt in their reliability as accurate or truthful witness and, potentially casting doubt on the balance of their written statement (Morphy 2007).

The heavy burden on Claim Groups is to disprove extinguishment from State expropriation requiring Claim Groups, even those with strong connection evidence, to face well-resourced opposition by the same government that is responsible for resourcing (or not resourcing) its case (Wolfe 1999, p. 202). The Larrakia claim at Darwin failed despite 'a vibrant, dynamic community embracing its history and traditions', because the effects of settlement, arrival of other Aboriginal people into their country and their creation of a corporate entity to manage Larrakia factions led the court to a view that a radical transformation of traditional decision-making had taken place (Scambury 2007).

Native title is a communal, intergenerational property right, protecting prior sovereign rights. It is inalienable, except to the Crown, and quite different from freehold and other property rights.

> "For Aboriginal and Torres Strait Islander people, native title may provide less security and fewer rights than a statutory title – such as the inalienable freehold title available to traditional owners under the provisions of the *Aboriginal Land Rights (Northern Territory) Act* 1976" (ATSIC 1994, p. 17).

Aboriginals were recorded as making "widespread complaints" that native title delivers little in the way of meaningful recognition of customary property rights (or the systems of 'law and custom' in which those rights are embedded) (Centre for Aboriginal Economic Policy Research 2010).

The rights themselves may be limited in ambit, eg 'hunter-gatherer', and frequently exclude commercial use resulting in concern that the right will decrease as Aboriginal people are drawn into the western economy (Burnside 2009, Wooton 1995, p. 109-110). When

'recognition' occurs it tends to mistranslate or transform local Aboriginal 'cultures of connection' to land (Centre for Aboriginal Economic Policy Research 2010).

Thus, native title appears to be relegated to the bottom of the property rights hierarchy, extinguishing or limiting Aboriginal rights that are inconsistent with mainstream property rights (Priest 2006). Some consider this sends a message that native title is inferior to non-native title property rights and, where they conflict, western title prevails. While suburban property owners look forward to rising property prices, native title property owners enjoy no such market, even during a resources boom, where native title extends over resource-rich land (Priest 2006). AIATSIS identified that:

> "more could be done at a more foundational level to assist Indigenous groups to identify economic potential and business/enterprise opportunities in their region, particularly where there are not established markets to enter or learn from" (AIATSIS 2008a, p. 2).

Suboptimal structures seeking to protect native title assets impede economic opportunity impact with red tape burying limited local administrative resources available at the local level (Henry 2007).

Partnerships, supported by the Minerals Council of Australia, to identify better PBC planning and implementation, identify a need for better business planning models, improved opportunity identification and a corporate design tailored to the native title context, for the PBC business as well as enterprise development (AIATSIS 2008a).

The "end-goal" of NTAct is said to be a *level playing field* achieved through competent and effective advice, representation and necessary support in negotiations and agreement implementation (Native Title Payments Working Group 2008, 3). However, the literature indicates concern that traditional owners are "often compromised in negotiations" with their interests inadequately represented (Native Title Payments Working Group 2008). Writing fifteen years after NTAct enactment, the Native Title Payments Working Group found inadequate resourcing for high-quality effective negotiation strategies and development of institutional frameworks to manage agreements and it is beyond belief that, fifteen years after

its enactment, this Working Group needed to recommend that traditional owners have available to them advice and representation of a similar quality as development proponents.

NTAct's 'good faith' provisions have been interpreted by NNTT so as to force Claim Groups into narrow risk strategies involving 'token' agreement or limited pre-conditions. For example, lack of 'good faith' was found in a Benefit Group request requiring a confidentiality clause (*Western Australia/Strickland & ors on behalf of the Maduwongga People; M Forrest & ors on behalf of the Karonie People/D R Crook and G K Edson* [1998] NNTTA 7). Likewise, a Benefit Group was found lacking in 'good faith' when active in public protest, media campaigns or works obstruction (*Western Australia v Taylor* (1996) 134 FLR 211). It is rare for a Government or third party developer to be found lacking in 'good faith' and rarely is development stopped (*Western Desert Lands Aboriginal Corporation/Western Australia/Holocene Pty Ltd* [2009] NNTTA 49). Failure by a non-claimant party to meet a funding commitment was not considered lack of 'good faith' (*Holocene Pty Ltd/ Western Australia/Western Desert Lands' Aboriginal Corporation* [2009] NNTTA 8). Likewise, 'good faith' did not require a developer to make 'reasonable substantive offers or concessions to reach agreement' (*Strickland v. Western Australia* [1999] 868 FCA; (1998) 85 FCR 303).

Often Benefit Groups find themselves forced to trade their rights away to secure basic Government infrastructure and services. Far less frequently do such trade-offs involve business venturing opportunity support. Implementing and enforcing agreements can create a miasma of hopeless processes and empty promises (Albrook & Jebb 2004, O'Faircheallaigh 2002). Groups initially delighted with an agreement may only realize later the implications of the loss which it entails. One Aboriginal woman described the sickening sensation at the awful realization and her unbearable sorrow:

> "We now have many more obligations under white law than we had before, and less money to assist us to meet them … We thought that native title would bring us recognition, but we feel more overlooked than ever before..." (Riley 2002, 4-5).

Statistics on agreement benefits are appalling. The Native Title Payments Working Group Report estimated that only 'one dozen' of hundreds of agreements provided substantial

benefits or embodied best practice agreement-making (AIATSIS 2008b, 4). This is despite recognition, at highest levels, for over a decade of a predictable evenness as to what Aboriginal people seek - minimal damage to country (protection) and maximum financial return (reward) through training, employment, business opportunities, community development, financial returns and skills building (Neate 2001). Direct financial contributions resulting from NTAct related agreements do not necessarily translate into substantive benefits for Aboriginal communities (AIATSIS 2008b, O'Faircheallaigh 2002, O'Faircheallaigh 2004, O'Faircheallaigh 2007). The Centre for Aboriginal Economic Policy Research concluded that Indigenous economic status has changed little with the relative economic status of Aboriginals residing near a major long-life mine being similar to Aboriginals elsewhere in regional and remote Australia (Centre for Aboriginal Economic Policy Research 2010).

The system almost completely disconnects Government initiatives from the content of agreements, despite the plethora of programs targeting Indigenous economic development, Government has proved disinterested in using agreements to kick-start such initiatives (Ritter 2009, 73).

Finally, taxation implications exist. Groups tend to structure their agreements and asset-holding bodies to minimize engagement with complex tax decisions (Native Title Payments Working Group 2008). Such arrangements, for example charity or trust status, can be inappropriate for exploring entrepreneurial opportunities.

4.1.4.3 *Opportunities*

Despite substantial weaknesses, the NTAct contains potential for significant opportunities. The literature broadly identified that the relevant opportunities include leverage, external recognition, possibilities arising from compulsory negotiations, commodity trading, tax breaks, political or social benefit and even flow on to unsuccessful/ or non-claimant Aboriginal groups.

Aboriginal leader, Noel Pearson, described the NTAct as a "recognition space" in an overlap between Aboriginal and Australian law, as it transitions to a new law. He described a hegemonic, not equal, interplay between the two forms of law which formed one aspect of

complex Indigenous and non-Indigenous socio-cultural interconnections (Pearson 1997, also Martin 2004). Others consider it is more accurately described as one way the non-Aboriginal law acknowledges Aboriginal Peoples' laws (Mantziaris and Martin 2000, Weir 2009). This space of change and somewhat chaotic revisiting of both legal systems to create a new 'mainstream' provides opportunity for creation and destruction.

The existence of a recognized property right forces third parties and Government to involve the Benefit Group in future commercial or developmental decisions and ventures that affect native title and positions it well for 'good' deals and entrepreneurial opportunity.

Compulsory negotiations have been identified as a key opportunity (AIATSIS 2008a). Aboriginals negotiating with large third party commercial interests can demand high standards and real benefit, whilst providing such companies with a competitive advantage against upstart juniors or smaller resource companies that might find such standards difficult to meet (Ritter 2009, p. 53). The bargain at the heart of each NTAct agreement is that the mainstream commercial interest gets the freedom and certainty it requires to prosecute its industry. Large resource companies may have tens or even hundreds of applications being simultaneously processed through the native title system. Competition among resource operators may place Claim Groups under pressure to concurrently conduct negotiations with multiple resource companies competing for the same or similar interests. Benefit Groups may priorities participation where participation creates benefit, delaying or withholding NTAct approval until the price is right. Those Benefit Groups better able to create a 'great' deal are likely to be those enabled and resourced to have a strong confident voice.

Maximum opportunity was reported to involve the agreements in which Aboriginal benefits were commensurate with the scale and impact of the operation and, so far as possible, long-term benefit. These agreements provided Aboriginal business and employment, not just an income stream, a range of areas including, for example, environment protection and cultural heritage and a balance between party benefits and impact on land and waters. They aligned trust structures, assured cultural appropriateness and contained enforcement provisions that imposed effective penalties on all parties, not just paternalistic arrangements for Aboriginal default or delay. Finally such agreements provided for regular review of long-term agreement

objectives (National Native Title Council 2008). NTAct agreements can create the solid economic base that assists achievement of traditional Aboriginal outcomes.

> "This Agreement gives us a secure economic base for the future, and the freedom and independence we need to go back and live on our own country. We can start to rebuild our Dambima-Ngardi community" (Kimberley Land Council 2006, 1).

As NTAct creates a compulsory alliance of interests in the same land, this alliance requires ongoing management, not only by each partner of its own interests as served by the alliance but by both partners to the alliance's co-ownership and management arrangements to ensure its stability and improvement over time in advancing alliance opportunity and opportunities through it for each of its partners. Alliance theory recognises that, as corporations evolve from command-and-control structures with sharply defined boundaries into loosely knit organizations, corporate alliances become central to many business models, with most large companies having from thirty to one hundred or more alliances. Yet despite the ubiquity of alliances—and the considerable assets and revenues they often involve—very few companies systematically track their performance, although doing so is recognised to be a far from straightforward task with problems including performance measurement resulting in alliance management by intuition and incomplete information, disagreement among partners about venture progress and delays in problem solving. Alliances often fail to recognize performance patterns across portfolios, including agreement structures, types of partners and functional tasks. Alliance design (in this case mandated by NTAct) is only the beginning. Both parties need to ensure that the time and expense associated with the alliance does not exceed benefit (Bamford, Gomes-Casseres & Robinson 2003). A recent 'joint management' conference organised by AIATSIS researchers highlighted a litany of problems and "an urgent need to promote the benefits of joint management ... as a means of attracting resources" (Bauman, Stacey & Lauder 2012).

If Benefit Groups gain little from the alliance, it is not unexpected that they would engage little effort into its governance. Where ILUA agreements weld on additional alliance partners either for part of the Claim area or for certain ventures, each individual alliance needs careful attention and Aboriginals and Government need to address the interweavings of these multiple alliances.

Some writers consider that large-scale developments can potentially encourage small business or 'economic free spirits' within native title communities to create new ventures using ethnicity as leverage to get through the front door building on personal relationships with major companies developed during native title negotiations.

Some writers come close to critiquing inventive and ambitious Aboriginal people who gain individual benefit from their group membership or use their Aboriginality as a market advantage (Ritter 2009, 69). For example, Ritter described such Aboriginals as involved in the rhetoric of traditional community, whilst the pecuniary nature of the transaction was clearly individualistic. Ritter viewed native title as a commodity for trading, with its value highest if traded in a timely fashion with the process providing an opportunity to learn how to sell a commodity (Ritter 2009). Those most successful were those able to sell at the highest price, with the only real negotiation concerning the amount paid and the extent to which development could be undertaken without damage to country. He viewed negotiations not as dispute resolution, but simply trade - the sale and purchase of a commodity (Ritter 2009, p. 47, p. 74 cf Greer 2003). However, because Aboriginal people, effectively cannot prevent development or even decide not to trade at all, there are flaws in this analysis.

NTAct also created opportunity even for 'unsuccessful' Groups who lodged no claim and those who could not secure certification or had their claim rejected. For example, an alliance of geographically proximate Murray River traditional owner groups, including the 'failed' Yorta Yorta Group, secured favourable arrangements with Government and local municipalities that extended far beyond the rights and interests available to native title holders (Shiel 2004, *Yorta Yorta* 2002). Likewise, the Kaanju of central Cape York Peninsula developed a proposal to gain recognition of their Aboriginal system of governance and management as a base for their external partnerships (Smith & Claudie 2003).

NTAct also provided a trigger for various Government initiatives. AIATSIS developed a 'toolkit' for native title groups to reduce search costs in sourcing Government 'start up' finance programs (AIATSIS 2009). It coordinated a *pro bono* panel of tax law advisors and

encouraged key Government agencies to foster Aboriginal economic development programs, eg Registrar of Indigenous Corporations (AIATSIS 2008a). Indigenous Business Australia (IBA), discussed further in 4.2 below, recently formulated a native title 'task force' to link its work with native title outcomes (Fry 2012).

4.1.4.4 *Threats*

> "(A)n attitude of passive good faith elegantly satisfies the ambitions shared by all state governments in relation to future act negotiations". Governments do just enough with grace and profess willingness to do more if asked (Ritter 2009, p. 35).

NTAct operates within a commercial and political arena in which mining and mineral resource exploration has long enjoyed preference in the Australian political economy (Pearse 2009). Even *pro bono* projects, particularly those attracting Government funding place young professionals into the native title field, by employing them into Rep Bodies, large law firms, Government departments, NNTT and the Courts (The Aurora Project 2012]. A serious threat is that native title will be found to have been extinguished, leaving the Claim Group with no opportunity at all (Lahn 2007, Morris 2003). As noted above, Government actions in the past have 'extinguished' native title in all prime-land, settled areas of Australia" (G. Foley 2007, 138). The mere threat of extinguishment can, without more, impact opportunity. For example, the *Yorta Yorta* claim failure reverberated widely making many Claim Groups sufficiently threatened that claims were compromised even on disadvantaged terms.

The agreement opportunity is threatened by complex legal documents presented to Aboriginals for signature at the end, not the beginning of negotiations and without time or money to properly take them through the provisions. Sometimes these agreements are *pro forma* documents that have been extensively negotiated between Crown, industry and Applicant lawyers before presentation to Applicant(s) as a *fait accompli* - 'take it or leave it' (O'Faircheallaigh 2002, O'Faircheallaigh 2004, O'Faircheallaigh 2007).

O'Faircheallaigh, who extensively studied agreement outcomes, identified that threats be addressed by regular input from key decisions-makers, regular progress review with necessary adjustments and close attention to implementation. He recommended the routine inclusion of unambiguous concrete goals, commitments and responsibilities supported by identified key

representatives able to provide ongoing leadership and credible measures to deal with failure to fulfill obligations (O'Faircheallaigh 2002). There is very significant threat that under-funding and lack of access to skilled legal advice will result in agreements that are inadequate and produce, at best, limited or, at worst, negative outcomes. There is massively unequal bargaining power. Benefit Groups are often worn out, spread too thin, and frequently located far from the invariably city-based resources (O'Faircheallaigh 2004, 2007).

Participation in the native title process itself can transform traditional laws and customs, resulting in loss of the very uniqueness that presents an opportunity (Glaskin 2007, Hirsh 2001, Smith & Morphy 2007). Knowledge and language can become captured by others (O'Faircheallaigh 2002, O'Faircheallaigh 2004, O'Faircheallaigh 2007).

Many Claim Groups see a threat in submitting to State authority over land they regard as theirs, perceiving that native title concerns the radical enactment of sovereignty over Aboriginals. There is a risk of what Smith & Morphy term 'false consciousness', where Aboriginals reserve their sovereign selfhood from articulation with the State, but the State disregards sovereignty as a NTAct issue (Lahn 2007, Mantziaris & Martin 2000, Smith & Morphy 2007).

AIATSIS maintains that native title groups lack access to programs and resources to identify and support business enterprise, with Government investment programs critiqued as unwieldy and overly prescriptive (Native Title Payments Working Group 2008, p. 5). The key Government department concerned with Aboriginals is the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA). It prefers not to direct its funding to PBCs but rather to Rep Bodies. This threatens the opportunity for individual Benefit Groups, forcing opportunity into the hierarchical, often geographically distant, artificial and formal structure of a Rep Body with a representative function rather than an entrepreneurial or even necessarily economic focus (AIATSIS 2008a, Commonwealth of Australia 2009). Some legislative disincentives exist to invest in Aboriginal enterprises including audit, investigation and Government overreach (Native Title Payments Working Group 2008, p. 5).

Aboriginal venturing ambitions can sound to ‘empty halls’ (Claudie 2007). For example, one group expended considerable effort producing a report detailing its economic and cultural aspirations at the request of the State Government. It was then told the Government would conduct an ‘opaque’ land evaluation process (Claudie 2007). This process took a long time, during which the Government required the Group to wait. In the end, the Government report was never officially provided. The Group eventually obtained it indirectly via a local conservation group. It revealed that the Government had already decided upon an alternative future use for the Group’s land and the ‘opaque’ report provided its justification (Claudie 2007).

Many Aboriginal writers consider that native title exacerbates their economic disadvantage (G. Foley 1999, Watson 2002). There is also the threat that native title benefits may be lost in tax, with no tax deductibility for expenditure on capacity building and insufficient incentives for joint ventures yet also no tax concessions for funds accumulated to protect the communities’ future (Native Title Payments Working Group 2008, p. 4).

4.1.5 Summary: NTAct SWOT

Recognition is the key NTAct strength and opportunity identified by the literature. However, even where the Claim Group cannot secure the regulatory benefit, the existence of NTAct *per se* creates opportunities. NTAct empowers Aboriginal voice and has been noted to build external social capital and networks, despite creating internal stresses and frictions.

The Aboriginal opportunity has been conceptualized as commodity trading of competitively sought land-based resources. However, NTAct constrains the terms Aboriginals can impose and decides its terms should it fail to trade at all or, in a way that is acceptable to their trading partners or the judiciary. The agreement process is flawed in practice, with Aboriginals inadequately resourced in every area of negotiation. 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.

As Schumpeter predicted, omnipresent Government with a permeating bureaucracy creates severe obstacles to orderly commercial process and entrepreneurial opportunity. The

literature raises issues linking NTAct with sovereignty. It also focuses on the impossible dilemma of a State facing destruction of its monopoly in land, that is also the entity that funds and resources those destroying the monopoly.

Despite libraries of literature concerning NTAct, its conceptualization as a post-recognition alliance is currently ill-formed. That conceptualization offers great entrepreneurial opportunity for the form of strong alliance collaborations and partnerships typical of international and local commercial activity, but careful attention to the design, management and review of the regulatory alliance needs urgent attention (for example, GS1 Australia 2012, National Distributor Alliance 2012, One World 2012). The researcher found no literature considering the operation of the alliance necessarily created by NTAct and no consideration of post-recognition arrangements in the context of alliance theory. Likewise, there was limited conceptualization of NTAct processes as networks of trusting relationships building important social capital.

NTAct agreements have, by contrast, received massive attention in the literature confirming that, whilst they offer substantial entrepreneurial opportunity, there exist widespread practical and operational failures that outweigh benefits. 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-making arrangements, resulting in on-going lost opportunity. Inadequately resourced Aboriginals continue to attempt to negotiate with mighty power imbalances, with their 'hands tied' by NTAct provisions and NNTT decisions. The result is that the literature is indicating that agreements beneficial to Aboriginals remain few not only due to inadequate terms but also to failures in monitoring and enforcement.

4.2 ABORIGINAL VENTURING

To complete the Study's contextual literature review, it is now necessary to attempt a broad overview of the literature concerning business venturing among Aboriginals in general, as the set from which the regulatory Benefit Group is drawn. There has never been any comprehensive examination of Aboriginal venture or Aboriginal business in Australia and such is long overdue. Thus, this literature is limited by this fact and must necessarily be

viewed as a general description only, rather than a rigorous examination of the field itself. That is the subject of another study that is sorely and urgently required. The author's work in bringing together literature concerning Aboriginal Venturing despite its being an overview only is new work and makes a unique contribution, especially given the absence of such data, information and statistics and applying the contextual historical division between before and after 1993 and NTAct.

It is clear that the notion of Aboriginals as business owners can still appear as relatively unexpected in itself. The terms 'business' or 'industry' as widely used in business and across government generally refer to non-Aboriginal or, so called, mainstream business. The terms are often used with a meaning that excludes Aboriginals, either treating them as the 'other' with whom business must work or within the context of employment levels, under a sub-heading of 'self employment'. Frequently the terms are used as if Aboriginals were never active in business or industry as business owners. It is essential to record, particularly for international readers,that the absence of data, statistics, information and profiling within Australian in respect to Aboriginals contrasts markedly with many other countries. As with observations concerning the unique characteristics of NTAct itself internationally, the silence of the *terra nullius* doctrine has flowed into many other silences concerning the existence and recording of elements of Aboriginal life in contrast to that of non-Aboriginal Australian activity.

The study reviewed historical and anthropological research, along with Government documentation and websites, seminar papers, research papers, the Indigenous Stock exchange as well as individual websites created for individual Aboriginal ventures. The review is new work in itself, the author being unaware of any such compilation prepared previously. It does not purport to be comprehensive or complete, but is simply a broad contextual overview to provide a background description of the context within which the data and its analysis will fit. Given this, whilst some comparisons are made before and after NTAct, between Aboriginal and non-Aboriginal business and with features of International entrepreneurship, such exercises need to be prefaced by the limits of the context literature review upon which they are based.

Although the literature does not arrange itself in this way, this review attempts to improve contextual understanding by separating the literature concerned with the situation prior to NTAct, ie before 1993, and that concerned with a post-1993 situation. Thus, 4.2.1 considers literature concerning traditional and twentieth century Aboriginal venturing before 1993, when NTAct began. 4.2.2 considers literature concerning Aboriginal venturing after 1993. 4.2.3 compares these two components of literature and 4.2.4 provides an overview and SWOT analysis.

4.2.1 Aboriginal Venturing Before NTAct 1993

Despite the limitations presented by the absence of statistical data information and information, this review considers literature concerning Aboriginal venturing prior to 1993, which tends to divide itself into those considering traditional life and those describing the situation after white settlement. This context review of literature concerned with the pre-NTAct period adopts the same approach, with traditional Aboriginal venturing considered at 4.2.1.1 and post-settlement at 4.2.1.2.

4.2.1.1 Traditional Aboriginal Venturing

Australia is described as an affluent society prior to British settlement (Dingle 1988, Mattingley 1998). The standard of living of an 18th century Aborigine has been favourable compared with that of most Europeans of the time (Blainey 1982, Watson 1984). According to UK estimates, in 1722, shortly after Captain Cook planted his British flag on a sandy spot along Australia's east coast, only 4% of the earth's people were 'free', with the remainder, according to Schumpeter, slaves, serfs, indentured servants or vassals (McGraw 2007, 146). All Australian Aborigines were free. Although the first settlers brought narrow notions of freedom, and despite their great disadvantages, Aboriginal people were never officially rendered slaves.

As described in 4.1 above, story, song and dance sustained the entire Aboriginal legal and trading systems, with clans coming together for trading and negotiation in ways that resemble the business meeting or conference. Aboriginal people innovated agriculture, aquaculture and housing (Diamond 1997). For example, the Gunditj Peoples of Lake Condah in western

Victoria have an 8,000 year old aquaculture industry with sophisticated engineering and dry stone wall buildings and works (Builth 2002, Lovett 2007).

Nevertheless, Aboriginal social organisation rejected the pursuit of wealth and social mobility. All Aboriginal Nations had concepts of property that equated little with western notions of private property. Clear territorial boundaries applied and, within 'country', all land was precious and precisely regulated. Trade was communally controlled without a financial system involving money, stocks, bonds or credit mechanisms. Land was held to provide for the family group. It was managed and protected for future generations. There is some suggestion that the economic trading base was led by a stratified society ruled by chiefs with a form of heredity succession to such office (Commonwealth of Australia 2004, Dawson 1881, Lovett 2007, 2). Among some People, the trading base lent itself to the formation of villages (Commonwealth of Australia 2004, 5, Coutts et al 1978, *Lovett on behalf of the Gunditjmara People v State of Victoria* [2007] FCA 474 (30 March 2007), pts 4 and 18).

Whilst knowledge systems and philosophical standpoint differed from Europeans, traditional methods of research and application existed with knowledge carrying responsibilities to the human beings, animals, plants and places with which the knowledge was concerned (Pereira & Gupta 1993). Aboriginal knowledge was inherently dynamic and constantly evolving through experimentation and innovation, rendering it responsive to fresh insight and external stimuli.

Whilst international trading was long a peaceful and profitable enterprise in northern Australia, with annual trading visits by Maccassans and others from countries north of the Australian coast, competition models are shown in the literature to have led, before white settlement, to the genesis of conflicts, violence and distrust:

> "Many Guditjmara people were massacred on Guditjmara land … by whalers bent on protecting their commercial interests" (Lovett 2007, 16).

4.2.1.2 Post-Settlement Aboriginal Venturing

From the earliest days after white settlement, Aboriginals took up business opportunities arising from the arrival of settlers. Their centuries old trading activity laid the foundations for the post-settlement commercial exchange that gradually established between Aboriginals and Europeans (Trudgen 2000). Often their first contact with the settlers raised economic and commercial matters eg opportunities to lead the newcomers through their land and introduce them to water sources and 'the exchange of food, tools and cloth for labour' (Hercus & Sutton 1986, 1). However, not all trade between Aboriginals and the white settlers was competitive or fraught, let alone exploitative or violent. Western desert Aboriginals traded artifacts with Europeans as far back as the late eighteenth century including, not only utilitarian objects but artifacts for sale (Batty 2006). It was a creative interchange in which the Aboriginal supplier and European buyer exercised in varying degrees of influence on a classic supply-and-demand basis (Barnes 2007, Museum Victoria 1929). Likewise, the European supplier provided new opportunities for easier to use materials and attractive items unknown traditionally. For example, Patterson records Aboriginal use of European bottles that were broken to provide easier stone napping and new tools (Paterson 1999).

The literature also notes that the function of Aboriginal language has marked differences from western, documented language and that different terminologies together with different traditional approaches to trading *per se*, needed to be overcome by nimble traders. In parts of Australia, some Aboriginal people never spoke English at all, while in others 'Aboriginal English' because a model of common trading communication (Eades 1992).

Aboriginal knowledge of, for example, the location of mineral resources, was highly desired by settlers who had a widespread conviction that Aboriginals knew the locations of precious stones but would keep this knowledge secret. However, a quiet assumption of responsibility and capacity to manage on the part of Aboriginal people was recognised by many. For example, the South Australian Railways welcomed Aboriginals on the Ghan railway, with the common view being:

> "Is there really anything we can do for Aborigines that they can't do better for themselves." (Gordon undated in Rowley 1970, fn 2, 76).

The confidence of early settlers in Aboriginal pastoral business skills saw them bequeathed pastoral stations (Hercus & Sutton 1986, 192, McDougall Vines 2010, Moore & Kelleher 2009). Indigenous innovation is honoured on the Australian $50 banknote, showing the Aboriginal inventor David Unaipon who developed and patented a modified shearing handpiece that revolutionised the nation's wool industry. He made patent applications for nine other inventions, including a centrifugal motor, a multi-radial wheel and a mechanical propulsion device (Jones 1999).

However, despite the evidence of Aboriginal venturing, it is sometimes viewed, especially by anthropologists, as a tradition that is culturally antithetical to entrepreneurship:

> "Ours is a market-civilisation, theirs not. Indeed, there is a sense in which The Dreaming and The Market are mutually exclusive." (Stanner 1958-9, included in Stanner 2009, 163).

This is a romantic, even somewhat paternalistic, view of The Dreaming and contrasts with Schumpeter's identification of tradition as the filter through which any innovation occurs (Schumpeter 1939, 244-247). Further, if Schumpeter is right, innovation could be theoretically encouraged by such a dichotomy between traditional/modern creates the chaos, the *Bahnbrechen*, for creative/destruction and so becomes the setting for entrepreneurial opportunity (D. Foley 2005/2006, Marrie 2007, 49). Thus, the view of eminent social scientist, Professor Charles Rowley appears more appropriate:

> "(Aboriginal) traditions embody a unique and profound view of reality that may even now be developed by Aboriginal scholars to enrich the mainstream of human thoughts. The skills are precisely what the nation needs to appreciate and to conserve a unique environment in real danger" (Rowley 197, 358).

Aboriginal knowledge of plants, traditional farming and land management practices, crop diversity, over this period aligns with the Indigenous entrepreneurship literature as being of considerable potential significance (Akerele 1996, Altieri 1987, Oldfield & Alcorn 1998, PCAST 1998, Shiva 1998).

In 1994, some ten years after a regulatory change to give land rights to an Aboriginal community in South Australian, two evaluation studies were undertaken that included some consideration of Aboriginal venturing. Referred to in Chapter 2's literature review, the following was described:

> "scope for expansion and diversification in arts and crafts and some more short cultural tours. There are considerable untapped resources in mining and potential for growth in the pastoral industry. There may also be opportunities for building on the successes of small-scale hunting and food-preparation ventures. ... (E)nterprises must be consistent with the highly mobile Anangu lifestyle and consider traditional obligations within the kinship networks. It is also difficult to raise venture capital when the land is not privately owned ... Finally there is a need to increase the literacy, numeracy and business management skills of the community." (South Australia Centre for Economic Studies 1994, 6).

The explosion of the 1980s Aboriginal art market is also described in the literature. Many of these artists forms companies, for example, Papunya Tula Artists, that 'went global', with consequential pressures upon individual artists due to family demands, community approaches that failed to protect intellectual property, inexperience and circumstances that prevented these companies achieving the maximum profit achieved by others through secondary sales (Christo et al 2004, Johnson 2010). Also in another area of the arts at this period was the business success of the musicians Yothu Yindi, continuing a long traditional and post-settlement Aboriginal musical experience (McFarlane 1999).

4.2.1.3 Summary

In summary, the literature before 1993 concerns traditional and 'difference' studies and, as land rights and the art and music markets created change greater focus on Aboriginal-led venturing within the frame of conventional business opportunity. However, the emphasis remains upon the 'bad news story' of serious, impenetrable difficulties facing Aboriginals, including the barriers of their own culture and tradition. The burst of the Aboriginal art market in the 1980s, the slow burn of commercial flow on from commercial music success

and the introduction of land rights were indicators of change underway and positive venturing outcomes potentially available from these.

4.2.2 Aboriginal Venturing After NTAct 1993

As detailed above, the literature reviewed in this context, included the websites of the Indigenous Stock Exchange, individual Aboriginal businesses and Aboriginal communities, the employment and business development offices in various State and Territories, including those specific to Aboriginal, government reports that usually concerned only one aspect of business, eg taxation, various banking website and the website and information packages produced by the government Indigenous business stimulating entities (ILC, IBA and AIMSC) as well as broader academic and popular literature uncovered relevant to contemporary Aboriginal venturing.

Earlier post 1993 studies of Aboriginal venturing continue an ethnography context, however, more recently, along with the growth of Australian entrepreneurship schools, some studies of Aboriginal entrepreneurs have occurred. Growing from the work of Aboriginal p researcher Denis Foley, as with early entrepreneurship research globally, these early studies focus on the entrepreneurs themselves (Christo et al 2004, D. Foley 2002, D. Foley 2006). Aboriginal entrepreneurs were described as goal-oriented, articulating a clear vision and placing greatest value on the richness of their culture, the wellness of their people and educating the greater community. Western business structures such as companies, partnerships and legal frameworks tended to be viewed as foreign and inconvenient. Some felt they needed to engage a 'white' accountant to ensure they were perceived externally as a professional outfit. The studies recorded that as some white people with whom they traded failed to keep their word, these entrepreneurs found this difficult to understand or reconcile, leading to a weariness toward white suppliers – 'weary of white man's lies'. On one view, these Aboriginal entrepreneurs had a micro approach compared to many 'western' entrepreneurs but, on another view, they had a very large picture, macro approach, ie the achievement of vast goals for country and the shifting of national perceptions. These studies asked whether Aboriginal businesses and business owners may simply be transitioning to a capitalist model and drawing closer to the western model. They recorded that the sources of capital and systems for evaluating business proposals tended to be less well developed, familiar or culturally compatible for Aboriginal entrepreneurs. Government Grant programs, controlled

from Canberra (with limited or no Aboriginal staff), were recorded as accompanied by unacceptable conditions that tended to present a poor fit with the individual, intrinsic characteristics of Aboriginal business persons (D. Foley 2002).

A dichotomy was described between the Aboriginal entrepreneur's own community and his or her personal self-interest. For example, an Aboriginal entrepreneur who bought a new car received community backlash as disrespectful to the community (D. Foley 2002). Such community pressure, which might also be viewed as social capital, may cause new Aboriginal ventures to incorporate cultural heritage and community socioeconomic improvement as business goals (Fredrick 2004, Christo et al 2004).

Aboriginal leader, Noel Pearson, has more recently been vocal about Aboriginal venturing. He considers that the traditional [tribal] individual entering the modern era must split in tow, with part of their personality 'animated by their own self-interest' in the 'pursuit of their individual interest … as the best (and only) means of social and economic uplift', whilst half of their personality maintains their Aboriginal identity with their people, lands, languages, traditions and heritage (Pearson 2009). Anthropologist, Peter Sutton, shares this view:

> "(T)hose who remain culturally closest to the classical traditions of their forebears may be those least likely to find engagement in the market economy congenial or, even if initially attractive, possible" (Sutton 2009, 67-8).

Other commentators have articulated that contemporary Aboriginal entrepreneurial activities beyond Aboriginal tourism and outback art, are limited to gambling, illegal alcohol and marijuana bootlegging (Sutton 2009, Sutton personal communication 18.12.2009). Some even refer to a perspective of Aboriginal venturing that see it as the ideas of disingenuous 'economic free spirits from native title communities' using their Aboriginality for individual advantage (Ritter 2009).

The literature records that many Aboriginal Australians lack a strong credit history, detailed financial records and clear business plans. Many even face difficulty providing something as basic as a birth certificate (Topfield 2009, Victorian Law Reform Commission 2012, 7-8). Some of the literature observes that qualifying for to access Government grant schemes can

be beyond the reach of Aboriginal entrepreneurs, as even websites can be difficult to access, language difficulties and the absence of ready, direct contact with government grant administrators, with no surety of success and the time and effort involved not being cost-effective. The situation is similar in regard to lending practices. Thus, Reconciliation Australia observed that:

> "There is little evidence of systematic attention being applied to ensuring indigenous Australians can even enjoy equitable levels of access to those essential banking and financial services that are taken for granted by other Australians" (Reconciliation Australia 2001-2003, Executive Summary).

A number of the major Banks promote Aboriginal products and lending 'innovations'. However, when checked in detail on behalf of a prospective Aboriginal borrower, these appeared to provide little that is different to standard business and commercial lending offers (Wei 2010). 'Wing-ing It', 'bootstrappping' or the more modern term used in the entrepreneurship literature 'bricolage' is the most common way of operating and managing funding issues, derived simply from the resourcefulness and ingenuity of the Aboriginal entrepreneur. Methods include taking up favours, delaying payments to creditors, barter, the use of friendships, spinning off cultural heritage, using credit cards and personal respect, as well as garnering 'in kind' support for business needs (Christo et al 2004). The community itself is one funding source with inherent understanding of the business and its operators. For example, the Jabiluka Association used mining royalties as a source of seed capital for a number of new businesses that would draw on community uniqueness, location, geography, isolation and remoteness (Trudgen 2000). However, problems that arise from using the local community as a funding source include the risk that it adopts an insular outlook, has limited business knowledge and resources or is swayed by family loyalties and personal conflicts.

Federal Government programs include Indigenous Business Australia (IBA), Indigenous Land Corporation (ILC) and Australian Indigenous Minority Supplier Council (AIMSC). IBA is a Federal Government entity that provides commercial loans or assistance in identifying sources of finance to Aboriginal ventures. Its stated aim is to create opportunities for Aboriginals to build assets and wealth "as an integral partner within the Australian Government's overarching Indigenous Economic Development Strategy" (Australian Government 2010b,

15). It has involved itself in mining, tourism, property and other areas, including investigations into emerging trends within the carbon trading and energy renewal markets. At least one applicant and 50% of the business owners must be of Aboriginal and/or Torres Strait Islander descent and the applicant must have its own capacity to meet the cost of a business consultant (Wei 2010). It recently created an internal native title team to optimise the Aboriginal business benefit from native title (Fry 2012).

ILC is a Federal Corporation that administers a Land Fund. Its four priority outcomes are socio-economic development, education and cultural and environmental heritage protection as well as sustainable management. Applicants must demonstrate a real prospect of business development, employment creation and socio-economic improvement (ILC 2012).

AIMSC is a supplier group to Australian Government and corporations. Aboriginal ventures seeking to trade through this organisation for Government or corporate contracts must meet criteria including Australian location, minimum 50% ownership of the company by an Indigenous Australian(s), leadership or management by an Indigenous Australian (AIMSC 2012).

Increasingly over the period since 1993, the literature has come to emphasise the potential value of Aboriginal knowledge systems themselves, with their unique notions of being in the world, connectedness to place, kin, community, all species and the natural world, lying as they do within a very different perspective of time and history (Grieves 2004). There is recognition in the literature over this period of the need for their protection by appropriate regulatory change (Langton & Ma Rhea 2005, Marrie 2007). Studies during the early 2000s draw attention to regulatory change that encourages the concentration of life industries into the few giant transnational corporation that increasingly control world seed and pharmaceutical development and thereby actually or potentially leaving Aboriginals paying for access to their own knowledge (Langton & Ma Rhea 2005, Marrie 2007). The fundamental difference of these knowledge systems finds this literature recognising that Aboriginal knowledge recovery, if led by Aboriginals, will not look the same as programs led by ‘experts’ such as scientists, conservationist, technologists, even if participatory, due to the, often goodwilled, ‘cherrypicking’ that selects and emphasises some Indigenous knowledge, whilst ignoring, discarding or excluding others (Nakata 2008). There has been increased

willingness in the literature to consider those aspects of Aboriginal knowledge that are, apparently, uninteresting or of no value, have no funding, are not published and remain marginalised or at risk of being overlooked or actually written out. Increasingly, the literature records attempts to secure Aboriginal led or sole-run projects and critical thinking approaches by 'experts' for alternative knowledges or understandings that might lie before them but be being overlooked or interpreted from one perspective, ignoring other equally valid approaches.

Overall, the uniqueness of the cultural offering presents a particular competitive advantage and entrepreneurial opportunity. Venturing appears to fit within a number of broad categories:

- *Small business within an established industry:*
  Retail or service activity, eg mechanical, cleaning, hair and beauty, printing, clothing, wine, food making and supply, café, tours, craft, aquaculture and consulting;

- *Small business within a new industry:*
  Newer green eco-industries, eg bicycle-pod, carbon sequestration offset projects, remote area food enterprise.

- *Larger ventures:*
  There were new commercial opportunities within a relatively new industry. Others arose from the base of an existing business or organisation. These larger ventures involved a range of industries – telecommunications, media, online business, the Indigenous stock exchange, land development and very large scale land-based projects. A number of businesses contracted staff to multi-national firms, eg mining and building and some involved themselves in training organisations.

- *Community:*
  Aboriginal enterprises all tended to articulate community focus. However, some were created specifically to drive long-term social-economic change for

> Aboriginal people by investing in people's abilities, providing scope for innovation, encouraging aspiration and rewarding self-responsibility.

4.2.2.1 Summary

In summary, the post-1993 overview provided by the literature review dispelled many common misconceptions about Aboriginal business venturing, revealing Aboriginals and their advisors actively at the cutting edge of modern commerce, spotting or setting market trends and working to exploit them (Barnes 2009). It also indicated that Aboriginal venture-owning still has room for development well beyond current limits (Buultjens & Fuller 2007). It dispelled a view that contemporary Aboriginal venturing and entrepreneurial activities are limited to tourism or art, let alone illegal activity or the disingenuous use of Aboriginality for individual advantage (Ritter 2009, Sutton 2009, Sutton personal communication 18.12.2009).

4.2.3 Comparison of Aboriginal Venturing Before and After NTAct

In seeking to make a before and after comparison, it is again critical to understand that no statistics, data or information exists that comprehensively profiles Aboriginal business owners or business venturing. It is simply not possible to accurately, scientifically, reliably or quantitatively compare Aboriginal Venturing before and after 1993. To repeat what has been said earlier in this thesis at many points, this absence is serious and requires urgent attention within a soundly based National study of the area. Its absence necessarily presents a limitation to any study in the field. There is need for basic profiling across a number of the business variables universally studied in entrepreneurship and business research, including parameters such as industry type, firm size (staff and financial), firm growth, geographical location and business ownership type, percentage of Aboriginal business-ownership and business type.

That said, it seems that some tentative qualitative overall observations can be usefully made. The literature before 1993 tends to be dominated by historic overviews, anthropological or social recording and general observations, frequently by non-Aboriginal 'experts'. Only two studies comparing Aboriginal before and after a regulatory change were located, with somewhat conventional findings (ie tourism, art, need for better education). By contrast, the literature concerning the post-NTAct situation, tended to be different in character,

incorporating small studies of Aboriginal entrepreneurship that profiled one or several entrepreneurs, a grab bag of on-line descriptions, many by Aboriginal business owners themselves, available both through the Aboriginal Stock Exchange and their own individual websites, government reports that, usually via a heading styled *Employment* and sub-heading *self-employment*, provided some descriptions of particular areas. Various AIATSIS research papers were concerned with elements of business, such as taxation, and the Banks and Government lenders had various glossy offerings of what the literature noted to be of restricted value.

The literature post-1993 presents an opening of thinking that appears to better enable and empower Aboriginal venturing. The topic as a study area in itself seems to have moved through the 'stones & bones' of historic or anthropological study to programs and ideas that articulate the 'on ground' issues facing the Aboriginal venturer and which seek to resolve them. As was observed in the literature concerning Aboriginal entrepreneurship in general, the influences, both positive and negative, of traditional culture do appear to remain relevant today and provide a distinctive difference with non-Aboriginal entrepreneurship.

However, while such contrast and comparison can be observed by dividing the literature, somewhat artificially, at 1993, there appears to be very little evidence of a link with NTAct directly. What appears to be more likely is that the advocates and judges in *Mabo* and those framing NTAct, including the then Prime Minister Paul Keating, were part of a critical thinking based both on revised jurisprudential approaches and post-colonial critical rethinking that created a readiness to go deeply behind colonial law and its interaction with native legal systems. From the High Court's readiness in Australian leaders in many fields, especially law and business,to go more deeply behind colonial law and approaches and re-examine their contemporary interaction with native title legal systems and traditional cultural and social fundamentals. From the High Court's readiness, flowed what Keating called a 'window of opportunity' which not only created regulatory changed, but strengthened opportunities for Aboriginal people generally eg enabling them to become academic and business leaders, What the literature may be revealing is that the influence of NTAct is part of a slow change of societal assumptions in Australia that preceded 1993 and continue today or that *Mabo* and NTAct might be operating as a slow-fuse dynamite slowly effecting significant change to

Aboriginal self-determination and Aboriginal business venturing. These are fascinating musing, that might tempt later researchers to further investigations.

4.2.4 Overview – SWOT

From the review, a SWOT analysis of Aboriginal venturing was prepared and is **Figure 16** below. As the findings emerge from a literature review that contains multiple limitations and reservations. They must be viewed as descriptive, general and preliminary. As identified above, the literature reviewed predominantly reflects white voice, often government or 'expert' voice, although the link into Aboriginal's own websites was an exciting way to balance this feature of the literature. There is a paucity of statistics, data and information on Aboriginal venturing and the author's findings, extrapolated from a literature review, have obviously not been examined or endorsed by Indigenous leaders on communities (save as described in Chapters 5 and 6). That said, in the author's presentations at the annual native title conference, the findings have been confirmed by questions and discussions with Aboriginal People in attendance and other speakers both Aboriginal and non-Aboriginal (for example Kelleher 2012). The author's work in bringing together this context literature concerning Aboriginal Venturing and undertaking a SWOT analysis, although it is an overview only, is new work and makes a unique contribution, especially given the absence of such data, information and statistics and applying the contextual historical division between before and after 1993 and NTAct.

Element	**Positive**	**Negative**
Internal	STRENGTHS Aboriginal trading tradition Community strength Helping Aboriginal people Energy Proven success	WEAKNESSES Language issues Poor education/ literacy No credit Inadequate business training Western accounting concepts
External	**OPPORTUNITIES** Aboriginal recognition Strong community emphasis Traditional knowledge and culture	THREATS Powerful interests taking unique knowledge Racism

	Climate change, environmental and food awareness Remote, unique or monopoly product or location Technology, satellite, telecommunications IBA/ILC/AIMSC	Criticism from other Aboriginal people

Figure 16: SWOT Analysis of Aboriginal Venturing

Source: Researcher

The SWOT analysis confirmed that Aboriginal trading **Strengths** included Aboriginal trading traditions as well as community social capital, helping other Aboriginal people, energy and proving to the general public Aboriginal's ability to succeed and models of proven success. **Weaknesses** frequently related to poor reading, writing and educational skills as well as lack of business training, language issues, access to credit and the nature of western accounting concepts.

Opportunities arose from traditional knowledge and culture and climate change, environmental awareness and food production issues, often involving a remote, unique or monopoly product or location optimised by technological advances of improved telecommunications and satellite linkage. Again, there were many references to improved social capital opportunity, including Aboriginal recognition and improved financial, health, education and social outcomes for Aboriginal people. **Threats** included the potential for unique knowledge to be taken by powerful corporate interest, racism and criticism from other Aboriginal people both overt and subtle.

Comparing this analysis of the context literature with the broad features of Indigenous entrepreneurship generally as described in 2.4.1 of Chapter 2's Literature Review, one finds the broad features of cultural significance, language and educational issues recorded in the literature specific to Aboriginals. Reconciling tradition with innovation, notions of a non-materialist, non-market and spiritual Indigenous culture with its strong community obligations and notions of tradition as being antithetical to entrepreneurship appear to have international relevance. The struggle to make regulatory change work for Indigenous Peoples also appears to apply across national boundaries. Accounting practices normalising thought, decisions and aspirations around western values and objections also remain a grievance recorded in the Aboriginal venturing literature. The emphasis upon the hindrance of economic and social deprivation appeared less evident in the Aboriginal context literature, although the burden of extensive influential government policy was as much a burden on Aboriginals and other Indigenous people in their effort to be viable economic agents in a globally competitive modern world.

In summary, the literature concerned with Aboriginal business venturing, like the broader Indigenous entrepreneurship literature, clearly shows that Aboriginal entrepreneurship draws on a long ancient trading tradition. Like the broad spectrum of Australian entrepreneurship, Aboriginal venturing extends beyond one or two narrow industry segments, including the vast spectrum of business endeavours in both large and small businesses.

Key opportunities arise from monopoly positions in particular geographical locations, assisted by broad advances in telecommunications and digital communication. These are supported by unique traditions and culture, scientific knowledge and techniques, including environmental and food supply and awareness. These are also enhanced by improved Aboriginal recognition and reduced acceptability of racism generally. Key emphasis upon community and family obligations and pressures reveals social capital as a priority.

The opportunities identified in the Aboriginal venturing context literature review in **4.2** were linked with the opportunities identified in the NTAct context literature review in **4.1**. These are shown in **Figure 17** below. Recognition emerged as a key opportunity providing lines of enquiry along which to interrogate the data in this Study, taking account of identified venturing opportunities and NTAct opportunities.

NTAct OPPORTUNITIES	VENTURING OPPORTUNITIES
Recognition Leverage Negotiation Alliances Segment 1 – **Securing Claim** • Claimant status Segment 2 - **Post Orders** • External Recognition • Third Parties Forced to Communicate and Trade • Public-Private Partnership/ Alliance with Government Segment 3 – **Agreement** • Chance for a Deal • Other Parties Must Communicate and Negotiate • Commodity Trading Concept • Other - Flow On Opportunity to Unsuccessful/Non-Claimant Groups - Compels Government Initiatives	Aboriginal recognition Strong community emphasis Traditional knowledge and culture Climate change, environmental and food awareness Remote, unique or monopoly product or location Technology, satellite, telecommunications IBA/ILC/AIMSC

Figure 17: Comparison of NTAct and Venturing Opportunities

Source: Researcher

4.3 VOICE and SOCIAL CAPITAL-TRUST

Aboriginal languages use a rich range of communication devices including gestures, inhaled speech, snapping fingers, singing and gesticulations (Laster and Taylor 1994). Silence conveys meaning in Aboriginal communication. It may indicate a wish to consider or a speech ban related to a person's death (Eades 1992, Neate 1997). 'Secret' knowledge depends upon a complex system of rights to information and is essential to sustaining person-country relationship (Rose 1996).

Aboriginal societies tended not to divide the spiritual and the temporal, with the higher levels of knowledge most secret. Aboriginals often find they must publicly justify the sacred in the face of scepticism or ridicule. The sacred arises from a philosophical base that:

> "… is the triangulation of the Physical, the Human and the Sacred worlds. … The sacred world is not entirely within the metaphysical… Its foundation is in healing …,

> the lore (the retention and reinforcement of oral history), and care of country, the laws and their maintenance" (D. Foley 2005/2006, p. 30).

Whether something is 'secret' might depend upon a complex Aboriginal system of rights to information, including the right to know something, to hear it and speak of it (Gray 2000). Violation of these rules amounts to theft (Michaels 1986). Given this context, Aboriginal people generally reveal secret knowledge only when all attempts to withhold it fail, but their delay can rise to suspicion that it is only a recent invention (Gray 2000).

Some Aboriginal people, for example those from the Western Desert, are said to have nowhere near the capacity to objectify and coherently articulate their cultural practices through a native title system and are, in effect, being subjected to a civilisation test (Sutton 2009, 156). The Aboriginal expert, steeped in his or her own culture, may not appreciate the barriers to its understanding by those steeped in the western commercial world, let alone the highly specialized culture of the lawyer (Wooton 1995). As Wooton wryly explains:

> "Whereas the amount of knowledge of native title exists in descending order from Aboriginal people to anthropologists to lawyers, the amount of power to define it for official recognition may exist in inverse order in the three groups" (Wooton 1995, p. 106).

Anthropologists have professional skills to summarise material from numerous sources which can save court time and enable questioning in a culturally acceptable and comprehensive manner. They also tend to make the context of the culture understood by the Court and lawyers and render the whole exercise more intelligible to Aboriginals.

Sadly, many Aboriginals have, directly or indirectly, suffered severe trauma, including inter-generational trauma. Silence around such trauma or the traumatic events themselves, is likely to be a severe impediment. Yet telling also takes a toll. Anecdotal reports reveal a spike in Elder deaths and serious illness following the giving of evidence to enquiries such as those of the *Bringing Them Home* and *Aboriginal Deaths in Custody.* A tragic example is the death of

Yorta Yorta Elder, Burnum Burnum, not long after giving evidence in that native title hearing (Farnsworth 1997).

Verbal conflict was and is a domain of great skill and finesse in Aboriginal cultures, often involving highly elaborate uses of language, rich, deeply idiomatic swearing, cursing, insulting and provoking resources, not only in anger but as a joke (Thomson 1935). Often these skills are instilled into children from an early age, frequently as a form of play (Sutton 2009, p. 92).

However, subtle pressures on voice can arise from the multiplicity of discrete issues coming before Aboriginal people at any one time. For example, at the same time as the Northern Territory Government was opposing the Larrakia's native title Claim it was seeking their involvement in its 'Community Harmony' project for Aboriginal itinerants in Darwin. Evidence required for the native title claim forced Larrakia into conflict with itinerant Aboriginals with whom the Larrakia previously had no issue. Government exacerbated this by using the native title claim as a reason to delay final arrangements for the itinerants' camp (Scambury 2007). Similarly, evidence eliciting frank accounts of past mistreatment of Aboriginals by their white 'bosses', despite Aboriginal attempts avoid this or include positive elements, led the white parties to become aggrieved (Smith & Morphy 2007, p. 21).

Indigenous lawyer, Irene Watson, considers it essential to create conversations going beyond popularly perceived Aboriginal 'leaders' because land councils and Rep Bodies can effectively silence the voice of traditional and broader language-named identity groups. The right to speak should not go away from people in one area or elide group identities (D. Foley 2007, G. Foley 2007, Claudie 2007).

> "(W)hen the land of my grandmother at Cape Jaffa is excavated for a marina ... to house the yachts of those who have stolen everything from my past, present and future, there will ... be little that will be heard; my voice in opposition has as much likelihood of being heard as if I were speaking during the final quarter of an AFL grand final" (Watson 2007, p. 28).

There is a silence around many Aboriginal matters, including philosophical standpoint, language and knowledge systems (Foley 2005/2006). This silencing was illustrated in where the New Zealand Environment Court decided that oral evidence of Maori elders was unacceptable in the absence of 'backup history' evidence, because it was 'cryptic' 'assertive' 'sparse', 'general' and not 'geographically precise'. The High Court appeal rejected this, stating:

> "Those in the iwi entrusted with the oral history of the area have given their evidence. Unless they were exposed as incredible or unreliable witnesses, or there was other credible and reliable evidence which contradicted what they had to say, accepted by the Court, how could the Court reject their evidence. The Court complained it was bereft of 'evidence' and had 'assertion' only… The evidence was given by koumatua based on the oral history of the tribe. What more could be done from their perspective. The fact that no European was present with pen and paper to record… could hardly be grounds for rejecting the evidence" (Young J. in *Takamore Trustees v Kapiti Coast District Council*, (2003) 3 NZLR 496, para.[68].

However, voice must not be seen as synonomous with social welfare. There is no guarantee that Aboriginal self-government and voice-power will deliver social improvements and a need for caution in reducing serious medical, social and cultural issues to the politics of "voice" (Sutton 2009, p. 118 referring to Anderson & Loff 2004, Cowlishaw 2003).

Many Aboriginal communities score low on socioeconomic indices including those relating to health, alcohol consumption, mortality, morbidity, income, educational attainment levels and employment status (Martin 1997). Yet, despite such statistics, Aboriginal voice contributed directly to *Mabo,* closely lobbied the NTAct and advocated the various NTAct 'test' cases. At first blush, this supports Habermas' view of law as a primary medium of social integration in modern society. The overview of contemporary Aboriginal business venturing, shows many Aboriginal communities drawing on alliances and social capital in entrepreneurial activity. There is need to avoid negative issues from outside management that devalue Aboriginal input leading to break down of such partnerships (Marika et al 2004).

The exposure draft of 2012 proposed amendments to NTAct provides that in future act negotiations, the parties must attempt to:

> "establish productive, responsive and communicative relationships between the negotiation parties" (Native Title Amendment Bill 2012, S6, amending S31A(1)(b)).

Aboriginals regard relationship as highly important and demonstrate great sophistication in them. Sutton records that, when Aboriginals expect the arrival of a non-Aboriginal person whose work they value, they appoint a person of consequence to closely relate to the newcomer. In this way the community exploits new opportunities for links to the outside world and to increase its knowledge of the wider 'white' State and Nation (Sutton 2009, p. 169-172). Such relationships were actively collaborative, containing the key elements of trusting business and alliance relationships, ie each party dependent upon the other without ability to control the others. Sutton describes his relationship with Silas Maralngurra at Oenpelli:

> "His entrepreneurial role in annually distributing Toyotas bought with uranium royalties was legendary. ... His grasp of finance was better than mine. He once asked me if we would get simple interest or compound interest on any rental income from letting our house while overseas" (Sutton 2009, p. 167).

Sutton, in a view similar to the gemeinschaft/gesellschaft distinction, considers that most contemporary Aboriginal people move within an "intercultural space, which is also an inter-ethnic social space, and an economic and political space, where nobody's relationships are entirely with the members of a single race" and that it "is of practical importance that future relationships ... achieve better balance between the collective and the personal than... achieved in recent decades" (Sutton 2009, p. 164). Then Treasury Secretary, Ken Henry, strongly advocated for Aboriginal engagement in policy development, pointing to Harvard studies of native American groups where greater autonomy in decision-making lead to improved socio-economic outcomes (Cornell & Kalt 2003, Henry 2007).

In summary, Aboriginal voice is sophisticated, including silence, song and story. There is need for conversations with Aboriginal people beyond the popularly perceived Aboriginal 'leaders'. Although Aboriginal communities score low on socio-economic indicia, Aboriginal voice has strongly influenced *Mabo,* NTAct and key 'test' cases. Aboriginals regard

relationship very highly and demonstrate sophistication inter-culturally, economically and politically.

4.4 REGULATORY CHANGE

This part considers various approaches described in the context literature that are of relevance to Regulatory Change. Unlike Western culture based in documentation and built form, Aboriginal legal and trading regulation is based on story, song, dance and music mixed in intimate connection to country.

Aboriginal legal thinking, which as described above, involves the notion of *feeling lawfulness* intrinsically links with the law of relationship rather than governance (Parker 2012). Little Aboriginal jurisprudence has entered the Australian regulatory system and that which is almost entirely land law (Berg 2012). However, Aboriginal regulation involves highly sophisticated and complex systems of individual and societal responsibilities from which evolve particular rights. Despite this sophistication and complexity, the regulatory type is oral, passing from one to another according to entitlement to know and, as explained above, recorded by dance, song and story type which must be precisely remembered in full detail.

Traditionally, Aboriginal 'ownership', particularly of land, vested in those with the knowledge. It is critically important under Aboriginal Law that the knowledge-holder controls what knowledge emerges and when and to whom. This contrasts with the Western 'right to knowledge' approach in which the enquirer tends to maintain control.

> "There is a perception by some that access to Indigenous knowledge is an entitlement, as though it is part of the global commons" (Collings 2006, p. 2).

A person with knowledge may need to defer to a person who is more senior, of a different gender or the 'proper' one (Neate 2003). The person questioned may not be permitted by traditional law to divulge information (Eades 1992, Eades 1995, Hunt 1999, also *Danci* v. *Danci* (1984) FLC 91-560, *Gaito* v. *R* (1960) 104 CLR 419).

> "Even in mundane matters, it is wrong to speak of (or for) somebody else's country, dreaming, or personal business unless given explicit licence to do so" (Gray 2000, p. 4).

A promise made is binding and enforcement is harsh and clear. Rules associated with taboos on using certain words, relationships of avoidance, systems of familial obligation and the existence of non-delegable duties to care for sites on country create obligations and obstacles, while funerals and ceremonial business may preclude negotiations for lengthy periods. Aboriginal systems of control rely upon the trust inherent in kinship relationships which exist because it is the Law (Chew & Greer 2000). Revelation of Aboriginal knowledge through storytelling is closely tied to trust.

Comparisons of Different Approaches to Interacting with Regulatory Change and the law between Aboriginals and Non-Aboriginals are revealing. For example, Western Court rules concerning who speaks, in what way and at what points, emphasize the power of European law and the authority of the Judge, who can choose to speak freely at any time. Morphy observed the Blue Mud Bay native title hearing (Morphy 2007). Claim Group voice was curtailed, despite the fact that traditional owners held knowledge of the Laws and customs that was the subject matter of enquiry. The courtroom became a 'ritual space' for the western legal system to forcefully express its intrinsic power, a meaning layered by Aboriginal alienation through cultural disjuncture. Even before the Court exercised its power, its authority had been established by the courtroom itself. Yolngu Law was explicated through examination and cross-examination, despite the fact that direct probe questioning is foreign to Aboriginals and considered disrespectful, especially of older people (Criminal Justice Commission 1996, Kearins 1991, Morphy 2007). Morphy describes how Yolngu claimants subtly resisted this, making their own Law system visible. They requested, and obtained, approval to conduct a courtroom 'welcome' ceremony before 'official' proceedings began and arranged for the court to view their 'country', during which time the Yolngu led along their own lines. This approach was different from a Miriam Elder who felt that traditional law (Malo's Law) had, in *Mabo,* come to co-exist with white law (Passi 1993).

Aboriginal reservations about interacting with law and regulatory change are articulated by Watson who examined what she calls an absorption process in which Aboriginals become

consumed by the State and its citizens, who then, by that consumption, almost seek to become Aboriginal.

> "(W)hites come into the space of our freedom to roam as Aboriginal peoples over our Aboriginal places and spaces … They anticipate coming into their own state of lawfulness through the consuming of our sovereignty" (Watson, 2007, p. 18).

Referring to Greer's invitation to consider the Australian State as an Aboriginal one, she asks how white are Aboriginals and what happens to them in the process of hybridization and what is the role of the commentator-expert in the silenced spaces of Aboriginal voice. She expresses concern that Aboriginals become cannibalized – with the cannibal yet to see or know itself in its eating and asks how Aboriginals can create a safe conversational space for a 'close encounter' without being appropriated (Greer 2003, Watson, 2007, 18-19). Sardar's conceptualization of colonization, a conceptualization not utilized by Schumpeter, becomes relevant:

> "Colonialism was about the physical occupation of non-western cultures. Modernity was about displacing the present and occupying the minds of non-western cultures. Post modernity is about appropriating the history and identity of non-western cultures as an integral facet of itself, colonising their future and occupying their being" (Sardar 1998, p. 13).

In summary, Aboriginal 'regulatory type' is oral, through stories, songs and dance. Right to Aboriginal knowledge is according to Aboriginal Law and practices, which do not divide out the spiritual and involve *feeling lawfulness.* There is need for greater Aboriginal autonomy in decision-making. Culture needs protection from post-modern 'cannabilisation'.

SUMMARY

This Chapter provided the first phase of this Study's Case Study. It described the context within which NTAct's impact upon entrepreneurial opportunity will fit. NTAct has a complex ancient and recent trading and regulatory setting. Framed from a controversial political process following High Court decision-making, it creates clear opportunities for Benefit

Groups despite massive weaknesses and threats. Its impact on entrepreneurial opportunity for Aboriginals must also be set within a long Aboriginal, and indeed First Nations tradition and culture of trading including, among Aboriginals, considerable innovation. This sees much exciting contemporary Aboriginal business venturing that is comparable to non-Aboriginal entrepreneurial activity, over a wide range of industry in both large and small firms. Important opportunities in Aboriginal venturing appear to include increasing awareness of climate change, food and environment, unique Aboriginal heritage and culture and remote, unique or monopoly locations or products, linked with technological, telecommunications and satellite improvements. Strong social emphasis persists as an important foundation shaping and optimizing entrepreneurial opportunity, with NTAct's impact on Aboriginal venturing influenced by unique elements of voice, social capital-trust. Interaction with law and regulatory change among Aboriginals contains certain assumptions and reservations that differ from such interactions among non-Aboriginals.

"I see, I hear, I feel you:

... the one who tramps her native land no more,
And the one who, tossing her beautiful head,
Said: "Coming here's like coming home."

I'd like to name them all by name,
But the list has been confiscated and
is nowhere to be found.
I have woven a wide mantle for them
From their meager, overheard words."
Akhmatova 1940

Chapter 5

THE DATA

CASE STUDIES, JUDICIAL RECORD AND INTERVIEWS WITH ELDERS

INTRODUCTION

Chapter 4 provided the first phase of the Case Study. It overviewed the literature concerning NTAct and Aboriginal entrepreneurship generally. This Chapter provides the second phase of the Case Study – the description of the data collected by this Study.

There were three data sources:

- Earlier Case Studies describing enterprise ramifications for Aboriginal Groups after a native title determination (ECS);
- The Judicial Record; and
- Interviews with four Elders from Claim Groups.

Overall, six Groups were studied, with the Judicial Record encompassing all Groups. The Study covered all Australian States and Territories except Tasmania and the Australian Capital Territory. One claim failed from the outset. All Groups, except the failed Claim,

entered into at least one ILUA which necessitated the establishment of one or a number of new legal entities.

5.1 EARLIER CASE STUDY (ECS) DATA

This data set comprises four case studies undertaken between 2007 and 2010. Each describes Claim Group experiences before and after NTAct as they relate to enterprise ventures. They were variously part of the AusAid Pacific Land Program and National Centre for Indigenous Studies Customary Land Tenure Case Study; an AIATSIS Research Discussion Paper; part of a book and DVD prepared through the Native Title Research Unit and AIATSIS; and supported by and forming part of a program of the Desert Knowledge Co-operative Research Centre None appears to be authored by an Aboriginal person, although one states it was prepared at the request of a Prescribed Body Corporate (PBC) Chairman. The stated purposes are to:

- describe the land management corporation (Sullivan 2007);
- effectively design and operate a Prescribed Body Corporate (PBC) and other corporate bodies used by Queensland Aboriginals to hold different forms of Aboriginal land title (Memmott & Blackwood 2008);
- tell the People's 'land justice story' (Weir 2009); and
- provide guidance on how to enhance Aboriginal livelihoods in desert settlements through improved access to and effectiveness of services (Memmott 2010);

The studies encompass Queensland, Western Australia, Northern Territory and Victoria and all involve a geographical location far distant from a capital city. Three of the Studies are undertaken by anthropologists and the fourth a human geographer, all of whom have substantial experience in Aboriginal affairs. In three of the four, enterprise outcomes are studied in some detail.

Each ECS tells a different story, with some using Aboriginal voice(s), others seeking to objectively describe and others adopting an 'expert-advisor' tone. Only one Study has as its purpose the telling of the Aboriginal 'story'. All studies appear to conform to Martin's Seven Respect Rules (Martin 2008, p. 6-7).

5.1.1 Outcomes

Whilst ECS data reveals that a successful NTAct Determination is regarded by the Benefit Group as a source of tremendous joy, celebration and optimism, this data confirms the contextual literature indicating that there can be limited outcomes beyond a basic recognition of Aboriginal identity and return of some land.

> "It's the final recognition that I am who I am in the sense that I've been saying and our parents told us and other people told us … " (Weir 2009, p. 24).

> "This feeling that we have now that we're recognised, it does give you a sense of pride … to be recognised by the Federal Court is justice at last, I see it [as] justice at last." (Weir 2009, p. 34).

> "Just the chance to do the things that I have been doing since I was a young tacker, and that's to hunt and fish and walk on country where I don't have to get permission to in this day and age. To go and get a feed of fish, to go and cut an armful of wood and light fire ... and don't need a licence for it." (Weir 2009, p. 24).

New venture creation generally takes the form of leverage from an agreement as well as the structures set up by the Determination and partnerships which the process creates. Thus, one Group begins by protesting a new bridge across a significant river place, which stops the work until cultural heritage clearance contracts are negotiated. This provides Aboriginal work at remote camp locations, from which the Group begins to commercially supply the clearance and road worker camps. This leads to on-going alliances between the Group and the Roads Authority for the supply of workers, with the Group ultimately tendering for the road construction work itself. From this, a training organisation is created to guarantee labour supply and the Group establishes a formally accredited TAFE training business. New ventures in other Groups involve expansion or revitalisation of existing businesses once NTAct recognition and claim payments occur, with one Group recommencing commercial aquaculture drawing upon its traditional aquaculture trade. In addition to PBCs, new ventures certainly arise as a direct result of NTAct. Some new ventures are thriving, some struggling and some moribund. PBCs are sometimes effective as enterprise vehicles, but sometimes

moribund and appear to present significant governance, operational, strategic and leadership challenges. The data also shows pre-existing businesses impacted in new ways.

All ECS data confirms Government and bureaucracy being strongly involved in multiple native title crevices, including as a party to the claim itself, party to agreement(s) and Indigenous Land Use Agreements (ILUAs) and administrator of the representative body. Government is a land owner (and transferor where fee simple was transferred), owner of abutting or nearby land, provider of resources and support, potential customer or supplier and provider (or denier) of seed capital. Government's failure to work as a conduit for the other parties (in one case 130 parties) was a heavy burden and slowed negotiation. At times, it was perceived by members of the Benefit Group to be at the same time both judging Aboriginal legitimacy and negotiating with Aboriginals.

Relationships with Government are always crucial and have major positive and negative influences. Where advantage is taken of the relationship to create active partnerships, major revitalisation becomes possible. Claim Groups in these circumstances perceive Government as having 'come around to Aboriginal ways of thinking'. Where Government participates in supporting management funding, this appears to nurture entrepreneurial opportunity but the supports recorded appeared to be its becoming a customer or various Achievement Awards. One ECS recorded that the Consent Determination signalled a profoundly improved relationship with Government. Where Government acts negatively, its impact is much greater eg withdrawal of an irrigation program without consultation, knowingly threatening project viability and breaching an executed agreement. The ECS authors record that Government needs to become aware of the changing dynamic in a region created by NTAct Determination and Agreements and that power imbalance between Aboriginals and Government needs targeting. Where the relationship with Government is successful, the Aboriginal venture needed to be cautious of becoming captured by that relationship, to the detriment of its broader business interests, customers and suppliers. One business created a formal Charter of Goals and Policies for each project-specific alliance, with risks and profits shared between alliance partners project by project. Government support is optimal when the Aboriginal venture links with the local and regional economic markets. Training programs play a key role in de-mystifying both Government and market place methods and clarifying key concepts and language. Despite the benefits, even where a positive alliance is created, Government is still

perceived with distrust. However although such alliances and networks are clearly relevant, only one ECS actually examines the detailed impact of new ventures being inserted into the complex set of existing market relationships with limited 'start up' resources.

One ECS advocates PBC funding through umbrella groups, eg a regional land and sea management agency, to optimise engagement with third parties, access to expertise and in maximum economic opportunities. Multiple landholding entities were recorded as problematic for some Benefit Groups.

As alliances and networks are crucial to NTAct-emergent new ventures, positive relationships with local municipality, work crews and key authorities led to new business. A venture suffers if it lacks resources to pursue regional partnerships or cannot generate reciprocal business. Its role in a supplier/customer cycle is important. Alliances and networks include those new ones created by the NTAct process itself, as well as expansion of pre-existing ones. ECS data records Benefit Groups actively taking advantage of the valuable working relationships that developed during native title litigation to build broader strategic partnerships. One ECS study notes that a strong and positive relationship between non-Aboriginal project managers and the Benefit Group is important. Another observes alliances being used where there are complex risk factors in order to ensure problems are solved together as a single team, with standard contracts preferred where known risks have boundaries and can be allocated to one or other contract partner.

Ceiling funding to PBCs risks them becoming moribund as lack of infrastructure, staff and money are given as difficulties in leveraging partnerships, with new ventures experiencing difficulty inserting into existing market relationships without sufficient 'start up' resources. ECS data records NTAct establishment-funding whittled away whilst the venture attempted to get established, difficulties in travelling long distances for meetings and the necessary merging of economic and landholding functions with ceremonial and social requirements. Optimal PBC structures appear to retain autonomy for each family or language group. Another describes the PBC as having difficulty opening a basic bank account; however that author does not address the probability that PBC governance rules were perceived as pointless. One Government provided 5-year funding and was recorded as considering that it had set a 'best practice benchmark' for other Governments. Dealing with multiple bureaucrats

was managed in one ECS by the State Department of Justice accepting a co-ordination role. Some PBCs are functioning through legal offices as far away as 1700km, either on a *pro bono* basis or reimbursed through the Future Act consents they negotiate.

Aboriginal knowledge of NTAct itself appears to be principally as a political and social struggle, rather than a source of information about entrepreneurial opportunity. One ECS records the Judge referring to the coming together of two legal systems and stating that the possum skin coat on the bench and ancestor banners on the walls were "greatly welcomed" by the Court.

All ECS data concerns locations far from the nearest capital city that appear to offer advantages for niche services that are feasible for local Aboriginals but may be unattractive to others. Reliability of incoming goods and services and some funding support for overheads appears to be important. One Group located its head office in a regional city and another close to a regional city, both of which had daily direct capital city air flights. However, all core business was solidly located on country with attention to community and tradition.

The data shows Discovery/Learning as Groups find new ways to apply cultural heritage and, with their lawyers, frame ILUAs to finance title holding bodies and enterprise opportunities. Aboriginal venturers actively learn new skills and actively teach skills to their youth. There was also evidence that Benefit Groups used native title opportunities more skilfully because they learnt from earlier failures eg land grants under earlier regulation, earlier non-native title litigation or first stage ILUA outcomes.

There is a strong impression of Effectuation. Aboriginal tradition provides a strong sense of "*Who I am*" and *"What I know*", with ventures springing directly from this. Emphasis is invariably on control by an Aboriginal (ie not whitefella) and new ventures appear to grow as control grows. Skills in how to work with whitefellas strengthen or effectuate as the venture takes up new innovations or ideas. There appears to be a symbiotic relationship in new venture starts between the practice of Aboriginal Law and the practice of commerce, with the two mutually supportive. As described above, in all cases, the 'W*ho I know*' is most important and alliances are fundamental.

The normalising of commercial arrangements to align with western commercial requirements is frequently identified as a significant challenge. One ECS study concludes that it is unrealistic to expect small poorly resourced PBCs to ever manage external relationships involving complex commercial negotiations. That said, ECS data confirms the persistence of Aboriginal identity and culture as a dominant continuity, as Aboriginals, unwilling to leave their 'country', seek a 'fit' with the complex mix of potential enterprise in local market conditions. The benefit of empathetic partners, consultants and policy-makers is significant. Agreement-making did offer entrepreneurial opportunity, but there was only limited evidence of this being discovered from the terms of the NTAct itself.

There was no suggestion that the Benefit Group considered its Law diminished. One ECS, referred to two systems of Law, only one of which (the Aboriginal) required proof of its existence. One ECS recorded links between Claim Groups around land justice with one Benefit Group actively assisting the Yorta Yorta, after its failed claim, to reach a joint-management agreement with Government. One ECS referred to the need for the Benefit Group to take control over information and decision-making based on it.

Social capital shines out in the emphasis upon community projects, the banding together to leverage whatever is required to create new ventures and ensure supply of basic infrastructure and community needs. Social capital is recorded as arising from informal instruments of Aboriginal governance based on family, clan, kin network and cultural bloc. In many instances, the voice of Aboriginal People is loud and effective in negotiations and advocacy to secure the Claim, but in others it has moved elsewhere or stopped. That said, ECS data refers to native title both creating divisions within families and giving rise to superlative cross-Peoples co-operation.

ECS data shows that interactions with other regulatory types, such as Land Rights legislation or Aboriginal corporate governance regulation, can clash with NTAct goals and commercial enterprise and governance requirements. Inexperience in business management is recorded in one ECS as resulting in less-than-optimum outcomes from earlier legal outcomes. Otherwise, ECS data provides no insight into regulatory models or methods beyond demonstrating NTAct's proscriptive approach using a conventional regulatory method and no consideration of regulatory type innovation.

In summary, ECS data confirms that NTAct impacts entrepreneurial opportunity by creating the new ventures required by and those leveraged from it. It can provide start up resourcing and finance as well as direct enterprise benefits, particularly through negotiated native title agreements. New ventures appear to follow an effectuation model, drawing on owner identity and knowledge, with shifting alliances and networks particularly important. There is also discovery/learning. The data shows Government's powerful role in shaping or hindering entrepreneurial opportunity. Remote geographical location is recorded as a competitive advantage. Aboriginal knowledge of the regulatory change is limited but does not appear to affect entrepreneurial opportunity. Voice is exercised to secure the claim and, to some extent, agreement terms. There is clear evidence of strong social capital within Benefit Groups and evidence that it extends externally. The data shows that other regulations affect impact.

5.2 JUDICIAL RECORD DATA

The Judicial Records of the Federal Court and NNTT were comprehensively examined for all Groups from which data was otherwise collected. NTAct created NNTT to administer native title Claims. The Federal Court was given a specific Native Title jurisdiction. The data was not consistent across Groups containing, as is usual, different documents tailored to the needs of individual Claims. Federal Court public access is determined by Court Rules that permit non-party access to certain documentation that is not confidential or restricted. It includes claim, application, pleadings, agreed facts, judgments and reasons, orders, appeals and affidavits accompanying claim, along with various procedural documentation (Federal Court Rules 2011, Rule 2.32). NNTT maintains an online national public record of all Applications, Orders and an Agreement extract statement disclosing area, parties and duration. The author was also provided with some judicial documentation by Interviewees. This data set provides rich data concerning the benefit secured by the Benefit Group. It goes to the heart of the chaos created by the transformative regulatory change, shedding light on the seed point for any impact on entrepreneurial opportunity.

5.2.1 Outcomes

The creative process is confirmed by this data set, which records orders that grant the regulatory rights, but in most claims one or several agreements with multiple parties including Government(s), at least one large commercial institution and a Government authority (eg

National Parks) as well as the new PBC. Government is shown to invariably drive a hard bargain before allowing its monopoly land rights to be destroyed.

The numbers of *parties* is invariably extensive. As well as the Claim Group Applicants (often more than one person), it includes State and Commonwealth Governments, other Aboriginal Groups, municipal Councils, other Government bodies (eg water, catchment management, parks, maritime), private land owners, other mainstream business interests (eg mining, oil, pastoral, forestry, ports, fishing, beekeeping), infrastructure providers (eg telecommunications, gas) and other interested Groups, (eg recreational and public land users). In one Claim, the parties were so extensive they were administratively divided into 'interest' categories. Outside class actions or planning appeals, the Australian judicial system is not generally faced with cases involving such a large number of parties.

Most of the many parties have separate *representation* by individual lawyers. Claim Group representation is invariably provided through State Native Title Services or Rep Bodies, with such representatives invariably complaining about lack of money. Government Solicitors represent the States and Commonwealth. A wide variety of law firms act for other parties. Occasionally, one or a group of Claim Applicants are separately represented. Complaints as to funding shortages permeate the entire NTAct judicial and legal system.

Reliance upon highly qualified non-Aboriginal historic and anthropological 'experts' is routine. This 'expert' evidence extends beyond connection to country and influences the process itself (eg whether the Claim should be treated as a whole area or a set of family claims). Instances exist where this 'expert' evidence is actively withheld from Claim Applicants themselves. Actors in the system, such as lawyers, suppress elements of the regulatory change and emphasise others. The data shows that such actors do not brook interference, but openly work out terms for the Benefit Group which they then set about getting the Group to authorise - 'we will tell they them what the agreement says'. The data includes one instance of a Judge minimalising serious and multiple breaches of the rules of natural justice as a misunderstanding or a consequence of inadequate funding.

Delay, experienced in all cases except where the Claim was rejected at the outset, ranges from 11 years to more than 17 years. Delays of such length in bringing cases to trial are unprecedented in the Australian legal system where Courts have streamlined case

management systems to ensure prompt and efficient case processing and resolution (see 4.1.6). These delays mean that key people die before rights can be established and entrepreneurial opportunity weakens by deflating motivations, diverting energy and hindering creativity. Most cases involve multiple hearings, mediations, case management meetings and many 'occasions'. These include field visits gathering oral evidence, which require extensive time and often long travel by elderly Claim Group members, and 'on country' 'handover' ceremonies where Judges, parties, their representatives and the community celebrate. Funding is available for these expensive 'on country' 'handovers', despite desperate funding shortages for legal advice to optimise what Aboriginals might celebrate. Government-funded case determination ceremonies outside Court rooms are also unheard of outside this jurisdiction.

This data set confirms again that Government permeates every crevice of NTAct, with generous elements of actual or potential conflict of interest and extensive control of outcomes. At least two Governments (Commonwealth and State) are parties to each proceeding. In one instance, where the Commonwealth opposed the State's acceptance of the Aboriginal connection claim, additional work (and delay) was occasioned in convincing it to accept the agreement reached between the State and the Claim Group.

Apart from its direct interest as a party to every claim, Government also has an overreaching involvement in managing the process as well as arranging (or denying) resources to Claim Groups and other key parties. In one instance, funding for adequate meetings to discuss the extensive final draft Determination and suite of Agreements was refused by the Rep Body (an arm of Government), with parties being told they were compelled to make final authorisation resolutions based upon uncirculated drafts, documents that did not yet exist, incomplete documents tabled without notice and inaccurate summaries (Dodd(a) 2012).

Government controls both judicial administration and NTAct research. Its judicial officers, as Registrars, Mediators, Tribunal Members and Judges, dominate achievement outcomes. A large section of one native title Determination was given over to congratulating various Court officials who participated in the process:

> "(T)he outstanding work of Registrars… Their dedication has been unique in my experience of these cases. The parties and the community owe a huge debt to them"

(*Lovett on behalf of the Gunditjmara People v. State of Victoria* [2007] FCA 474 (30 March 2007) (Lovett 2007), p. 16).

"(A) judgement without such acknowledgement would leave the critical contributions unrecorded and would be a very poor and incomplete record of an important historical moment" (Lovett 2007, p. 15).

The Court proceedings delivering the final Determinations frequently read like an historic, ceremonial address, rather than a hearing to deliver final Orders. In proceedings held on the land to which native title recognition was granted, the Court said:

"As a symbol of this recognition … I will now hand to … traditional owners and the Attorney-General … copies of the signed orders of the Court…" (Lovett, p. 17).

Such comments in Reasons for Determination are extraordinary in Australian judicial tone, yet the Court clearly wished to record a sense of something unusual and significant.

Claim Groups control knowledge *resources*, lawyers control the legal resources required to achieve success under NTAct and financial resources are almost exclusively controlled by Government. Geographical location is relevant with more settled areas having difficulty establishing the degree of connection NTAct requires. Remote location adds to the size of budget allocations for ceremonial determinations in a system that suffers from widespread lack of funding in all other areas.

This data source also reveals effectuation elements. '*Who Am I?*' is key to securing NTAct benefit. '*What Do I Know?*' reveals Aboriginals holding extensive traditional knowledge and needing to educate the Court as to their land justice requirements and *modus operandi*. The judiciary tends to take greater than usual care to ensure the Claim Group knows Court procedures and key principles of western law. '*Who Do I Know?*' reveals linkages between lawyers, witnesses, advisors and their clients, as well as their linkages with the Court or Tribunal. Such professional alliances clearly influence NTAct's impact. Legal system alliances exist to which Aboriginals are 'outsiders', for example case management meetings exclude the clients. However, the NTAct, by its agreement procedures, creates new formal alliances for future land development.

This data set does refer to innovation, but it is invariably made within the context of the dispute resolution process rather than among the Aboriginal Benefit Group, for example:

> "outstanding work of Registrars … who navigated the discussions through choppy waters" (para [52]).

Voice is important in facing up to the violent history, anger and shame inherent in the NTAct process.

> "(W)e were one of the first places invaded… - so that's led us to a lot of hard history between the indigenous and non-indigenous community … there's a lot of shame, there's a lot of anger … and we want to get people together to talk about it, have a row about it, but ultimately to … get together and address what has happened … to get to a stage where we can move forward…" (Lovett 2007, p. 14).

The data confirms that Claimants do not self-silence but, responding to the importance of the matters in issue, work actively and at considerable personal cost to achieve positive outcomes. This resonates with Eades' observations that Aboriginal people remain silent until the last situation (Eades 1995). Despite this, Aboriginal voice is not extensively articulated directly in this data set, though judicial decisions concern the entire future of their country and their traditional connection with that country. Judgments almost never refer to Aboriginal voice itself, but rather to anthropological and other evidence, including video footage from anthropological fieldwork or ethno-historic or library archive material, including early expeditionary records, cross referenced with oral testimony from 'informants' (Finn J in *Dodd v State of South Australia* [2012] FCA 519 (Arabana), p. 8). Judicial statements, for example, record that the State 'found the claimants who participated in the field trip to be credible and knowledgeable' (Finn J, Arabana, p. 7). No record is made of whether the claimants found the State participants credible or knowledgeable. Deep reliance or reassurance is frequently placed in the State's in-house historian's historical or genealogical research (Finn J, Arabana). In one case, the 'novel approach' of the State's historian and legal officers in taking a fieldtrip together on country to speak to 'informants' was mentioned as a significant innovation (Finn J Arabana). There was an example where concerns raised to the Court that the Claim Group and its members were not being heard was discounted as a "misunderstanding" that "happened without any fault on the part of anybody", with judicial expressions of concern at

delay and lack of funding to allow the claims to be heard (Auscript 2012 transcript of Mansfield J in Dodd 2012, p. 3).

This data set confirms distrust as a key obstacle to NTAct outcome. It records active, innovative steps by the judiciary to address this. The judiciary appears genuinely to attempt to carefully listen and build trust, making Orders requiring lawyers and Government to speed up timelines, account for delays and explain failures to negotiate suitable terms. Nevertheless, trust remains a fundamental issue referred to by Judges and litigants.

> "(T)here is often a history of violence and dispossession against indigenous people to be addressed. Against such a background it is no surprise that the gaining of trust and confidence between the negotiating parties takes time to establish before meaningful discourse can occur" (North J in Lovett 2007, para [48]).

As mentioned above, the Consent Determination is generally convened 'on country' and unconventionally, with the bewigged and robed Judge, relevant Court officials, lawyers in wigs and gowns and, frequently, local politicians and dignitaries mingling with members of the Claim Group and local community, including large numbers of children, in a highly celebratory ceremonial style often in the open air or under a canvas canopy.

This data set shows all parties working within the confines of an extremely complex and increasingly technical regulatory type, but does not reflect alternatives or regulatory type innovation.

In summary, the Judicial Record Data confirms the creative/destruction process, shedding unique light on the seed fertilisation process from which an entrepreneurial opportunity might spring from NTAct. The data set reveals unusual NTAct features – delay, multiplicity of parties and considerable symbolic and ceremonial elements. It again confirms Government's dominant role, including its subtle influence on judicial processes via funding and Rep Body influence. The effectuation model is confirmed, along with the relevance of geographical location. The data highlights the role of legal actors in controlling outcomes and determining the extent to which innovation and commercial opportunities are built into Determinations and Agreements. It is clear that these actors are neither neutral nor passive.

The voice of the Aboriginal is filtered through experts and lawyers with highly ceremonial decision-making occurring. Distrust is a major constraint upon effective operation of the

regulatory change itself and was referred to by both Claimants and Judges. The Judicial Record data reveals that the judiciary perceives elements of its system as innovative.

5.3 INTERVIEWS

Interviews conducted with four Elders comprise the final data set. As indicated in 3.4 above, those chosen for study were not selected by statistical determination or random sampling, but using purposeful, strategic sampling. Thus, effort was made to include the Wik People, as theirs was the first native title 'test' case after introduction of the regulatory change. Relatedness was relevant, given the features of effective Aboriginal research methodology identified by Martin (2008).As far as possible to ensure a direct relationship between interviewees and the researcher, contact with or via non-Aboriginal people (eg advisers) was kept to a minimum. National coverage was also sought. The Interview was an Elder identified as involved with or knowledgeable about the communities' entrepreneurship. That person was, according to Ethics Committee requirements, to remain unidentifiable, hence the male pronoun and mixing was used. Their views were their own and, as identified in 3.4, the author did not seek to ascertain whether these views were representative of, or differed from, those of their community or other Elders of their People.

Two Interviewees are native title Applicants in their own right and all Interviewees are thoroughly familiar with the Claim and its sequelae as well as entrepreneurial activities of their People, both pre-NTAct and post-NTAct. Claim areas located in four different Australian States, one city-based and three rural (including two remote). Two of the four Elders came from Groups also considered in ECS data. The Judicial Record was scrutinised for all Groups prior to interview. Classifications, drawn from the Chapter 2 Literature Review framed the generic interview 'probe' questions for these Interviews. For reasons of privacy, following analysis, data was mixed to avoid identification, but quotations are referenced to the Group's venturing, ie Property Industry (PI), Timber Industry (TI), , Leisure Industry (LI) and Fishing Industry (FI).

The Interviews are stories in their own right from which a 'combined narrative' was arranged according to its own emerging logic. The themes of this combined narrative are summarised in **Figure 18** below.

KEY COMBINED INTERVIEW THEMES
Personal: ***Sorrow, trauma, violence, disillusionment***
Aboriginals View of How the Law Views Them
Aboriginal View of Australian Legal System
Voice After *Mabo*
Bureaucracy
Positives
Negatives
Inside the Group
NTAct Process
Governance of Native Title
What is Native Title Right?
Implementing
Business
Entrepreneurship
Potential Opportunity
Agreements
Government
Post-NTAct regulatory change

Figure 18: Overview of Key Combined Interview Themes

Source: Researcher

5.3.1 Outcomes

All Interviewees have strong important stories that they want told. No Interviewee has previously been asked to comment on the impact of NTAct upon entrepreneurial outcome and each welcomes it as an opportunity to provide knowledge he wants told. Outcomes from this data set reveal 'behind the scenes' more than the other data sets, recording sorrow and violence, with lawyers described as instruments of Government or mining corporations, Elders forced to sign agreements extracted after misleading or incorrect legal advice and Claim Group meetings that routinely breach the rules of nature justice. The voice of these 'outsider' Elders provides a unique, disturbing and deeply nuanced understanding.

Positives they record include recognition, identity and 'as of right' access to land without the need to justify oneself. Negatives include mere rubber stamping of rights they always knew existed, rejected claims, disrespect of Aboriginal Elders, agreement reaching processes that ignore Aboriginal trading traditions and, across all, a view that no-one *really* listens to them and limits on traditional trading and commercial opportunity. Governance structures prescribed by NTAct are seen as artificial, ignoring both traditional and existing governance structures and so complex they hinder entrepreneurship, existing only for bureaucratic reasons.

Key themes are the tragedy and serious personal misery, stress, trauma and disillusionment that NTAct causes, particularly compared with the hope that followed *Mabo*. Native title outcomes come with many layers of deep anger, disappointment and frustration. Bumping into the NTAct world is uncomfortable for all Interviewees and their People. It causes internal complexities with traditional respect undermined as Elders find themselves tricked and made to appear unsophisticated. Internal division is also deliberately seeded by third parties. Agreement-making is a key NTAct opportunity outcome, but poorly links with existing businesses and land holdings and this impedes entrepreneurial opportunity.

Interviewees consider their People cannot communicate through an Australian law that has no idea of Aboriginal culture. Aboriginals see the Crown as a 'headless hat', reinforcing racism against them. Where possible, the Claim Group attempts to secure control, but despite huge delays, NTAct often gives insufficient time for case preparation, allocates insufficient resources and is viewed as another weary fight, following earlier Land Rights struggles.

Bureaucracy is a chronic entangling burden, increasing trauma and anger and negatively impacting opportunities. Government is 'the other': seen as paying the money in order to secure control and a dominant rather than equal party.

> "…And it's a full time bloody job going to meetings and everything. … Yes, so that's very draining in itself. Especially because we have no real control over what people … Just being consulted to death by mining companies, by Government and their wonderful new programs. Constantly rolling out new programs … a lot of pressure on the community and a lot of time to, you know … go to these meetings constantly and participate in social and economic impact assessments and environmental impact assessments you know" (TI23).

Another respondent, after the formal interview ended, referred to visits by judges and lawyers as pointless

> "I want to ask them - 'how many of our young people did you lock up today?' "

Most Elders were astonished to learn that NTAct's Preamble expressed Government's intention to facilitate economic benefit for Aboriginal people.

> "Is that what it says? In the Native Title Act? Jesus Christ. … Well that is hilarious. … That's fucking hilarious" (TI52).

Elders consider that Aboriginals should be given a chance to make their own mistakes and learn from them. The constant need for white verification or an umbrella organization is a trying irritant:

> "They'd be happy if the white CEO had a signature letter saying that they support our organization, they're happy with that. The CEO that's there for a couple of years, you know. Just because it's a – it's another Government authority. You need that – it needs that support and hey, and we've had problems with that. … [I]s the uh, the CEO … happy with this? … [D]oesn't come from here … doesn't know nothing about it and it should be the CEO asking our organization…" (TI55).

Large payouts, mentioned as $1M, are considered to be a false hope:

> "Well that's divided amongst the three or four thousand members" (LI21).

Elders consider there should be some way of going about using NTAct to assist in capital raising:

> "There should be. There should be but there's not" (TI32).

Often the Aboriginals find they are a long way ahead of others, particularly in areas of climate change and environmental sustainability:

> "Haven't you fellas caught up yet?" (FI25).

> "[W]e do have cultural assets that are pretty unique. We do have a story that's very unique in terms of human settlement and agriculture and development. We always knew we had that… For us to be prosperous, we need to live in a broader prosperous community …" (FI18).

PBCs are seen as merely post boxes without any organizational life of their own and merely "providing a service to the commonwealth" (TI14). Complexity of governance structures is a major hindrance to entrepreneurial opportunity.

> "[A]ll of these entities and everything all of these plans." (TI4).

Traditional reporting and operating practices are valued and adhered to:

> "As a board … we have to report back and (have) instructions from the wider group. You know, that's – that's how it should work" (TI39).

Elders consider that NTAct does not recognize how Aboriginal decisions are made.

> "Absolutely. Divide and conquer. And it's not a pro- it's not a bottom up approach" (TI13).

Unwritten regulatory forms applying Aboriginal Law and societal arrangements appear to be micro-regulating an impact. The consent process involves risks:

> "And then they'll just buy off a few … Offer them an outstation house… And then because there's hierarchy, there's people who have, you know? … As soon as you buy one or two of the key people, you know, the bosses of the clan. Or the most powerful. Um, then we have – we can't say anything, you know?" (TI6).

Financial support to umbrella organisations such as Land Councils or Rep Bodies concerns all Elders. It creates barriers to flexible grass roots entrepreneurship as well as seed funding, especially where the Rep Body is located over a thousand kilometres away and is very hard to access.

> "But the other issue is, because of the Native Title Act, like when you're talking to the Feds, the only thing they must fund, like they you know, they must fund under the Native Title Act is … native title rep bodies. Rep bodies" (TI52).

Elders consider that it is these umbrella bodies that "are listened to" (TI12).

> "Trying to destroy, destabilise the business … because it's another entity they don't have control of us. They want, have to control" (TI56).

> "Oh, it's a little select group and it's been quite corrupt in the past. … [T]hey've had a string of people who are just puppets for people who aren't traditional owners …

> and they're quite secretive … Government respects them over traditional owners…" (PI7).

For many, NTAct provisions are, in effect, unknown and in meeting NTAct requirements, Aboriginals often face language difficulties, educational issues, lack easy access to legal advice, live long distances from legal and other services and simply find it impenetrable.

Businesses are tied to country, song and story, woven through community. Entrepreneurship is built on tradition, harsh earlier experience and strongly sourced in community goals and social capital, with a unique Aboriginal offering and possible climate change/ environmental sustainability opportunities. Agreement depends upon the ability to negotiate and, although NTAct brings Aboriginal people 'to the table', they find themselves compromised by a dramatic imbalance of resources. NTAct's role in triggering new venture start is acknowledged by some, but not others:

> "Well really at the end of the day, if it wasn't for the Native Title Act and that thing in there about ILUAs, you know, that provision, indigenous land use agreements under the Native Title Act, registered, recognized by the world, none of these entities, none of these businesses that I've established would be there. … [W]e wouldn't have this opportunity to start it, you know. We actually – the seed funding came from our royalty payments from (mining company) because of Native Title Act … So that's a real positive. I think that's probably the only positive thing beside the fact that you know, yay we can say we have native title rights, you know. Um. ILUAs" (TI14).

> "[I]t's like when you're building a house, you know, they lay down the concrete, they lay down the foundations. Now we have recognition, yeah, from the outside world that we are from that country. We have our rights" (TI5).

Others see it very differently:

> "There's not much you can say apart from getting rid of it and starting anew" (LI53).

> "I am not aware of any successful business venture as a result of Native Title Legislation. I am not aware of that … because you could never make, there can never be a successful enterprise created for aboriginal people as a communal group of people

> and it doesn't allow individuals, to my knowledge, to go out there and create enterprises … or any entrepreneurial activities" (LI15-16).

Certain understandings of entrepreneurship are regarded as a western imposition and rejected on moral grounds:

> "[A]ll of the ruling body … come along and say, 'You want to be an entrepreneur like the Bondies and all this, so you need to do this … to get these skills. … To me … an entrepreneur is a business person, the rich business person… . [T]o be a successful businessman you've got to be a bastard. You've got to be a mongrel. You've got to be a very ruthless person to be a successful thing. You can't be a kind person and – but that's not our thing. If you're not in there to tread on toes and crunch people in a business you're wasting your time" (LI12).

Others have a less kindly view of Aboriginal trading with new venture often triggered to secure control:

> "Bit of control … 'cause you see a lot of tourists – from the mining, you know, from miners, I mean, just setting up on … people's outstations and yeah trashing the place. So we wanted to be able to control it. … where they go, what they do. … together. … and wanting to go into our own business" (TI24-5)

> "… [W]e wanted meetings with all the participation with the miner. We wanted our people running the trucks. … Enough to be running the employment training strategies to get our people's you know … in there. … Um, because … we knew that they were going to be (extending) … Which they are. Mining our country" (TI25).

New businesses are mentioned as, in some instances, emerging from the Claim Group itself:

> "You know, our own meetings, our own public meetings. … [W]e wanted to invest in economic development as well as … education. … [S]o we'd meet amongst ourselves and talk. Everybody would say well we want sort of this. Our own management is important and these are the issues. … And then that's how (the various businesses) came to be. … [A]s well our people want to be able to be on our own country, we want managing country. But also it's a source of income for our people" (TI24).

Tradition and the experiences of the old people remain a strong guide:

> "[I]f you can broaden the story out over a couple of thousand years, and see what kind of change people have been through, it gives people a bit of confidence and resilience that, you know, we've done this before, yeah." (FI18).

> [E]ven those people who … may have been in fear of identifying as Aboriginal, but they were still out there in business and … quite a few of them were entrepreneurial… Aboriginal involvement in entrepreneurship dates back much longer than what we're prepared to understand or talk about, but it was an Aboriginality that was hidden" (PI50-51).

Initiatives often begin by seeking creative ways to appropriately monetize the native title right.

> "[P]urchasing a property for communal groups … with numbers in the thousands to reap the financial success of that property … is impossible. It can never, never, never happen. … You wouldn't generate enough finance out of that property for something like two or three thousand members of that group of people. … To expect that pastoral property to generate enough money is like trying to find hens teeth" (LI17-18).

> "[T]hey're paid X amount of dollars yearly to sell, to give away the rights of their heritage. … And their culture, their land which is part of them which is embedded within those lands, the spirit of their ancestor, right? In return they were getting something like $175 each per year" (LI21)

Opportunity focus is generally quite clear:

> "Our product is what you would call the more boutique product … slow food products, it's very exclusive. It's from this part of the world and it's processed traditionally from a landscape that's been built for over eight thousand years. … So that will be part of our marketing … you get the wellness and the goodness … but you'd also have um, um, that attraction to come here to see the actual landscape" (FI27).

One group successfully undertook a major government heritage project to reconstruct early settler (ie non-Aboriginal heritage) dry stone walls using skilled traditional techniques. Flexibility and adaptability are key:

> "Well we're a flexible organization that just responds … to the needs of our people. You know, maybe five years' time or three years' time people want to get into something else. … [I]ts to prepare, this enabled us to prepare for our negotiations with the miners just to say well 'this is what we want'. Instead of just all of a sudden, yeah, having to respond to what they're wanting to offer us" (TI27).

Difficulties from the pre-NTAct past are turned into positives outcomes:

> "I was just thinking, with … like losing everything and sort of pulling ourselves through something like the … sustainable development project that will be our entrepreneurship." (FI18).

NTAct difficulties force traditional owners to act creatively:

> "[I]t's made them negotiate directly with Councils … and what that's meant is that TOs [traditional owners] have been able to get little snippets of land and it's usually a disused hall, it's an old premises and they've been able to turn those into, you know, babysitting areas or meeting halls or, so the whole concept of entrepreneurship is that they've been able to maximize the use of an unwanted space and then turn it for something positive for the community and that's what's been really exciting now. I argued that maybe if we had've been given everything, the same as the Land Councils have got, you know, which is millions and millions of dollars that they've wasted, would have we done what we've done and would we have fought so hard and I'd say 'no' because we would have fallen into that blackfella thing that, you know, the … white man owes us something (PI43-44).

Failed claimants find entrepreneurial opportunities in a reverse way triggered by NTAct:

> "Yeah that's the entrepreneurial aspect, they've realized that under the Native Title Act that they have nothing and they'll get nothing so therefore we'll look at building up our asset base and building up something for the future for our children through other means" (PI45).

ILUA conditions, requiring preferential treatment to the Claim Group, tend to convert into venture opportunity:

> "If an aboriginal company can do the job and then our prices, you known, are reasonable … [t]hen there's a clause in there that they… give us preference… I mean it's good for us, it reminds them hey" (TI34).

All Elders express concern for NTAct Claim Groups who happen to have no resources or other development potential on their land. They are seen as having little opportunity to readily convert NTAct into money or business opportunity.

The Interview data also confirms NTAct killing an entrepreneurial opportunity:

> "They wrote back and said, 'It's a very … good program and we support that but we can't because Native Title is over that land' and it was a Native Title signatory who was actually applying for that program, who had put together that program and this was about not Native Title rights. This was about dealing with social problems" (LI4-5).

> "We had, we were looking for two blocks … to build teacher's houses… [O]ur Native Title claim excluded all public places such as towns and any other public facility. I asked if we could have those blocks for those school teachers and that. This department, Education Department, told us they could not have those blocks and that I, the claimant, … signatory on the claim, could not extinguish Native Title rights. … [I]f … they paid Native Title Office or their department … $250,000 each for those blocks they could have the blocks. It wasn't the Aboriginal people asking for that money. It was the Native Title Department themselves" (TI23).

Three of the four Elders sense NTAct as seriously stifling new ventures and projects.

> "Oh, I absolutely have no doubt. I have no doubt it is. Yes." (LI37).

> "[T]hey think they know best. They come flying in from (city more than 1,000km away) and they tell us well this is how it's gonna be done and just what you people, you blacks, have to do, just sign on the dotted line here. … We have over 125

> Government departments and agencies delivering services … flying in, flying out constantly, running around delivering their services" (TI8).

> "It's an oppressive bit of legislation and I certainly think that it was meant to do such a thing… Prevent people" (LI6).

> "[T]hey see it as a way, another way of Government controlling us…" (PI27).

> "Turns into a big black bureaucracy. … There's structural flaws" (TI13).

One Elder explained how the Yorta Yorta claim failure reverberates throughout Claim Groups Australia-wide, leading directly to nervousness and claim compromises. Entrepreneurial time is lost:

> "I'm wasting my time … fighting with bureaucrats" (TI60).

The sudden new arrival of a development that might interrupt or even compete with the Aboriginal venture and constrain its free market operations is a constant threat impacting entrepreneurial opportunity. Exclusion from normal market forces by NTAct is a constant grievance:

> "[W]e don't even have the right to … tell them to go away. …. it doesn't give us any rights to stop development. Outsiders coming in and mining. Or do whatever they want to do" (TI6).

The worst aspect for some is the huge mainstream NTAct juggernaut:

> "[I]t's created this legal business and a bureaucratic business and its also … definitely impacted on the objectivity of a lot of archaeologists and anthropologists …this industry that's been spurned from it is definitely the worst aspect (TI 51).

NTAct creates opportunities for non-Indigenous people "particularly in the legal industry":

> "I think in the mining industry and the pastoral industry, it's created a heap of confusion and its definitely created a lot of people employed in those industries to interact with…to sort it out. … Aboriginal employment hasn't gone up. Aboriginal involvement in the mining industry hasn't gone up" (TI 53-4).

The opportunity presented by ILUAs is threatened by complex agreement documents presented for signature at the end, not the beginning of negotiations - often as a *fait accompli* for 'take it or leave it'. These documents invariably run to hundreds of pages of English-language legalese, with vast attached Schedules of maps and tables and additional documents, invariably containing extensive legislative cross-referencing. Rarely are the Aboriginal parties taken through the provisions in detail, with sufficient time to consider their implications, as this is a process that might literally take days, given limited reading skills or English language knowledge. Sometimes incorrect summaries are handed about, leading community members to misunderstood what the agreement really provides. These agreements often use *pro forma* documents that have been extensively negotiated between Crown, industry representatives and Applicant lawyers before being presented to the Applicant(s) themselves.

Most Elders consider that the voice of NTAct itself is that of the 'Magnificent 7' or the 'A team', rather than individual Claim. NTAct recognition is acknowledged to give some voice:

> "There is … (a) seat at the table. …. A bit of a voice… A bit of a voice. But that's all. … It's a very passive model. So, they fly into town… To tell us what they're gonna do. Or what they propose to do" (TI7-8).

One poignant story confirms the effect of silencing inherent in the NTAct system:

> "[T]hey want concrete evidence to prove who you are … in my particular case my grandmother, her mother and her mother, there's three generations of women, who were in slavery, you know, with the … Church. Now the … Church refuses to acknowledge that they had slaves that they actually bought and sold them and so if the Church refuses to acknowledge … and they refused to hand over the birth records … you can see how it's very difficult to prove who you are and … Native Title Services they want… primary documentation and they make it very hard. … [Y]ou finally go along to Native Title Services when they finally will talk to you and you go along and you take, you know, boxes and boxes of pictures, diagrams, birth certificates, death certificates, you take it all in there. A., you may never get it back and B., as in my case, three times 'what pictures!, what files!, you never gave us any!'. So they totally lost it 3 times and I believe it was motivated purely to silence me and the fourth time I went in there they say 'oh, oral history. We can't prove this'. And you know like,

> that's how they silence people, people get silenced because they get so fed up they just walk away because they show you to be a liar" (PI49, 58).

In another instance, the Elder, as Claim Applicant, was denied access to his People's connection evidence on the grounds of confidentiality, despite his extensive personal contribution to it and its prior circulation to representatives of the other parties and external Counsel. Later his authorisation to be the Claim Applicant, which comprised a map of country signed by old, now deceased Elders, was returned to him as a framed gift from his lawyer who refused him a copy throughout the claim!

Social capital appears strong, even in deprived and poverty-stricken areas. Motivations of individual entrepreneurs are invariably community oriented. Remuneration is community, not profit, related:

> "Business doesn't pay for my time. I'm just a director. … [W]e have directors, a board of directors. Separate board of directors for each of the entities. … [N]ext year … my wage will be split. We've got a service agreement now developed between the three companies so it's a fixed service" (TI50-51).

> "[A]ll of these entities and everything all of these plans. I will go when all these things are set up properly … and can run themselves and are not dependent, you know, don't need (me)… to be around to continue. … [W]hen they're at that stage then we can move on … sustainable and it's not dependant on people who are, you know, there … An organization that can – doesn't matter who the CEO is or who the directors are, it can still stay there. So that's … my goal" (TI63).

Entrepreneurial motivation draws heavily upon this social capital:

> "[P]retty much people's faces when the kids get a, you know, find a job, you know, it's people. … Yeah it's the people. … You change someone's life, like – you know. … [T]he little boy start school, helped them through … [W]e gave him a job as an operator … So set himself up that way … (from this) can get jobs with other companies which he has done in the last year because we haven't had any work for him. And his wife has settled down looking after the kids eh? And that, they're so happy and they … don't want it any other way … [T]hey're living a happy life and see that's – that is rewarding in itself. That is rewarding. … Or running those holiday

> programs …And the looks on their faces … It's a life-changing experience… That's rewarding…" (TI64).

Emphasis on the communities' children appears to be a particularly strong entrepreneurship incentivator

> "[P]rovide for their kids, give their kids a better life than they had" (PI63).

> "I think there's an entrepreneurial spirit out there and I think it's coming from the younger people. … 100% of the single mums are University students… The (traditional owner group) is really trying hard to look at entrepreneurial action. … [T]here was no longevity there, so there's ideas and that out there but they're short term…" (PI61).

> "[T]his one here was a holiday program so our people said well our kids are really bored, … damaging council equipment, this and that. So we said okay, well let's have holiday programs then. We'll put in a submission, you know, and then we put in a submission. We run (break dancing) cultural, uh, (break dancing) workshops and sent kids to (city) and had camps out in the country um, so that's just – that was a one-off really like it run, we did that over two years" (TI42).

Elders confirm that Aboriginals do not trust the NTAct process.

> "[T]hey think it's a total waste of time actually, they don't trust it at all. … It's more Government spin yeah" (UI54).

Distrust and racism by Government, western business and legal systems is a serious concern and expressed as an additional obstacle for Aboriginals.

> "Absolutely. Yeah, it's the whole … All the time yeah. … And it's mostly Government you know … Fuck yeah. … Government is just really deeply ingrained in their psyche. They just –it's … Well I just feel Australia is, you know, they're a racist … place. Country." (TI49,50).

> "Whole different new set of issues when you're an aboriginal organization. … You know, a lot harder. Lot harder" (TI52).

Elders also confirm that the regulator does not really trust Aboriginal people to properly run a business.

Some alliances arise to address such mistrust:

> "Like I sit on several Boards and the only reason I sit on them is just to keep an eye on big brother and just watch what's going on and see how bad the relationship is between the Land Council and the Government" (PI69-70).

Regulatory type is also an issue:

> "[T]he judge said yes you have the right, but he gave no methodology for the regulators to follow" (FI28).

> "We can get a licence but we want a licence on our own terms" (FI25).

Two Elders report that NTAct has a more negative impact upon entrepreneurial opportunity and new ventures than Land Rights legislation.

In summary, the Interview data is the only data set that describes NTAct's tragedy and misery or its burden impact on the Benefit Group. Despite this, it identifies opportunities for Claim Groups, including failed Groups and non-benefit Groups. Some confirmed that new venture starts arose driectly from NTAct and others that failure and difficulty seed entrepreneurial opportunities by forcing creative and alternative ways to use NTAct to 'beg, borrow or steal' some benefit, confirming the Murray River Claim Groups' experience following the failed Yorta Yorta case (4.1.7). This data set confirms a Native Title Industry as its own entrepreneurial opportunity for lawyers, anthropologists, mining industry advisors and various Government judicial and administrative bodies, an opportunity that appears generally to be unavailable to Aboriginal people.

This data set again confirms Government's all-pervading role, noting it as time-consuming, unhelpful and often mischievous. Umbrella groups are viewed with distrust and serious problems are articulated with Rep Bodies and Land Councils. The agreement process offers potential for entrepreneurial opportunity, but the data reveals how hard it is to take this beyond a mere potential. The data reveals the severely limited resources of Claim Groups, who frequently compromise claims and appear to feel forced into agreements in order to

secure some benefit whilst attempting to keep their people unified. Rationally, Aboriginals adjust their activity to obtain the benefit, eg make a native title claim to gain recognition, but other parties adjust their behaviours by stalling applications, stage-managing authorisation meetings or deferring funding. The Benefit Group's real losses from such swings and adjustments might outweigh its gains

NTAct gives scope for voice, but is severely stifled at all stages from Claim proof through agreement processes and post-Determination, with Aboriginals feeling themselves 'wheeled out' to be told what they are to agree to. Whilst there is opportunity for Aboriginal voice, bureaucratic layers and multiple 'formal', rather than genuine, consultations make this a process where listening appears to be a mere formality to securing the Aboriginal tick to pre-arranged outcomes that others consider will benefit them. Social capital among Aboriginal groups appears strong and a clear driver of entrepreneurial opportunity. Trust is fractured from the perspective of both Aboriginals to Government and Government to Aboriginals, with distrust recorded throughout the entire system and such problems limiting opportunities to extend social capital beyond the Benefit Group. NTAct is seen by some as a less effective propellant to new ventures than other regulatory type.

SUMMARY

Data was collected from three sources – four earlier documented case studies, judicial records for six claims and four interviews.

The data confirmed that NTAct does impact entrepreneurial opportunity. Despite tragedy, misery and burden to the regulatory Benefit Group, new ventures arose directly from NTAct and there was intriguing evidence of NTAct's impact on entrepreneurial opportunity even when no direct benefit was secured.

The native title industry emerged as an entrepreneurial opportunity, but mostly one available to non-Aboriginal people. The regulatory process was unusual in many instances with multiple parties, enormous delays and considerable symbolic elements. The role of Government was dominant.

There was clear evidence of strong internal Aboriginal social capital, even given considerable disadvantage and dysfunction. Trust was a major issue. Aboriginals distrusted Rep Bodies and

Government. Governments distrusted the Benefit Groups to manage 'properly'. Bureaucrats were perceived by the Benefit Group as a distant nuisance, arriving intermittently to interfere but not listen. NTAct was shown to subvert and sometimes destroy existing Aboriginal norms and social ordering but not to subvert or destroy any existing norms or social ordering for developers or Government.

The voice of the judiciary was strong and ceremonial in an unusual way. Aboriginal voice tended to be filtered through 'experts' and stifled through bureaucratic layers. Lawyers strongly influenced outcomes by negotiating (or omitting) commercial opportunities within Determinations and Agreements.

NTAct is a 'command and control' statue that lead to the usual practical problems of monitoring and enforcement. Government was present at every turn. Self-regulation was non-existent and none of the principles of Regulation Without Rules found any place within the NTAct schema. Unwritten regulatory forms applying Aboriginal Law and societal arrangements appeared to be micro-regulating an impact. NTAct regulatory type added to regulatory burden without obvious perceived gain to the Benefit Group.

"Each person has his or her own way of changing or ... perceiving that everything is changing.
... nothing is more arrogant than wanting to impose one's law on others.

My way of being the same is, by definition, the most singular part of what I am …
The pressure of identity and the injunction to break things up are both similarly abusive".
Foucault [1979] 2000, 444

Chapter 6

DATA ANALYSIS

INTRODUCTION

Chapter 4 contained a literature review relating to the context of the regulatory change studied by the Case Study. Chapter 5 described the data collected from three data sources, drawing conclusions from each dataset and patterns and themes that emerged from their combination. This Chapter now analyses the data aided by the Key Elements that emerged from the literature. It uses each of the KIMatrix, the Regulatory Prism and the Impact Key Elements to cross analyse, decontextualise, disconfirm and recontextualise in order to more deeply examine the emergent patterns and themes. These overall analytic outcomes are then synthesised with the contextual review in light of the three Research Propositions to arrive at a Case Study overview and conclusions.

6.1 ANALYSIS and CROSS-ANALYSIS

The observations from individual data sets described in Chapter 5 now need further critical challenge in a search for deeper meanings and understandings as well as alternative explanations to generate new insights. Three tools, derived from the multi-disciplinary literature are used to interrogate the combined data, recontextualise it and derive deeper patterns of description and explanation. The tools are the KI Matrix, comprising Key Indicia that emerge predominantly from the entrepreneurship literature and other literature that focuses on entrepreneurial opportunity. The Regulatory Prism and Elements predominantly draw from the regulatory and legal literature. The Impact Key Elements derive from impact

considerations across the literature. These tools aided cross-analysis, decontextualisation, disconfirmation and recontextualisation and, when synthesised with the broader contextual setting discussed in Chapter 2 (2.4.1) and Chapter 4, lead to articulation of new conclusions and outcomes. Each tool is now considered in sequence. The data analysis in this Chapter is ordered so as to directly follow the sequencing of the Key Elements (separate paragraph by separate paragraph) exactly as they emerged from the literature review in Chapter 2. This logical and methodical analytical approach creates some extremely short paragraphs requiring very limited discussion that may appear without direct smooth transition to the next Key Element described in the following paragraph.

6.2 KI Matrix

The KI Matrix, derived from the literature (2.1, 2.2, 2.4, 2.7 and 2.3.4) details twenty four Key Indicia relevant to the research question. This shows each of the Key Indicia with analytic outcomes from each of the datasets recorded against each. The KIMatrix with its outcomes is shown in **Figure 19** over and the discussion analysing the data follows this point by point.

Across all data sets, the Creation/Destruction and Schumpeter's new combinations are evident. Whilst this impact is partly due to NTAct provisions which themselves create a number of new organisations, eg PBCs and NNTT, there is considerable evidence of a broad range of new ventures triggered by NTAct eg food production, road construction, machinery contracting and training, as well as new extensions to traditional tourism and community-related ventures.

Schumpeter viewed 'the powerful' creating the rules they require, to which they agree to submit for the primary end of protecting their private property. The data confirms such a view. Australian location-based industry and individual land owners participate strongly in native title agreement-making, taking advantage of the Claim Group's inability to trade according to free market conditions which are not constraining non-Claim Group businesses. Qualitative differences in the data sets highlight this, contrasting utterances of historic celebration from the powerful judiciary, with expressions of tragedy and sorrow from less powerful Aboriginals.

The sheer scale and size of Government involvement with NTAct is overpowering. Government is clearly vastly more resourced and powerful than any Aboriginal party. It is, in many instances, actually an opposing party with a patent conflict of interest. All data sources confirm the paramount role of Government in NTAct's impact upon entrepreneurial opportunity. They all confirm Government involvement as a complex variety of dominant influences – land owner, agreement party, funder of lawyers and experts, employer of Court and Native Title Service/Rep Body staff, employer of State and Commonwealth public

	Key Indicia	**Judicial Public Record**	**Interviews**	**Earlier Case Studies**
1	Business Venture Creation/Destruction	√	√	√
2	Schumpeter's 5 new combinations	√	√	√
3	Power	√	√	√
4	Bureaucracy/Government	√	√	√
5	Activity/ Resource Allocation	√	√	√
6	Institutional Environment/ 'Normalising'	√	√	√
7	Regulation as Opportunity Spawner/Driver	√	√	√
8	Regulation as Information Source	√	√	√
9	Sovereignty	√	√	√
10	Knowledge of Regulatory Change	√	√	√
11	Flow of Alliances	√	√	√
12	Geographical Location	√	√	√
13	Regulatory Turbulence		√	√
14	Land Regulation cf Knowledge Regulation	√		
15	Gainers Few: Like Interest	√	√	√
16	Discovery/Learning	√	√	√
17	Effectuation – Who I am, What I know, Whom I know	√	√	√
18	Risk			
19	Voice : Language: Story	√	√	√
20	Silence: Self-silencing	X	√	x
21	Social Capital-Trust		√	√
22	Regulatory Model: Deterrence, Responsive	√	√	√
23	Regulatory Method	√	√	√
24	Innovative Regulatory Type: Networks, Information Integrity,	√		

	Reputation			

Figure 19: KIMatrix – Case Study Analysis

Source: Researcher

servants, provider of budget allocations to Aboriginal organisations and policy determiner in housing, welfare and other important areas outside native title. There was not one data source that failed to demonstrate interaction and concern with Government and bureaucratic process as an important issue. The data evidenced Government sitting back, whilst Aboriginals without resources battle to optimise the regulatory change.

Schumpeter's warning that bureaucracy would be persistently hostile to commercial self-government is clearly borne out across the data. Bureaucracy is repeatedly referred to across all data sets as a significant hurdle and hindrance in blocking information and a cause of huge complex slow systems. There are two levels of Government, numerous separate departments and divisions within departments all of which are frequently drawn into relatively simple decision-making.

It is hard to know whether NTAct activity allocation has provided a cumulative benefit. NTAct's alternative would be a deregulated native title environment in which individual Peoples approached the Courts for a *Mabo* style decision. It is difficult to known whether diversion of activity through NTAct and away from conventional Court litigation would have cumulatively increased productive activity. The answer must remain conjectural. However, NTAct mandates the grant of native title rights when certain pre-conditions are met - and from this benefits flow which would not have occurred 'as of right'. Assuming NTAct provides actual 'benefit', its existence creates some degree of certainty as to securing the right, managing it in alliance with the Crown, arrangements for land development and governance of the asset-holding entities.

All data sets confirm institutions 'normalising' change and preserving *status quo* by both passive conformity and active resistance. Weak financial and legal support to Claim Groups,

although flagged at the highest levels for over a decade, remains unsolved. Inadequate agreement enforcement is routine. The data tells the micro stories of this institutional dead hand and the 'normalising' that confirms approaches that convert NTAct's intended outcome into the kind of practical change that more neatly fits existing institutional practice. Alternatively, the data served to demonstrate an outcome that which was intended despite the wording of the Preamble that is misleading. Growing institutional resistance, eg by Rep Bodies ignoring Applicants and judiciary 'normalising' breaches of the rules of natural justice as 'misunderstandings' are concerning. The data also seems to indicate that this institutional normalising is free-flowing and advanced to a point where, as the theory predicted, NTAct is almost perceived as proposing nothing new, just a varied device to confirm how it was always done.

The notion that NTAct would be viewed as an opportunity spawner or driver is almost laughable. Not one Interviewee saw that and it found limited support in ECS data with the very concept irrelevant to judicial considerations. The data actually shows some opportunity-oriented Claim Groups deliberately keeping themselves as far as possible outside the native title system.

Although Shane viewed regulatory change as a potential source of new information, NTAct appeared to provide no obvious information source to the Benefit Group. Connection information that Aboriginals revealed to anthropologists provided new information to the parties outside the Benefit Group. The Interview and Judicial Record data both referred to this information source - one with tremendous sadness in providing deeply significant information to what the Interviewee described as an unbelieving, ignorant outer world, via an 'expert', the other relying upon this 'expert' verification to authenticate the information's correctness. Neither linked the information with entrepreneurial opportunities.

The literature equating certain regulatory change, eg therapeutic drug regulation, to national sovereignty is intriguing within the context of NTAct. Certainly *Mabo* touched close to Australia's sovereignty, with careful examination by the High Court of the intentions of the British at the time of the nation's colonial foundation. This Study reveals that Interviewees referenced matters of sovereignty despite its irrelevance to Judicial Record and ECS data. This dichotomy confirms concern in the native title context literature about a 'false

consciousness', where Aboriginals reserve their sovereign selfhood from articulation with the State, but the State disregards sovereignty as a NTAct issue (Smith & Morphy 2007).

All data sources show the Benefit Group having limited accurate knowledge of NTAct's terms, although it is well aware of its existence and implications. There is no evidence of consultants offering Aboriginals 'to proof your firm' against NTAct. Whilst the context literature revealed efforts to ensure Claim Group members were 'at home' in court, the Judicial Record data showed little effort to ensure the Claim Group knew NTAct provisions and both ECS and Interview data revealed a disturbing lack of knowledge.

The data confirms that NTAct creates shifts and realignments across a wide front, with new alliances contingent on particular circumstances. Aboriginals form new linkages across a wide spectrum but the data confirms the limits of unproblematic transfer of responsibilities between actors. Alliances exist among lawyers, witnesses, advisors and clients - and include their very different linkages to the judiciary. Mediation aids the finding of common ground and working around areas of dispute.

All sources confirm the relevance of geographical location, with Benefit Groups able to leverage significant resources into their region where they could identify an venture opportunity.

NTAct was at the outset, and at points throughout its life, a turbulent regulatory environment, The literature suggested a clear difference between such transformatory/ turbulent regulatory change and what might be called more mechanical regulatory change.

NTAct concerns rights, their governance and future land management. It contains none of the regulatory elements identified in the literature as likely to lift overall entrepreneurship levels, including for example, R & D, university-business linkages and incubators. This is despite many references to obvious Benefit Group efforts to apply native title to knowledge growth and its take up of entrepreneurial opportunities in Aboriginal education and business training.

As Stigler predicted, diverse and small Claim Groups stood to make few gains as distinct from the comparatively small group of large commercial interests likely to make great gains, eg mining industry. Claim Groups faced high organising costs that may have exceeded gains had these costs not been met by others. Careful consideration of the data suggests that NTAct may have been incorrectly premised from the outset on an assumption that a very powerful

Aboriginal 'industry' or interest group, the 'A' team/ the Magnificent 7, would, unless severely constrained, make massive gains to the severe disadvantage of wide and diverse location-based commercial operators whose business was premised upon existing regulatory schema. This assumption may have had influence within the chaos of forging a *Bahnbrechen* transformative regulatory change, given widespread overreaction to *Mabo.* The Benefit Groups may have been perceived through images of the Aboriginal lobbying block with its close links to Prime Minister Keating and, for this reason, treated as being vastly more uniform and strong that these poor, diverse, disempowered and remote Groups actually are. Such a false assumption may account for the data across all data sets evidencing massive failure and the reverse scenario where the narrow commercial interests are making large gains and vastly more optimising NTAct experience.

Some data sets confirm that discovery/learning occurred. For example, Claimants educated the Judiciary about their land justice requirements and the Judiciary educated Claimants about the western legal system. All data sources confirm the relevance of Effectuation with *Who am I?* and *What do I know?* elements applying, along with emphasis across all data sets on networks, alliances and co-operation, the *Who do I know?* of Sarasvathy's identity elements. Risk received minimal attention in any data source, being only referred to in one ECS as a rationale for using alliances.

All sources confirm the importance of communication and societal dialogue in NTAct's impact on entrepreneurial opportunity. Non-Aboriginal voice dominates the Judicial Record data as well as much of the ECS data. The Judicial Record operates almost to distance the Aboriginal voice by needing to 'objectively' validate it through the filter of the 'expert' anthropologist or historian, and the lawyer. Even when Aboriginals raise concerns that they are not being properly heard, this is trivialised or accepted as a consequence of system underfunding (Mansfield J in Dodd 2012, 15.5.12 & 17.5.12). Aboriginals tend not to self-silence and the data shows the Court taking great care to listen when unfiltered Aboriginal voice actually comes before it.

All sources confirm the existence of strong social capital within Aboriginal communities and its important impact on entrepreneurial opportunity. However, distrust is a major element through the NTAct system and a key obstacle affecting NTAct impact.

Nevertheless, despite expressions of deep suspicion and, frequently, anger - *how many of our people have they locked up tonight?* – Benefit Groups are extensively connected with numerous external people and organisations, including leaders of Australian society particularly those influential to the legal system such as politicians and judges. Most Benefit Groups are represented on highly influential Government boards. The social capital and trust elements described above should not be confused with the poverty and disadvantage of these Benefit Groups. Each Benefit Group has large numbers of its members on welfare. In all places, unemployment and alcoholism are concerns. Educational opportunities are often inadequate and average income is extremely low. In areas located a long distance from a capital city or large employer, members of the community frequently have to leave home to seek work and education. High levels of internal violence occur in the group most successful at achieving benefit from the regulatory change and that evidences clear and positive entrepreneurial opportunity impact. Thus, the strong social capital and community emphasis is evident, despite the extreme social disadvantage and poverty and this directly impacts new venture starts across the data.

NTAct is a regulatory type using a 'command and control' model and conventional regulatory method, demonstrating the many problems of such regulatory type. There was no evidence of innovative regulatory type in use or under consideration.

In summary, the KIMatrix tool led to confirmation of Schumpeter's conceptual model and observations that 'the powerful' create the rules they require with bureaucracy persistently hostile to commercial self-government. The sheer scale and size of Government involvement with NTAct is overpowering and institutional theory of 'normalisation' to preserve *status quo* by passive conformity and active resistance is evident through the combined data sets. The transformatory and turbulent setting of NTAct distinguishes it but there is suggestion that, within such a dynamic chaotic gale, the Benefit Group may have been incorrectly perceived at its inception as a strong Aboriginal 'industry' expected to make massive gains at the cost of diverse corporate and community interests rather than a diverse group of small industries each of whom was likely to experience only a small financial gain.

There is little evidence that NTAct is a spawner or driver of entrepreneurial opportunity and NTAct contains no 'knowledge' elements to lift entrepreneurial opportunity potential. However, although the Benefit Group was shown to have limited accurate knowledge of

NTAct's terms, including a 'false consciousness' concerning sovereignty, new ventures do emerge directly from it and the Benefit Groups demonstrate themselves highly receptive to new knowledge coming to them, using it to build into new ventures. NTAct shifts alliances across a wide front, with geographical location important and effectuation indicia strongly relevant. Discovery/Learning appears less relevant than effectuation in driving entrepreneurial opportunity. Risk received limited attention across the data.

6.3 Regulatory Prism Analysis

The second tool used to aid analysis is the Regulatory Prism drawn from the regulatory and legal theory literature and shown in **Figure 20** below. It offers four perspectives from which regulation can be viewed – law, social, economic and regulatory.

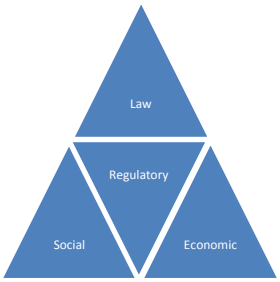

Figure 20: **Regulatory Prism**
Source: Researcher

Each perspective comprises various Elements with some overlap between Elements as fundamental concepts such as Liberalism are viewed from the different perspectives. The Elements of each perspective, derived from the literature (2.3) are shown in **Figure 21** over.

The analysis using the Regulatory Prism interrogates and cross analyses the data, initially from the perspective of the law, then decontextualises, disconfirms and recontextualises it, using social, economic and finally regulatory perspectives.

Under four separate headings comprising each of the four perspectives of the Regulatory Prism, the data is analysed according to each Key Element followed in sequence point by point.

LAW	SOCIAL	ECONOMIC	REGULATORY
Elements Rule of Law • Government Bound • Formal Legality • Process Legality Liberalism	**Elements** Principles of Liberalism • Individual and Group Power • Empower • Disempower • Security and social peace Culture • Class/Disadvantage • Customary Law Information Access • Moral Entrepreneur Instrumental Use • Symbolic • Ideological	**Elements** Rationality Equilibrium Allocative Efficiency Regulatory Capture Costs • Transaction • Opportunity Constraint & Reward system Marginal Effects Incentives Money as a Measure	**Elements** Trilemma in Regulatory Practice • Effectiveness • Responsiveness • Coherence Regulatory Models • Command & Control • Responsive Regulatory Methods Innovative Regulatory Types

Figure 21: Regulatory Prism Segment Elements
Source: Researcher

6.3.1 Law

According to the Rule of Law, laws should be applicable to and bind the Government, following principles of formal and process legality whilst being clear, practical and unbiased.

NTAct binds Government to such an extent that it destroys the Crown's monopoly in land although Government remains accountable for Crown land, 'the commons'. Some data casts doubt on whether this accountability is properly achieved by NTAct's PBC arrangements. Poor fit with Aboriginal approaches sees NTAct PBC governance requirements ignored, tokenised or controlled by others

Formal legality requires rules to be clear, practical and stable. NTAct is complex (592 pages, 253 sections and Schedule of 46 clauses) (omitting the regulations) with its Benefit Groups finding it impenetrable in the face of language and educational difficulties and without easy access to legal advice. PBC governance formalities are invariably irrelevant to the Benefit Group, frequently ignored by it or entirely managed from a lawyers' office thousands of kilometres away. The Judicial record appears impervious to such outcomes. Governance formalities comprise a poor fit with both existing Aboriginal organisations and new ventures.

Process legality requires unbiased public dispute resolution. In at least one instance, the data reveals major irregularities and breaches of the rules of natural justice by Rep Body and Claim Group lawyer. This aligns with the context literature noting such irregularities occurring with some frequency in this jurisdiction. Even positive Native Title Determinations appear to carry a bias eg Court judgments congratulating court officials, rather than the more objective tone usually applied.

Principles of Liberalism seek as far as possible to leave individuals unrestricted in opportunities for self-expression or self-fulfilment and create equality before the law as between rich and poor. NTAct certainly adopts the 'majestic egalitarianism' of Liberalism in bringing Aboriginal communities and large industry together to negotiate on 'equal terms'. Of course, one of these negotiating parties is inadequately resourced legally and financially and often needs to rely upon the State to provide its evidence even where the State is its opponent. The data raises the usual concerns of a rhetoric of Liberal philosophy but a practice that systematically denies it. It shows quite a degree of Government absolutism in practice for, whilst NTAct provides for collective asset ownership, the data shows restrictions on Aboriginal expression of Aboriginal Law, eg Elder respect and Aboriginal decision-making processes. Whilst there is no suggestion of physical restraint, there is a real sense of restraint arising from racism, bureaucracy and impractical unworkable NTAct requirements. NTAct also fundamentally offends that element of Liberalism that requires the State not to restrain activities unless they harm others by restraining Aboriginals from normal trading arrangements within the free market.

6.3.2 Social

Regulation can entrench policies that are ill-adapted to social needs and vindicate enduring values. As detailed above, NTAct offends fundamental principles of *Liberalism*. Whilst it binds Government, it actually fails to adequately watch it, instead giving it major powers, discretion and funding. Whilst appearing to favour individuals, this is not how it is structured at all. In some ways, whilst NTAct works at the interface of "tribal" or community groupings, it actually drags the 'tribal' into a western corporation without any of the traditional customary Law that facilitated community asset ownership and management.

All data sets confirm that NTAct recognition is considered by its recipients to empower them. A seat at the negotiating table does provide some empowerment and, thereby, opportunity to

secure advantages. Successful claimants regard themselves empowered by having formal recognition of their unassailable right to go onto their country. PBCs formally empower the ongoing management of land.

However, the data also confirms widespread disempowerment. The absence of the freedom to walk away from trading in their land and the absence of any right to reject development *per se* or even unacceptable development comprise evidence of disempowerment. The data reveals this disempowerment beginning with rejection of evidence of identity by a Rep Body, well before the matter even moved to a judicial body. It also occurred where the Yorta Yorta claim was rejected and word of this spread to other Claim Groups. It occurred when, despite large claim areas, recognition Orders formed only tiny areas, with the balance lost in attempts to secure full ownership of the most highly significant country and some community benefits. Although legal assistance to Claim Groups is said to be a foundation principle of the system, all data sets confirm its inadequacy. Appropriate assistance would need to be sizeable, given the size and scale of the issues, the development projects that frequently affect native title and the extensive nature of the agreements. Interview data revealed Aboriginals' utter frustration with all-powerful Government, referencing to it being there at every turn, 'flying in and flying out'. The need to avoid asset loss to taxation by 'locking up' the funds in charity or trust structures was felt to perpetuate dependency overtones and be disempowering. The data confirmed disempowerment when huge companies and huge bureaucracies took over matters and decided things without Claim Group consultation, creating a heavy, sluggish hand and swinging between being unreliable and a rubber stamp. One ECS confirmed the Interview data as to Government's unreliability as an alliance partner.

The data confirms that the social goals of s*ecurity and social peace* are not achieved. NTAct establishes an orderly way of processing native title claims and, in this way, provides security of title to owners of land in fee simple. It also provides some land justice to Aboriginals and some sense of security and peace to that social group. It goes some way to appeasing white guilt, by redressing a desire, as stated in its Preamble, to see compensation given and an Aboriginal economic base established. However, non-Claim Group stakeholders such as judiciary, miners and Government, appear to have achieved greater security. NTAct avoided overstretching the existing court system by creating a separate jurisdiction, although the data confirms unsatisfactory features of the new system, eg delays and enormous litigation. The

data also records serious breaches of the peace arising directly from NTAct. NTAct appears to be providing a surface or token comfort and security for government and the broader Australian community, but for Aboriginal groups the data reveals real risks to security and social disharmony. Attention needs to be paid to this serious level of disharmony.

Aboriginal culture is twisted, with "expert scientific" narratives taking a leading role and filtering the voice of the actual 'experts', namely the Aboriginals themselves. Customary law, as the way in which the actual social ideas of the Aboriginal culture are explained, finds almost no place. Governance structures are confirmed as flawed with two data sets showing entrenchment of western governance values and systems in disregard of culture and possibly without societal benefit to the wider Australian society.

Access to Aboriginal information and knowledge is, at least initially, clearly located with the Claim Group, although data reveals some access to even that was denied, eg the Elder unable to access his ancestor's birth certificates and the other Elder denied access to the 'expert' connection report and gifted his own native title authority in a frame from his lawyer. In practice, information appears to become controlled and gatekeepered by Government and lawyers, with other parties adjusting their behaviours to prevent Aboriginal access to information. Even when granted information access, Aboriginals face difficulty given remote location, limited IT capacity, short notice or simply difficulty in reading. Documents of hundreds or thousands of pages with vast Schedules, presented for signature without adequate notice and, at best, a short summary of contents hinder understanding and consideration of implications.

The data raises questions as to who benefits from information access. For example, the PBC corporate data may have little benefit except as Government 'back protection'. Whilst it might sometimes enable community members to monitor their PBC governance and 'keep it honest', it is difficult how this could be practical when records are held in faraway lawyers' offices - especially if the data is not being generated through the community but rather as a formality by the lawyer. The information is likely to be irrelevant to the PBC and likely to render PBC itself irrelevant to the community.

NTAct may create a 'legal fiction' of native title as a form of moral entrepreneurship. However, this 'fiction' does appear to be becoming 'the truth', disqualifying other legal and

social perspectives such as land transfers in fee simple, social programs, and knowledge sharing arrangements.

The data confirms NTAct as the instrument of dominant economic groups who successfully manipulate it to serve their economic and class purposes. It clearly serves a symbolic role in reflecting 'politically correct' values, ideals and ways of thinking widely prevalent in Australian society. By its Preamble, it profers an ideology that gives Aboriginals "the full recognition … to which … their prior rights and interest … fully entitle them to aspire' in order to "rectify the consequences of past injustice". Such ideology presents a humane appearance that may actually be covering other goals to protect established white interests.

In summary, the social perspective confirms that NTAct recognition apparently empowers the Aboriginal Benefit Groups but its removal from free market trading norms is evidence of disempowerment, especially when combined with inadequate legal and other resources to redress systemic power imbalances. NTAct gives Government major powers, discretion and funding but loopholes and budget allocations impact negatively on Claim Groups, further disempowering them. Goals of security and social peace are not solid, with the data revealing NTAct as seeding violence and division and agreement provisions that entrench power imbalances and Aboriginal disadvantage. NTAct appears to create property rights around a community grouping model, but actually drags the community into the corporate world by converting a communal land owning body to a western corporation, without any of the customary laws required for its governance. Culture is twisted as "expert" narratives filter the voice of Aboriginal 'informants'. Access to Aboriginal information and knowledge, initially located with the Claim Group, becomes controlled by Government. If one views NTAct a moral 'fiction', it has become 'a truth' that disqualifies operational realities and other perspectives. The data shows that the regulatory change is effectively used by and protects dominant economic groups in serving their own purposes, whilst it serves the symbolic task of apparently implementing socially desirable *Mabo* values under a humane appearance according to ideological goals of reducing past injustice.

6.3.3 Economic

Economic principles of rationality assume that the individual is the best judge of his or her own welfare and that people respond to incentives and self-interest. Removal of the right not to trade and refusal of Aboriginal veto offend principles of rationality as does the mandating

of PBC governance arrangements that individual Benefit Groups find costly, confusing, unhelpful and a hindrance to the flexibility they require for entrepreneurial opportunity. The data reveals Aboriginals rationally adjusting their activity to obtain benefit eg they may make a claim in order to attempt to gain native title recognition or they may set up a PBC even though they intend to ignore or sidestep it for any venturing activity. However, the data prompts questions as to the nature of rational 'self-interest'. Is it the concern of the Benefit Group toward their country or community, creation of venture, education or employment opportunities, creation of a valuable investment fund into the future or the achievement of short-term individual gains eg small cash payouts, a car or a rented outstation house?

NTAct was certainly prepared using assumptions of the equilibrium and perfect competition economic models which, from the outset, raises concern as to its likely ability to impact entrepreneurial opportunity, given that Schumpeter and other entrepreneurial theorists view entrepreneurship and innovation as necessarily disequilibrating activity that cannot occur in equilibrium. However, a regulatory schema mandating that Aboriginal people **must** trade (ie they cannot walk away from negotiations or agreement-making), sets up a non-market position. This starting point is simply compounded by the absence of a veto power. Such a position is clearly inconsistent with neo-classical and other economic theory which asserts that every transaction involves a willing buyer and a willing seller and that the result is the best that either of them could have achieved, given the interests of the other party. Indeed, one must query the applicability of economic theory to the entire NTAct schema and, from this, query the realistic prospect of any advance in economic benefit according to the Preamble goal. The data also hints that *regulatory capture* might be occurring, although this is not overt with evidence of possible 'capture' of expert and legal actors to the benefit of strong stakeholders heavily represented in the system.

Efficiency principles of economics assume a relationship between the aggregate benefit of a situation and its aggregate costs, with an efficient resource allocation achieving an overall increase in aggregate benefit – ie the largest possible pie. Again, the data queries NTAct's efficiency. There is no evidence of a cumulative improvement to the legal system by NTAct's approach following *Mabo*. Although there is evidence of a cumulative growth in entrepreneurial opportunity overall as an effect of NTAct resource allocations, principles of efficiency recognise that often improvement for one group, for example, a Benefit Group,

requires a reduction of circumstances for someone else. The data did not indicate whether this is happening with NTAct, but there is little doubt that non-Aboriginals fear native title rights will potentially reduce their circumstances. Efficiency goals that would see compensation by the gainer to the loser are blurry under NTAct. Allocative efficiency models, if applied to the NTAct creation period, appear to have been based upon Aboriginals getting a new, extremely valuable land asset. As described above, NTAct may have been based upon that model. The Act appears to set the Benefit Group up as the gainer who must compensate the land owner and the land developer who is the loser by the creation of the Benefit Group's native title. It appears to be a model premised on Determinations that will create extremely valuable land assets and destroy existing extremely valuable land assets enjoyed by others. It appears to fail to recognise that the Benefit Group is, in fact, very very poor and receiving only limited outcome.

There is patchy evidence of cumulative increase in productive resource allocation because native title settlements frequently return only small percentages of claimed area, are frequently non-exclusive, contain many Exemptions and Limitations and invariably less than optimal agreements. Frequently real benefit, if it emerges, only does so when provided by a proposed land developer, if any. There is real confusion as to whether the native title group is a beneficiary or actually the loser, given the huge benefits to the bureaucracy as well as anthropologists, advisors and paid legal people. Government might be the overall gainer because the land rights debate is all but silenced and a difficult legal and political issue is now managed via a sidelined under resourced, but overtly celebrated system.

Across all data sources, the value of native title recognition rang a clarion bell including a value outside conventional cost and accounting principles That said, all data sources confirm that t*ransaction* costs appear to outweigh practical native title benefit. Locating advisors or staff, assessing documentation and accounts, monitoring and enforcing can be more costly and disbenefitting than any monetary benefit. The time delays and stress are clear costs of NTAct transactions, along with the costs associated with participation in a complex city-based system by those located remotely. Additional transaction costs are associated with claim group members locating each other and link with social capital and quality of exchange. Similarly, all data sources confirm *opportunity* cost outweighing monetary benefit. For example, were Aboriginals simply given land and were such regulation associated with

knowledge clustering eg incubators, university linkages, entrepreneurship and business training, overall outcome may be improved with less cost and upset for Aboriginals. Likewise investment in alternative more suitable governance arrangements might achieve genuine accountability as well as increased entrepreneurial opportunity.

The data confirms that NTAct's constraints and rewards, assumed by economics to change behaviour, do not do so in many areas of operation. Severely limited resources for Claim Groups frequently see them compromise on claims or enter sub-optimal agreements to secure some benefit. Thus, the data reveals that the system of constraints and benefits, that see Aboriginals acting rationally to enter agreements, can result in low or nil benefits with potentially high costs, including stress and illness.

Change in the volume of 'effect' at the margins for each Segment's Benefit Group is very hard to assess but appears to be a positive adjustment above existing entrepreneurial activity. When the Act is analysed for its Marginal Effects, ie response at the margins, three Benefit Groups emerge clearly. The Benefit Group at Stage 1 is certainly the native title Claim Group. However, the Benefit Group appears to be different to the beneficiaries at Stages 2 and 3. These appear to be respectively Government, in achieving public accountability, and Developers in using the land itself. NTAct creates potential clashes among these emerging Benefit Groups. The clash revealed by the prism analysis is shown in **Figure 22** over.

Thus, whilst Stage 1 is about protecting and securing native title, Stage 2 is about accountability and Stage 3 is unashamedly linked with destruction of native title rights and change to claim area features by development.

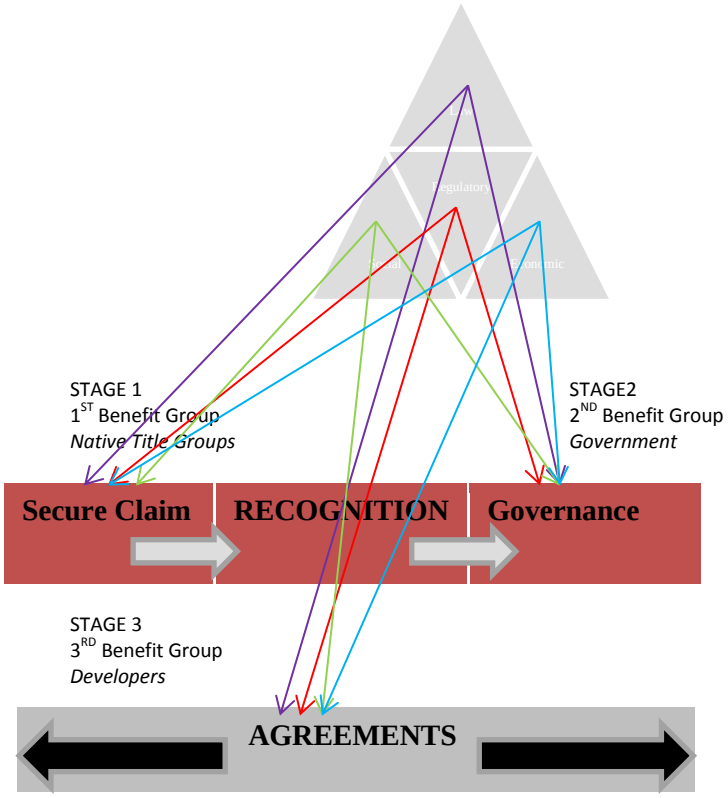

Figure 22: Key Segments of Native Title Act

Source: Researcher

In many instances, money is not relevant to Aboriginals whose key concerns are to protect and recover their country, to see Australian law recognise their native title, to achieve some order of justice and, frequently, aspects of sovereignty. Money as the measure is inadequate and blunt and one must query whether there is a good fit between means and ends.

In interfering with the free market, it appears as if Government were seeking to regulate a market failure as revealed when considering efficiency principles. The data suggests that Government may be the gainer because it can and does withdraw funding, resources and other Government benefits from the Claim Group where it takes objection to their NTAct approach.

In summary, the Economic perspective confirms that NTAct sets up a non-market position that is inconsistent with neo-classical and other economic theory. There are hints of regulatory capture. Although native title recognition is highly valued according to values and principles that fell outside conventional cost and accounting principles, system costs tend to outweigh monetary benefits. In many instances, the Benefit Group is not given free choice, especially

in market trading conditions and asset governance. Three Benefit Groups emerged - not just Aboriginal Claim Groups and the data reveals impact in all groups. NTAct appears structured as if the Claim Group is the gainer who must compensate the developer as loser but the data reveals this to be an error and a reversal of the real winner and loser to the disadvantage of the extremely poor Claim Group. There is patchy evidence of cumulative gain, with possibly Government the overall gainer, although the data confirms that non Claim Group developers substantially benefit by a process where Aboriginal parties, notorious in their lack of legal and financial resources are forced to trade with them on non-market terms and within a specified timeline.

Thus, whilst NTAct might be somewhat of a satisfactory regulatory change for western organisations and interests, it offends multiple economic principles as far as the Aboriginal Benefit Group is concerned.

6.3.4 Regulatory

The literature concerning regulatory theory highlighted three broad Key Elements for analysis – the trilemma of regulatory practice (efficiency, responsiveness and coherence), the choice of the regulatory model and method and innovation within regulation itself. These are shown at Figure 21 above and considered point by point in sequence below to frame a *regulatory prism* focus to the further analysis of the data.

Regulatory theory poses a trilemma as to whether NTAct is effective, responsive and coherent. This trilemma shed light on the data analysis in the following ways:

- The data shows NTAct as hugely *inefficient* and, in failing to effect the normative policy expressed in its Preamble, thereby lacking policy coherence;

- Whilst *responsive* to broad western contract principles, NTAct and its system fail to either identify the business alliances it mandates or paying any attention to the land management alliance, a form of highly sensitive public-private partnership, in native-title-held land that it creates. This alliance is on that the literature confirms as being inherently highly unstable being comprised of unequal partners with vastly different power, financial resources, staffing and experience, business type

and global business focus. The data shows that the native title system ignores the business literature confirming the inherent instability as well as the need for extremely careful management of it at all points over the life of the alliance and at all levels of staff, personel and business activity.

- There is a serious lack of both instrumental and systemic *coherence.* The data shows that NTAct removes basic market entry principles and the fundamental norm of freedom to contract. Further, in respect to accountability, it provides inadequately for the needs of both Government and society generally for the 'commons'.

When the data is considered in the light of the second Key Element of the Regulatory Prism, focus sharpens on the choice of regulatory type – the regulatory model and method applied by the regulatory change. NTAct is a 'command and control' model, a model that emphasises deterrence and forced compliance is heavily reliant on enforcement. The data reveals Aboriginal claimants forced to comply with outcomes they dislike and which offend the basic legal principles of both western law (eg natural justice) and their own traditional law (eg traditional decision-making processes). A heavy and huge bureaucracy 'churns through the work' created by NTAct complaining bitterly throughout that it, rather than its highly disadvantaged Benefit Group, it underfunded. Enforcement of systems that ill-fit remote Aboriginal communities reveal, from the data, the transmission of formal compliance (and power) to capital-city based legal offices.

The final Key Element revealed by the Regulatory Prism was the matter of innovation within the regulatory instrument itself. The data shows no evidence of regulatory innovation or the application of alternative regulatory models or methods. For example, there is no attention to the importance of information control identified by writers such as Lyotard to inform new, innovative regulatory approaches.

In summary, NTAct is inefficient as it fails to effect normative policy and lacks instrumental and systemic coherence. A 'command and control' regulation, it fails to correct a market failure and actually creates one. Despite the opportunities presented by a truly unique legal and social setting, after the *Mabo Case*, innovation is non-existent.

6.3.5 Combined Prism Analysis

In combining the analysis from each different perspective, recurring themes of market interference, government dominance and a nuanced advantage outside Claim Groups emerged from the exclusion of fundamental legal and economic principles, particularly Liberalism. There also emerged three distinct Benefit Groups and clashes between the interests of each.

NTAct is clearly applicable to Government. It destroys the Crown monopoly in land, an actuality unlikely to have been achieved across the Australian Federation without it. It creates a native title right in Crown land and a recognition that is universally acknowledged and applauded. Recognition alone is highly motivating, with intriguing evidence that the mere existence of a potential statutory right or even a failed right creates entrepreneurial opportunity without its actual achievement.

However NTAct is problematic in applying fundamental principles of the Rule of Law. It demonstrates serious problems of both formal and process legality. It also offends basic principles of Liberalism, both directly, by dramatic alterations to free market conditions, and indirectly, by operational inequality, racism and injustice. A regulatory schema mandating that Aboriginal people **must** trade, (ie they cannot walk away from negotiations or agreement-making), sets up a non-market position. This starting point is compounded by the absence of a veto power and limits upon agreement conditions available to Aboriginals. NTAct is clearly inconsistent with neo-classical and other economic theory and one must query the applicability of economic theory to the entire NTAct schema. It reveals a lofty rhetoric that is denied by systemic operation and serious problems with both formal and process legality. The Judicial Record and most ECS data omitted reference to the problems in compliance with the Rule of Law and principles of natural justice which emerged from the Interview data.

From a social perspective, the removal of Claim Groups from free market trading norms is clear evidence of disempowerment, along with inadequate provision of resources, and entrenched power imbalances that ignore Aboriginal disadvantage. Goals of peace and security are mismatched with evidence of violence. NTAct twists Aboriginal culture and shifts control of knowledge. The moral entrepreneurship that might have created NTAct ideology reflecting and symbolising *Mabo* principles is in practice reassuringly protecting majority *status quo* interests.

NTAct offended not only fundamental legal principles but also multiple western free market and economic principles, with hints of regulatory capture. Although native title recognition is highly valued, alone it provides limited monetary benefit.

When analysis revealed three benefit groups (Aboriginals, Government and developers), this explained many of its difficulties, as NTAct creates conflicts and clashes in meeting the interests of these three diverse groups. Analysis also suggested that NTAct might have been premised upon an incorrect assumption that Aboriginals were a small unified, strong interest group standing to receive a great gain rather than, as they are, multiple, diverse, extremely poor individual groups. There was patchy evidence of cumulative increase in productive activity as a result of allocations to NTAct processes.

The data confirms that non Claim Group developers, ostensibly controlled by NTAct in their operation on native title land, substantially benefit from a process where Aboriginal parties previously viewed as difficult are now forced to agree within a specified timeline along constrained terms and, if they fail, the judiciary finally sets the agreement terms. NTAct is inefficient in effecting normative policy and lacks instrumental and systemic coherence.

Within this setting, it is a miracle that NTAct would impact upon entrepreneurial opportunity other than negatively. Yet the data clearly confirms examples of productive, positive impact and this important finding shows the life-force within the 'rules of the game', as well as among Aboriginal Benefit Groups for whom enterprise development is a key aspiration (AIATSIS 2008a).

6.4 Impact Analysis

In this final segment of analysis, the combined data is interrogated using the Impact Key Elements derived from the literature (2.5) and shown in **Figure 23** over. As clarified in Chapter 1 (1.6.2), the term "impact", as used in this study, means having a strong effect or influence direct, indirect, independent or unintended. The combined analysis follows sequentially the Key Impact Elements derived from the literature and shown in **Figure 23**.

Form	Direct, Indirect, Independent, Unintended
Actors	Gatekeepers: Filtering Agents • Bureaucrats • Lawyers • Judiciary • Enforcers
Influence	• Causation? But for? • Variety of Groups and Interests
Link	• Regulatory Purpose and Outcome
Complexity	• Modelling Complexity and Chaos

Figure 23: Impact Key Elements

Source: Researcher

The data confirms that NTAct creates impact in a manner that is far from straightforward and is shaped by apparently extraneous conflicts and pressures, reflecting the wide range of societal inputs. Operationally, it comprises a variety of practices and conventions whereby rules are implemented, interpreted, used and/or avoided and which appear to be a function of the very power relations that created NTAct itself.

The data confirms that the primary audience at which NTAct is directed is clearly impacted, despite delays and process difficulties. NTAct's *direct* impact is that claims are being made and resolved, agreements are being effected and PBCs are being created and operated. *Indirect* impact would include the creation of the Native Title Industry as well as economically viable land management operations along with some of the Preamble goals. *Independent* impact occurs independently of conforming behaviour and is often linked to the symbolism of the regulatory change regardless of its actual operation. NTAct's impact upon entrepreneurial opportunity may well be correctly conceptualised as an independent impact, for whilst the Preamble mentions economic benefit, it makes no direct reference to new ventures or entrepreneurial opportunity. *Unintended* impact can include unproductive and destructive activity which would include the data revealing NTAct-related violence and distress and might also include the extent of lawyer control and the stifling bureaucratic hand.

NTAct's complex policy mandate may also reflect an insincere consensus at the time of its enactment – a transformative regulatory moment within a turbulent environment. The somewhat amorphous wording of the Preamble offers wide purposes. This may reflect either poor drafting, an uncertain regulatory purpose or an insincere consensus and this may lie at

the heart of a preferenced impact upon those with resources who seek to preserve their interests and power. It shows actors constraining, adapting and modifying NTAct's Preamble intention, with lawyers, judges and enforcement agencies as key actors. The data shows NTAct lawyers not drawing entitlements to the attention of Benefit Groups, whilst well paid legal teams reduce NTAct's burden on some key multinational sector industries. Lawyers for Aboriginals are inadequately funded, less frequently engaged and can, therefore, become less familiar with NTAct provisions and operations. The data confirms lawyers are also involved in NTAct's analysis and interpretation and, in this way, further determine its impact. Relatively powerless stakeholders find Government enforcement of NTAct-agreed benefits almost non-existent and those enforcing NTAct, in dealing with the less powerless Aboriginal stakeholders, exert an expanded sphere of control and can adopt a more punitive approach than they would over stronger stakeholders who can exert power over the enforcer.

The data reveals no thread of causation. NTAct clearly does not cause entrepreneurial opportunity in the way that it causes a Benefit Group to lodge a claim or a mining company to seek Future Act approval from the Benefit Group. Its influence is in the nature of a 'but for' - 'but for' the transformative regulatory change of NTAct the entrepreneurial opportunity that arose would never have occurred.

In seeking to identify the impact of regulatory change upon entrepreneurial opportunity, the data confirms that there are many solutions to many different problems and optimum regulatory drafting would more clearly identify the desired impact, by using terms that are more readily understood by its target Benefit Group. There is no evidence of any attempt to measure or understand NTAct's impact, let along model it in any sophisticated way according to agency, complexity or chaos principles.

In summary, NTAct's impact is in the nature of a 'but for' - 'but for' NTAct, identified entrepreneurial opportunity and new ventures would not exist. The data confirms direct, indirect, independent and unintended NTAct impacts, with analysis suggesting that, under NTAct, entrepreneurial opportunity is likely to be an independent impact, despite the Preamble's reference to "use of land for economic purposes". Key actors, including bureaucrats, lawyers, experts and judiciary, embedded into the system, actively filter and translate NTAct, constraining and modifying its goals and influencing its analysis and interpretation. The data clearly reveals these actors responding predictably to social and

economic structures and rationing justice according to cost barriers and their own long-range interests, with a resulting outcome suggesting that NTAct's optimal impact favours those with resources.

6.5 Synthesis

The final part of this data analysis synthesises this Chapter's analysis with the contextual review of Chapter 4, which summarised into a SWOT analysis the literature concerning NTAct and Aboriginal Venturing Opportunities which is **Figure 24** below.

VENTURING OPPORTUNITIES	**NTAct OPPORTUNITIES**
Aboriginal recognition National and international interest in traditional knowledge and culture Climate change and environmental awareness Remote, unique or monopoly product or location Technology, satellite, telecommunications	External Recognition, Opens New Doors, Leverage, Negotiation, Political and Social Flow On, Alliances • *External Recognition* - Claimant status - Property Right Forces Third Parties to Communicate and Trade - Chance for a Deal - Other Parties Must Communicate and Negotiate - Position of Strength • *Alliance* - Public-Private Partnership with Government - Land Alliance • *Other* - Commodity Trading - Flow On Opportunity to Unsuccessful/Non-Claimant Groups - Compels Government Initiatives

Figure 24: Context Review SWOTs

Source: Researcher

The Study's data analysis above, when compared with each aspect of the opportunity SWOT analysis, shows that opportunities broadly align. Recognition, as well as opportunities arising from location or unique cultural or environmental knowledge, facilitated by technological improvements, emerged in the data as real opportunities, many of which had actually been taken up. The Study actually sharpens focus on NTAct's interference with free market trading and breaches of fundamental liberal principles, as well as key legal, social and economic perspectives.

The Study data also confirms that the primary impact is the forced change that provides external recognition of Aboriginal identity and interest in land, enforced against the world. From this, the data confirms that opportunities can be leveraged and new doors opened through negotiation options. The Study data confirms the context opportunity review as to the importance of new and shifting alliances which include opportunities even for unsuccessful or non-claim Aboriginal parties. The Study data provides no support for views in the context literature that native title is a commodity for trade.

In findings that apply to all entrepreneurial opportunity, ie unrelated to any unique feature of Indigenous entrepreneurship, the Study data reinforces concern in the context literature as to the impediment of bureaucracy to entrepreneurial opportunity, a finding common to the broad literature concerning Indigenous entrepreneurship. It confirms the absence of attention across the data sets as to how a mandatory public-private alliance that is structured by regulatory mandate shapes its design and properly arranges its ongoing management, review and future strategy to optimise short and long term outcomes for all alliance partners. The Study data reveals that problems already exist in areas of alliance governance, complexity and the influence of powerful partners and there are strong indications that these are likely to increase.

The Study reveals the usefulness of the Schumpeter Model and Schumpeter's approach, ideas and Bahnbrechen model of creative/destruction. Approaching the data analysis and synthesis with the benefit of this Model, revealed the Model to be comprehensive in content, having a logical congruence and conceptual clarity which, despite a level of abstraction applied extremely well to praxis and both Aboriginal and non-Aboriginal cultural perspectives. As shown at 6.2, Schumpeter's conceptual clarity and cultural perspective in articulating that the powerful create the rules they require, invited critical thinking of the regulatory change creation process itself as well as its possible multiplicity of impacts. Schumpeter's warned, in the context of whether rules ought be made at all and how they might be created so as to best optimise entrepreneurial opportunity, that bureaucracy would be persistently hostile to commercial self-government. Against this comprehensive content enabled fruitful critical thinking as to the role of government and bureaucracy in the impact process of the regulatory change under study. Schumpeter's model contained a level of abstraction, matched with an unashamed application to praxis, that revealed within the regulatory change studied, as noted at 6.3.3 above, the assumptions of the equilibrium and perfect competition economic models within it and enabled effective extrapolation of their potentially strong influence on its

'impact' upon entrepreneurial opportunity. It also led to the new insight, not previously recorded in the literature, of the non-market position of the regulatory Benefit Group who, under the legislation, are prevented from operating in the free market by provisions mandating that they **must** trade whether they like it or not and regardless of the existence of unacceptable terms of trade. The use of equilibrium or perfect competition models would have repeated unstated assumptions within the regulatory change and provided a far less ready level of critical thinking and assumption questioning that did the Schumpeter Model. Of note also, is the usefulness of Baumol's proposed modifications to Schumpeter's Model, identifying the role of 'allocation' of entrepreneurial activity to 'productive', 'unproductive' and 'destructive' activity (Baumol 1990).

6.5.1 Research Proposition 1

Research Proposition 1 is:

> "**Transformative regulatory change, in the form of the NTAct, impacts entrepreneurial opportunity, in the form of new venture start, among the category of persons benefitted by the regulatory change i.e. native title claimants."**

The analysis confirms that there is creation of a new property right and destruction of the Crown's monopoly in land and clear evidence that NTAct impacts entrepreneurial opportunity despite massive problems with the regulatory change itself and its operations. Accordingly, Research Proposition 1 is answered with a resounding 'yes'.

6.5.2 Research Proposition 2

Research Proposition 2 is:

> **"The impact of transformative regulatory change upon entrepreneurial opportunity is affected by voice and social capital-trust."**

Again the analysis confirms that voice and social capital-trust affect the impact of transformative regulatory change upon entrepreneurial opportunity and emphasises the importance of communication and societal dialogue in regulatory change impact, even where Benefit Group voice is filtered and distanced from pivotal points of the regulatory schema. Strong social capital among the Benefit Group, despite its extreme social disadvantage and poverty in many instances, suggests its importance to the alliances and networks which the data reveals have emerged as part of NTAct's impact upon entrepreneurial opportunity and

despite distrust being a major element of the NTAct's operation. Accordingly, Research Proposition 2 is answered 'yes'.

6.5.3 Research Proposition 3

Research Proposition 3 is:

> **"Transformative regulatory change impacts entrepreneurial opportunity according to the type of regulatory change."**

NTAct is a regulatory type using a 'command and control' model with conventional regulation method and the data shows that following it, various forms of impact against considerable powerful opposition. There is no evidence whatsoever that Aboriginals and non-Aboriginals interact differently to such a 'command and control' regulatory model.

Alternative or innovative regulatory types are not directly contemplated in the data although the absence of alternative regulatory approaches, such as Aboriginal-specific licencing arrangements and land rights, was mentioned in the data suggesting receptiveness at least by Aboriginals to forms of 'industry' self-regulation or innovations that might merge better with their 'lived' experience and possibly also customary law. Accordingly, Research Proposition 3 is also answered 'yes'.

6.6 CASE STUDY OVERVIEW AND CONCLUSIONS

Bringing together this Case Study to incorporate its three phases - contextual review, data collection and analysis - reveals broad, deep, complex and important patterns and themes. Qualitative data collected in this Study, from three different data sources using two different data collection methods over six Benefit Groups, confirms that NTAct does impact upon entrepreneurial opportunity. It confirms that impact to be positive and productive, demonstrating the powerful role of this transformative regulatory change in effecting outcomes and impacting business venturing, despite apparently overwhelming restraints upon trade, lack of resources and powerful opposition. It reveals how that impact could explain allocations of entrepreneurial activity and relationships between the Benefit Group and entrepreneurial opportunity.

In findings that apply to all entrepreneurial opportunity, ie are not limited to any unique features of Indigenous entrepeneurship, the study shows that the mere existence of regulatory benefit arising from a transformative regulatory change such as NTAct does not guarantee an impact upon entrepreneurial opportunity, let alone a positive impact. This transformative regulatory change did not cause such impact upon entrepreneurial opportunity. What it does appear to do is optimise the exogenous environment and actively provide a stimulus that subtly, at varying speeds and in a variety of ways, can lead to entrepreneurial opportunity evidenced by new ventures and other types of new combinations. It is the 'but for' – 'but for' the transformative regulatory change, the entrepreneurial opportunity would not exist. The Study also suggests innovations, creations and ventures can arise beyond the Benefit Group, creating a cumulative increase in entrepreneurial opportunity across a much wider category of persons or entities than the obvious and direct Benefit Group.

Voice and social capital-trust are shown to affect the impact of transformative regulatory change upon entrepreneurial opportunity, even where major distrust and extreme social disadvantage exist. This emphasises their importance to such change.

NTAct is a regulatory type using a 'command and control' model and conventional regulation method. This is perhaps at the heart of its achievement in positively impacting entrepreneurial opportunity among a highly disadvantaged Benefit Group, in the face of powerful, well-resourced opponents. The 'Command and control' regulatory method appears to apply identically in compelling Aboriginal behaviour and non-Aboriginal, despite the differences in interaction with regulatory change among Aboriginal people noted in the context literature review at 4.4.

The Study confirms that impacts involved are direct, indirect, independent and unintended, with entrepreneurial opportunity possibly an independent impact. Interesting possibilities exist as to whether a cumulative increase in allocation to productive entrepreneurial activity could occur if entrepreneurial opportunity were drafted into the transformative regulatory change as a direct or mandated regulatory requirement. This Study located no reference to models of interactions between NTAct and its populations of stakeholders, actors and environmental forces, but the Key Elements utilised in this analysis could provide a base for trials along these lines.

Finally, the Study reveals Schumpeter's Model as excellent by virtue of its comprehensiveness of content, cultural perspective, logical congruence, conceptual clarity, level of abstraction and applicability to praxis.

SUMMARY

This Chapter explored the data by extensive analysis and cross analysis, aided by analytic tools derived tightly from the literature which enabled decontextualisation, disconfirming and recontextualisation to assist pattern and theme formation. It confirmed that NTAct impacts entrepreneurial opportunity, demonstrating the powerful role of this transformative regulatory change in effecting outcomes, impacting business venturing and optimising the exogenous environment to actively provide a stimulus that extends beyond the Benefit Group. Voice and social capital-trust as well as the regulatory type were shown to affect the nature and extent of this impact. Schumpeter's Model was found to be an excellent analytical tool. The Case Study provided a basis for discussion of Conclusions and Implications which are presented in Chapter 7.

"He who learns must suffer,
and even in our sleep
pain which cannot forget
falls drop by drop upon the heart,
until in our own despair,
against our will,
comes wisdom
through the awful grace of god"
Aeschylus 525BC- 456BC
as quoted by Robert Kennedy 1968

Chapter 7

CONCLUSION

INTRODUCTION

The Case Study described in Chapters 4, 5 and 6 confirmed that the NTAct did impact upon entrepreneurial opportunity. It demonstrated the powerful potential role of transformative regulatory change in effecting entrepreneurial outcomes. This power was evidenced by the fact that the transformative regulatory change studied actually removed fundamental free market trading rights for the Benefit Group, including the right not to trade. It offended many Liberal principles by its broad interference with basic market freedoms and competition principles as well as its operational restraints on trade. And yet, despite these powerful negative forces, positive entrepreneurial opportunity impact arose directly from it. This Chapter now takes the findings of the Case Study to address the broad Research Question and the three Research Propositions, draw conclusions and consider implications for theory, policy and practice, with further research recommended.

7.1 OVERVIEW

This Study examined one transformative regulatory change, NTAct, and its impact on entrepreneurial opportunity by exploring the Research Question:

"**Does transformative regulatory change impact entrepreneurial opportunity?"**

It brought together the fields of entrepreneurship and law, exploring them within a complex 'outlier' setting, providing a unique review of the possible impact of a transformative regulatory change upon entrepreneurial opportunity. This transformative regulatory change offered the degree of chaos, uncertainty and disequilibrium that Schumpeter would conceptualize as the gale from which entrepreneurial opportunity might spring, despite multiple hindrances and serious concerns. The regulatory change studied not only created a new property right in land, but conflicted with fundamental principles of Liberalism and many of the foundations of the Rule of Law, being fundamentally inconsistent with concepts of free trade and market forces that are generally regarded as a pre-condition to entrepreneurial opportunity. However, even within such a highly, highly restricted legal and trading setting, the regulatory change impacted entrepreneurial opportunity, with activity clearly allocated to productive entrepreneurial activity and evidence of cumulative increase in entrepreneurial activity. Schumpeter's conception of transformative *Bahnbrechen* Creative/Destruction as seed for new combinations was confirmed by this Study. Whilst the regulatory change created a direct impact on entrepreneurial opportunity among the Benefit Group, there were other indirect, independent and unintended impacts.

There was no doubt that regulatory change was an extremely important element in the exogenous entrepreneurial environment. Finding oneself within the Benefit Group of the transformative regulatory change and successfully crystallizing its benefit was a source of tremendous joy, with associated emotions of hope and a sense of opportunity.

The transformative regulatory change had a strong effect and influence on desirable, durable outcomes evidenced by a new venture or other new combination. This Study provided evidence of a positive impact among the Benefit Group even with 'both hands tied'. Impact also occurred even where the regulatory benefit was not able to be secured. It seemed that the mere existence of the potential for benefit could cause third parties to adjust activity so that even failed Benefit Groups could utilize the transformative regulatory change to impact entrepreneurial opportunity.

Whilst a transformative regulatory change that brought about Creative Destruction was the backdrop 'trigger' for entrepreneurial opportunity, that entrepreneurial opportunity did not arise from the thing destroyed by the regulatory change – 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 chaotically altered business environment of the regulatory change itself.

The process of impact could be extremely fraught internally within the Benefit Group as well as in response to external pressures. The lawyer emerged as influential to the impact of the transformative regulatory change studied. Regulatory change impact on entrepreneurial opportunity appeared to be optimized where the regulatory change was skillfully used. The regulatory change appeared to provide an initial prospect but impact maximization tended to involve shifting alliances. These often involved trusting relationships with informed individuals and included key 'actors' including, where available, skilled, effective and honest legal assistance. Where the regulatory change 'carved the heart out' of the Benefit Group or divided it, optimization was rendered more difficult.

Positively, the regulatory change potentially created its own industry and gave rise to entrepreneurial opportunities both inside and outside the Benefit Group. The outsiders included the advisory industry such as experts and consultants, along with key location-based industries and various arms of Government. Corporate interests outside the Benefit Group, such as miners who initially expressed vocal fears that the impact would be extremely negative, tended to be operating positively under it. This hinted that, in the chaos of drafting the transformative regulatory change itself, those outside the Benefit Group may have been substantially compensated or even over-compensated. Alternatively, it may be that whatever the regulatory provisions, those with the strongest market position would more readily have been able to position themselves to optimize its impact upon their entrepreneurial opportunity. A third possibility was that the regulatory change provisions actually created three Benefit Groups whose interests and entitlements clashed and conflicted. These clashes may have arisen from the chaos and turbulence of the regulatory change's emergence. Alternatively, these clashes may have been deliberately intended by the policy-makers to create indirect benefit groups and that the drafting of the regulatory provisions themselves as well as their operational implementation were designed to that end. Certainly, there was clear evidence of a design clash internal to the regulatory change between the different regulatory benefit groups. 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 the regulatory change, and its power, alters critical

elements that could not otherwise change. These critical elements of the exogenous environment 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 change as a knowledge or information source appeared less important as did knowledge of the regulatory provisions themselves. Entrepreneurial opportunity was influenced by geographical location, with the effectuation model of entrepreneurial opportunity strongly evidenced as the entrepreneur secured and retained control, using whatever means were at hand to select outcomes imagined or created from such means. Benefit Group entrepreneurial opportunity arising from NTAct was very much the cake baked using the ingredients that happened to be in the pantry at any point of time and these were generally extremely limited. Rather than 'discovering' or 'learning' an information recipe, the Benefit Group used what it had by any means possible. Education, training and funding to acquire the recipe of, for example, business skills, was generally unavailable or difficult to obtain.

The criteria required to achieve the regulatory benefit brought together people who would not otherwise have come together. From this, the opportunity for new means to new ends became feasible. The number of parties involved in this transformative regulatory change 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 to creation of entrepreneurial opportunity for future situations that were seen as desirable and, now, possible. The regulatory change created new linkages not only among the Benefit Group and between it and others, but also important and influential links among and between third parties substantially independent of the Benefit Group.

Burdens arose when the process to qualify for the benefit was complex and bothersome, excessively time-consuming or more costly than potential opportunities themselves. This was certainly the case in some instances studied. Governments were tenacious in attempting to prevent destruction of any of their rights without clear and extensive justification and all data sources emphasized an all-pervading and negative role of Government, apparently confirming Schumpeter's concern that bureaucracy was hostile to entrepreneurship.

The context literature, along with the elements of the data revealed the possiblity of greater than ordinary strong emotional, subjective reactions to the transformative regulatory change studied, suggesting the possible influence of the chaos inherent in the Bahnbrechen concept.

Despite evidence of serious and extreme constraints, the voice of the Benefit Group in the Case Study affected the regulatory impact by allowing it to shape their benefits. However, voice had a negative effect upon entrepreneurial opportunity impact where it was uninformed, based upon misleading legal advice, resulted from a speaker failing to listen to others or was heavily power-weighted, such as during meetings dominated by mining company or government executives.

Trust was strongly and repeatedly identified across all data sources as a key element affecting the impact of the regulatory change on entrepreneurial opportunity. This effect emerged at all phases of the regulatory change process ie making the application and proving it, reaching satisfactory agreements and agreeing upon the terms of development approvals and governing the PBC. Trusting relationships were key features of new ventures. Absence of trust was noted as a severe impediment that prevented the Benefit Group from getting to the starting gate to take up entrepreneurial opportunity. Among the Benefit Group studied, issues of trust strongly linked with social capital. Benefit Groups invariably were highly motivated to 'give back' to their community through self-employment, employment, infrastructure, school and medical projects.

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 model of the kind now regarded as Best Practice regulation in non 'high-risk' settings. It may be that a 'transformative' regulatory change is necessarily a 'command and control' as it must mandate – or force through – a *Bahnbrechen* change which may be vehemently opposed by powerful vested interests. Such transformative regulatory change may necessarily be 'high risk'. However, if this is in fact the case, such *Bahnbrechen* regulatory change 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 transformative regulatory change might have been optimized had other forms of regulatory

type been incorporated, for example, native title land holdings that require 'industry' self-regulation constructed in close practical interaction and consultation with the Benefit Group itself.

Finally, the Study reveals Schumpeter's Model as excellent by virtue of its comprehensiveness of content, cultural perspective, logical congruence, conceptual clarity, level of abstraction and applicability to praxis. It considerably assisted the research to reach the competition and equilibrium assumptions underlying much regulatory change.

7.2 RESEARCH QUESTION

The Research Question was:

Does transformative regulatory change impact entrepreneurial opportunity?

The data was consistent with and supported an affirmative answer. Yes, this transformative regulatory change did impact entrepreneurial opportunity and the impact was often positive. The research showed that such a transformative regulatory change, even one repressive of free market values and seriously flawed according to many objective economic and regulatory standards, could offer such a powerful tangible positive shift to the exogenous business environment that it facilitated entrepreneurial opportunity.

The impact created new means-ends, but the timing of the 'impact' appeared to vary and both pre-dated and 'triggered' new venture starts or it occurred via existing entities.

The impact was firstly informed by the process for successfully achieving the benefit offered by the transformative regulatory change. This could take a long time and be in itself a highly fraught, damaging process that interfered with existing entrepreneurial activity and motivations to new entrepreneurial opportunity. Thus, even where the regulatory process created tangible potential benefits, the impact on entrepreneurial opportunity could be both negative and positive. The 'impact' appeared to be strongly influenced by societal dialogue, being itself informed by the initial process which created it, ie what was its trigger, who advised Government and who lobbied and how strongly committed was that Government to shaping its policy goals and operational details. However, following enactment, the altered

societal norms that arose from the transformative regulatory change then led in new directions that could impact entrepreneurial opportunity, if optimized.

As posited by Schumpeter, in this Study a *Bahnbrechen* regulatory change, destroyed certain existing difficulties (but not all) and created something new. This transformative regulatory change, with entrepreneurial opportunity neither a direct or indirect regulatory goal, did not itself result in entrepreneurial opportunity. The Study suggests rather that its impact arose from a mandated recognition or grant of a new right or legal entitlement around which parties must, and then did, alter their behavior, actions and aspirations, accommodating the new legal scenario. The Benefit Group had a chance to turn this recognition into an entrepreneurial opportunity and, in this way, optimize its impact on such entrepreneurial opportunity.

The impact of a transformative regulatory change, such as NTAct, was not *necessarily* entrepreneurial opportunity as it might be with deregulation or privatization regulation which has a direct or at least indirect regulatory goal of private venture stimulation. Many of the Benefit Groups failed to even secure the regulatory benefit. Securing the benefit and, from there establishing the entrepreneurial opportunity, were impacted by high costs, both opportunity and transactional. Entrepreneurial opportunities arose through increased opportunity for negotiation and alliances that created possibilities for new contractual arrangements. Obviously the specific regulatory provisions may have emphasized this direction, but the Study demonstrated such potential within a transformative regulatory change.

The impact of regulatory change upon entrepreneurial opportunity in the Study looked more like Sarasvathy's effectuation process, with adjustments made as the opportunity cake was being prepared, depending upon the fluidity of the situation and the ingredients available. The effectuation elements of 'who I am' and 'who and what I know' were important, but again this may have been a feature of the regulatory change studied that required proof of identity and particular knowledge to Benefit Group qualification. Knowledge of the provisions of the regulatory change and its use as a source of discovery/ learning/ information or knowledge was not substantially in evidence.

This regulatory change had independent and apparently unintended impacts as illustrated by instances where the mere existence of the regulatory change created entrepreneurial

opportunity, prior to receipt of benefit or in the face of failure and where, therefore, the entrepreneurial opportunity impact was not limited to the stated Benefit Group.

There was clear evidence of the phenomena identified in the literature of formal regulatory compliance but little core change along the lines apparently intended by the regulatory 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. The importance of this setting was able to be clearly noticed when the Benefit Group was a disadvantaged social minority and the Study was at the margins among outliers.

Even where the new property right had limited value as loan security or to access seed capital funding, the Study found that a key impact was the strength that its mere existence offered to negotiation and optimization of entrepreneurial opportunity. Of course, again this may have been a feature of the regulatory change studied, which contained a specified Preamble goal concerning the use of negotiation to achieve economic improvement and provisions mandating this. However, the Study suggests that such impact may extend beyond those specific provisions.

Overwhelmingly, the role of Government and bureaucracy emerged as a dominant feature influencing impact. The regulatory change studied created multiple new Government roles compounding an existing multiplicity of Government roles and this was shown to negatively impact entrepreneurial opportunity not only due to the complexity of the multiple Government interests and crippling bureaucracy, but as operationally it evidenced a 'divide and rule approach'. This Study overwhelmingly confirmed the deflating and demotivating impact of bureaucracy and Government involvement upon entrepreneurial opportunity. As just one example, innovation of judicial administration was much lauded, whilst little attention was paid to facilitating innovation among the Benefit Group. These apparently conflicting findings – of positive impact of transformative regulatory change but the crippling effect of bureaucracy – suggest a need for regulatory drafting and impact assessment to avoid additional government control or interface, and reduce such wherever possible, consistent with effecting the desired change.

Lawyers played a crucial role in influencing the impact of the regulatory change studies 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 – often according to the demands and economic priorities of the Government paying their fees). Legal system alliances were very strong and generally tokenised or excluded the Benefit Group.

7.3 RESEARCH PROPOSITIONS

The Research Question, having been answered in the affirmative, this section examines each Research Proposition.

7.3.1 Research Proposition 1

Research Proposition 1 states:

> **Transformative regulatory change, in the form of the** NTAct**, impacts entrepreneurial opportunity, in the form of new venture starts, among the category of persons benefitted by the regulatory change i.e. native title claimants.**

The data was consistent with and supported Research Proposition 1. Numerous ventures were started among native title claimants as a result of the transformative NTAct regulatory change. In all cases where the regulatory change benefit had crystallized, some form of entrepreneurial opportunity occurred and resulted in at least one new venture. The Study confirmed that the transformative regulatory change had enabled development of these new ventures and, in that way, created new means-ends for entrepreneurial opportunity.

> "If it wasn't for (regulatory change) … none of these businesses I've established would be there. We wouldn't have this opportunity to start it. The seed funding came from payments because of (regulatory change)."

NTAct regulatory change was not an Opportunity Spawner *per se* or a source of new information and contained no 'knowledge' elements, but it created a flow of alliances across a wide spectrum, with geographical location and effectuation strongly relevant. Certainly, the opportunity context was one in which the Benefit Group had a strong trading tradition and evidenced a wide range of business ventures unrelated to NTAct.

The impact of the transformative regulatory change studied appeared to be in the nature of a 'but for' – 'but for' the transformative regulatory change, the new ventures would not exist.

Factors that were replicated across the data were that this transformative regulatory change created a turbulent environment in which entrepreneurial opportunity impact occurred. What the transformative regulatory change did powerfully for all Benefit Groups was provide a recognition that was highly valued and this was primarily expressed in non-monetary terms. When probed as to what that recognition actually amounted to, it appeared to comprise a compulsion in third parties to consult with those potentially within the Benefit Group and, thereby, to some extent, alter their actions to take account of the interests of the Benefit Group.

The entrepreneurial opportunity was the outcome of a lengthy process that required cohesive multi-disciplinary teams, participative decision-making and motivating elements (negative and positive). The regulatory change involved a lengthy, harrowing legal process to secure the regulatory benefit. Across all groups, differences in the extent of Benefit Group control over decision-making influenced the strength of entrepreneurial opportunity impact. Lawyers were influential upon the impact in negotiating terms that facilitated new venture starts, although ventures began without this, even where claims failed.

Factors that were not replicated across the data were the degree of benefit that accompanied achievement of the regulatory benefit. There were marked differences in the extent of success and what was regarded as success, with wide variations as to the delay in achieving benefit. There were also differences in the ability to 'leverage' the regulatory benefit (even before successful determination) to optimize outcome, but this difference was strongly impacted by the degree of unity and cohesion within the Benefit Group and the calibre of the legal actors who strongly influenced the 'benefit' outcomes achieved under the regulatory provisions.

7.3.2 Research Proposition 2

Research Proposition 2 states:

> **The impact of transformative regulatory change upon entrepreneurial opportunity is affected by voice and social capital—trust**

The data supported and was consistent with Research Proposition 2.

This Research Proposition laid over the Research Question the intervening variables of Voice and Social Capital–Trust to explore whether any impact of transformative regulatory change upon entrepreneurial opportunity was affected by voice and social capital- trust. It focused upon the core role of communication and societal dialogue in the formation and operation of regulatory change. The Study revealed that, although substantially constrained, filtered and distanced from pivotal points of the transformative regulatory change, the voice of the Benefit Group had an important role not only in shaping the regulatory change from the outset, but influencing the nature and scope of its impact, both positive and negative, upon entrepreneurial opportunity.

The Benefit Groups studied demonstrated high levels of internal social capital with great emphasis in all data on achieving tangible community benefits. Whilst trust did not exist between all individuals, each Benefit Group was, on the whole, tightly interconnected internally, through family relations and also enjoyed extensive and influential connections that were expanded by the transformative regulatory change. Such internal levels of social capital might not extrapolate beyond the Case Study to other types of regulatory Benefit Groups such as commercial competitors within an industry Benefit Group but they appear to be beneficial.

Distrust was a major element of the regulatory change studied. The existence of trust or distrust influenced the timing and extent of entrepreneurial opportunity and the degree to which it had positive or negative impact. Again, it is possible that the emphasis on trust was particular to the transformative regulatory change studied, but such findings are consistent with broad findings across the literature, although none has specifically considered links between regulatory change, entrepreneurial opportunity and trust.

Factors that were replicated across data were deep distrust by the Benefit Group of bureaucracy and Government. All venture development was strongly linked to community and the development of positive social outcomes. Strong internal and external interconnections were evident in all instances.

Factors that were not replicated were the extent to which distrust could be transformed into effective alliances and whether distrust could be beneficially overcome.

7.3.3 Research Proposition 3

Research Proposition 3 states:

> **Transformative regulatory change impacts entrepreneurial opportunity according to the type of regulatory change.**

The data was consistent with and supported Research Proposition 3. The Study provided indicators that transformative regulatory change such as NTAct impacted entrepreneurial opportunity according to its regulatory type. The regulatory type studied was of the Deterrence or 'Command and Control' Model using a Conventional Regulation Method. Whilst the regulatory change was shown to impact entrepreneurial opportunity and the impact could be positive, the Study demonstrated the limitations of the NTAct regulatory type and the frustrations and disappointments associated with it.

It did suggest that a 'Command and Control' conventional regulatory type may be the only, or the best, regulatory type able to effect transformative regulatory change because it forces and controls the intended change, resulting in its actually occurring even in the face of powerful forces of resistance and, thereby, achieving entrepreneurial opportunity impact. A more flexible or innovative regulatory type may have been insufficient to drive a new direction through the *Bahnbrechen* chaos against strong normative commercial and societal pressures. It is also likely that any other regulatory type would have been insufficient to remove fundamental free market and liberal principles which, in the circumstances of the Study, may have been a necessary compensation for the 'gain' of native title recognition.

It was also clear that any one regulatory type sits within a network of regulatory instruments comprising a variety of regulatory types. Thus an impact from an earlier one may influence the new regulatory change which in its turn will influence and be influenced by later regulatory change, with each affecting the impact of the transformative regulatory change upon entrepreneurial opportunity. There is a need for much greater exploration of impact evaluation as well as consideration of methods for isolating or enhancing impacts, rather than the hitherto 'all too hard' approach. Regulation may need to be framed to ensure that entrepreneurial opportunity becomes a direct impact of the regulatory goals, purposes and provisions.

Factors that were replicated across the data were the limitations of the 'Command and Control regulatory type and the complete absence of alternative regulatory methods or tools within the regulatory change under study. While a 'Command and Control' regulatory model might be best practice for 'high risk' situations, care is needed to ensure that the regulator is not perceiving 'high risk' where there is simply a chaotic setting, using the 'high risk' category for political reasons or overcompensating for an overstated or misconceived risk that would be better managed using a different regulatory type.

Factors that were not replicated were the variations in the ability to use the 'Command and Control' regulatory type to optimize benefit. Relevant to this was the differing role of legal 'actors', the varied ability to access and fund quality legal assistance as well as the internal cohesion and understanding of the system which enabled individuals to positively steer the impact toward entrepreneurial opportunity despite the limitations of the transformative regulatory change studied.

7.4 IMPLICATIONS FOR THEORY

The Study provided support for Schumpeter's conceptual model. It also supported modification of Schumpeter's conceptual model to allow for allocation of entrepreneurial endeavour to productive activity (rather than just destructive or unproductive activity) according to the 'rules of the game' (Baumol 1990).

The Study noted the role played by the institutional environment in determining the strength of demand for regulatory change from the outset. The transformative regulatory change studied seeded in the actions and decision-making of a judicial institution, the High Court of Australia. This triggered immediate concern from major location-based commercial institutions as well as other areas of the judiciary calling for action to prevent large volumes of litigation throughout Australia or override the Court's decision.

The Study also delved into questions as to whether the demand for regulatory change is stronger when the gainers are relatively few, expect to make large gains, have similar interests and can exclude others from sharing those gains (Stigler 1971). It confirmed that those achieving most positive impact, ie the greater gainers, appeared to be those that fitted Stigler's 'demographic'. However, it may be that in the chaotic circumstances of the exogenous

environment out of which this transformative regulatory change emerged, the target Benefit Group may have been inaccurately perceived as the stronger hence requiring compensation to those incorrectly perceived as likely to suffer loss, and this compensation took the form of serious restrictions on the use of normal market mechanisms by native title holders. The Study reveals Schumpeter's Model as an excellent theoretical tool by virtue of its comprehensiveness of content, cultural perspective, logical congruence, conceptual clarity, level of abstraction and applicability to praxis. It considerably assisted the research to reach underlying assumptions arising from the widespread use and acceptance of competition and equilibrium models.

This Study certainly confirmed that large organizations, with much at stake commercially, appeared better able to familiarize themselves with the terms of this regulatory change and the methods for optimizing corporate advantage than the small Benefit Groups for whom it was purportedly enacted (Macaulay 1979).

This Study confirmed that transformative regulatory change did shift relative costs and benefits. It provided a direct benefit to a specified Benefit Group and allocated resources to determining the qualification required to join that Benefit Group and negotiating opportunities for it (Drucker 1985). This direct benefit enabled the Benefit Group to move to productive activity.

The Study confirmed that regulatory change can impact upon entrepreneurial opportunity, even when the regulation contains no provisions to deliberately spawn or drive such opportunity (cf privatization or major project regulation). The regulatory change provided a setting for entrepreneurial opportunity impact, rather than spawning or driving it. It demonstrated that even quite indirect regulatory provisions can incentivate, for example the recognition of prior right in land causing "a bit of confidence and resilience" (Timmons 1999).

The Study showed regulatory change shifting the relative costs and benefits of alternative resource usage, with control of resources 'funnelled' to parts of the regulatory regime and not others, particularly through its practical operation. Significant resources became allocated to third parties quite removed from the Benefit Group, eg experts and lawyers, with budgets for such resource allocations being allocated according to Government policy priorities (Eckhardt

& Shane 2003, Shane & Venkataraman 2000, Venkataraman 1997). Certainly, the regulatory benefit *per se* shifted the relative costs and benefits of resource use. However, despite the Preamble's stated purpose, the allocated resources were not sufficiently strongly linked to Benefit Group enterprise creation, even by a minimal mandate that start up resourcing be a compulsory consideration in ILUAs or future act approvals.

It also suggested that existing institutions may adapt poorly to entrepreneurial opportunity, because change forces the institution against its own norm (North 1991, Shane 2012, Shane 2009). In a regulatory change, this may interplay with lawyers and other agents or actors involving with its impact. This can result, as postulated by Macaulay (1979), in such actors responding predictably to "the social and economic structures in which the practice of law is embedded" resulting in justice being rationed by cost barriers and be rationed by cost barriers, "the lawyers long-range interests" (Macaulay 1979).

Research showing initial 'token' acceptance of regulatory change or wholehearted support, could end ultimately in passive resistance to core change that ultimately neutralized the regulatory change goals and reinstated institutional norms (Mahlston, Kallgarn & Johansson 2012, Szabla 2007, Abrahams, Sullivan & Griffin 2002, Sullivan, Kelly & Gordon 2003). Powerful corporate and State government interests, despite initial vocal opposition to the regulatory change studied, adjusted well to the change, turning it to advantage and normalizing it within their corporate systems. These institutions were both strongly involved in settling the form of the transformative regulatory change itself to include terms which they could accommodate commercially and, once the regulatory change was enacted, moulded themselves effectively to it. It was difficult from this Study to assess whether this was because existing firms are least able to respond entrepreneurially or, actually the reverse, are more able to respond as an industry whole to secure their existing vested interests (cf Shane 2009 and Stigler 1971). The Study shows that Government and Judicial institutions merely applied their existing organizational norms and approaches to the new regulatory change and congratulating themselves on 'innovative' modifications made in response to it, rather than fully embracing the opportunity it presented or actively considering how to optimize that opportunity for the Benefit Group.

The Study supported the emphasis on information control (Lyotard 1984 [1979], Shane & Venkataraman 2000). However, it was not because information provided knowledge from

which entrepreneurial opportunity could be created. The relevance appeared as a 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. The Study confirmed the importance of links between information and resource allocation. Where control of both information and resources rested firmly outside the Benefit Group, this negatively influenced the linkage of negotiated agreements and entrepreneurial opportunity, creating serious impediments. It inhibited the possibilities of De Bono's approach for maximising information as a springboard for lateral thinking and active creativity techniques for business value-add (De Bono 1969). Linkages found between information, resource allocations and geographical location supported earlier research as to the importance of regulatory change in advantaging for niche opportunity (Seynard at al 2012, Venkataraman 1997).

Although remote geographical location impacted access to key information, effective day-to-day involvement in the regulatory system involved additional costs, overall the Study confirmed earlier research showing that regulatory verification bestowed a quality standard supporting increased networking, trust and co-operation in regional or remote areas.

The importance of building 'knowledge' stimulants into regulatory change over and above its regulation of land, labour or capital was reinforced (Journal of Entrepreneurship Theory & Practice Special Issue 2008). In the transformative regulatory change studied, no stimulants existed to build knowledge, although knowledge and knowledge systems were integral to the rights bestowed by it. The Study showed unique and important Benefit Group knowledge becoming channelled and controlled by the Government, judiciary, lawyers and competing commercial interests without any regulatory mandate to link the knowledge with knowledge stimulants such as University links, R&D or incubators.

Links among entrepreneurial opportunity, co-operation and regulatory control were confirmed in this Study (Gans, Hsu & Stern 2002). Conceptualizations of regulatory change impact as a shifting flow of alliances also found strong support in the Study. Entrepreneurial opportunity took place within clusters that drew on trust and co-operation aided by the provisions and operation of the regulatory change itself and included project-related alliances spinning directly from the rights created by it. These formed into a complex network of diverse alliances between private enterprise, various parts of Governments and among actors to the

regulatory change, eg lawyers, experts and judiciary which both involved and failed to involve the Benefit Group. Networks and alliances were crucial, ranging from relationships with work crews, Government officials and key authorities, from which grew beneficial additional new business and supply arrangements. However, where the new venture lacked capital to generate reciprocal business it might be hampered, as the supplier/customer relationship appeared important in some cases. Alliances obviously required trust and the Study found that areas of deep distrust hindered more fluid alliance flows. Negative alliance flow was also identified, including 'being consulted to death', required to respond to constant government social or economic impact assessments and attend 'endless' meetings. Alliances with umbrella organizations often had a negative impact on sound alliance formation with the Benefit Group.

Government emerged as an unreliable alliance partner, with regulatory change insufficiently and inadequately prescribing the design of the alliance at the outset and failing to address the future management of the statutory alliance it created. Government proved itself to be an insufficient effectuator. This was a particular problem between partners of unequal size and power. Public-private land ownership partnerships created by the transformative regulatory change were structured on the faulty assumption that each partner would have somewhat equal power, resources and access to legal advice. Government multiple interests and conflicts of interest influenced alliance effectiveness where economic development policy diverged from the economic goals of the Benefit Group. Government was found to 'hold all the cards', as Schumpeter predicted, and was either overtly hostile to entrepreneurial opportunity or passively neutral to it. Frequently, it was paternalistic. Whether as a consequence of a transformative regulatory change trigger or for another reason, the Government-Benefit Group relationship was a dominant feature of this Study. This differed markedly from the impact of technological change where, apart from meeting basic corporate and taxation requirements, new ventures proceeded without any particular relationship or partnership with Government. Government's potential for negative impact seemed to outweigh its potential for the positive, particularly given the power imbalance between an individual venture and the State.

The Study, by examining the judicial process, provided insight inside a key impact point for 'seed fertilisation' of entrepreneurial opportunity from a transformative regulatory change. At this fertilization point, where native title rights recognition was either given, or not given,

deeply entrenched societal and normative power imbalances came into play. The regulatory change, which was impractical and foreign to the Benefit Group, became managed and advocated by others and this management was strongly influenced by Government resource allocations and, to a large degree, Government policy, particularly the State Government. Government also could, at this 'fertilisation' point, threaten to, or actually, reallocate existing or potentially important resources available to the Benefit Group under other powers, according to the Benefit Group's response to native title matters. For example, Government could withdraw grant allocations should the Benefit Group fail to capitulate around Future Act agreement conditions or use its response to an itinerants' housing project to undermine its native title rights. In this way, at the precise 'seed fertilisation' point, the regulatory change operated actively to entrench policies that were ill-adapted to its overtly stated new social and policy goals and, thereby, protect and vindicate enduring values. The basis for this entrenchment included normative assumptions as to 'proper' decision-making processes for resolving complex competing interests, 'proper' organizational governance approaches and 'proper' arrangements for management of 'the commons'. The Study confirmed earlier findings that judiciary and lawyers were key 'actors' in the 'seed fertilisation' arena and were neither neutral nor passive in influencing outcomes (Frug 1989, Macaulay 1979). The Study showed these actors as 'gatekeepers' determining who would and would not be heard and what for. They were, in turn, unashamedly influenced by Government funding allocations and policies.

Links between regulatory change and national sovereignty were evident in this Study with notions of sovereignty at the heart of the way in which the transformative regulatory change was framed from the outset and what was, and was not, given to the Benefit Group (Vogel 1995). In this Study, sovereignty remained a 'live' and serious issue for the Benefit Group, although the transformative regulatory change itself, like that considered in earlier findings, had no direct or indirect impact upon sovereignty. The Study supported warnings of a 'false consciousness', where sovereign selfhood is reserved from the State by the Benefit Group but the State disregards sovereignty as an issue (Smith & Morphy 2007).

The Study provided support to the entrepreneurial opportunity model of effectuation, with less support for the discovery/learning approach (Sarasvathy 2001, Shane 2000). This Study finds that, whilst it cannot be said to be causative, the transformative regulatory change was a 'but for'. It is interesting to consider whether transformative regulatory change, rather than

directing resource allocation, is not better viewed as one of the products in the Sarasvathy effectuation pantry that, that happen to be there along with others and are used alone or in combination to prepare an entrepreneurial opportunity. The Study provided little direct support for risk as relevant to transformative regulatory change impact.

The Study was consistent with the literature in regard to the importance and multiple influences of voice upon transformative regulatory change, entrepreneurial opportunity and the impact of such change upon entrepreneurial opportunity. The Benefit Group narrative was powerful and influential in the lead up to the transformative regulatory change.

The Study contributed to the theory relevant to voice by showing how an RIA process that silences consideration of the impact of transformative regulatory change upon the Benefit Group not only silences their experience, but renders it irrelevant. The 'blah blah' and 'triumph' language surrounding the regulation under study was demonstrably obscuring creative opportunities as well as entrepreneurial and commercial realities. The Benefit Groups were shown to have some elements of a shared positive world beneath the 'normative' expressions of language. Narratives of the dominant or majority were widely regarded as the reality of the regulatory change, until deeply probed. The role of story-telling within law's culture of argument and persuasion was shown to be important particularly in revisiting assumptions, building internal resilience and a guiding vision to pursue entrepreneurial opportunity, invigorating the Benefit Group culture and support effective networks and alliances.

The Study reinforced the power of social capital and trust, whilst highlighting that 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 Benefit Group context and culture and this must be recognised and accommodated if regulatory impact 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 policing authorities and the community. There is also need to distinguish between the social capital of the Benefit Group and a Social Licence being sought by a third party commercial interest, seeking to

exploit or trade with the Benefit Group by evidencing actions that appear socially responsible. These are different phenomena.

In a situation of extreme distrust, the Study confirmed that trust, once destroyed, is difficult to rebuild and the danger is that it becomes self-fulfilling. As trust follows a perception of integrity, rather than actual integrity, focus upon building positive perceptions and experiences is required and needs to be understood as a long-term one-on-one process, at all institutional levels, that needs to involve positive media messages. Alliance building was demonstrated to remain a formality only where the Benefit Group party was not involved in creating joint value to maximise alliance outcomes as a centrepiece of corporate strategy for competitive advantage. Where the alliance was not required to include Florin's four structural characteristics of success ie social networks, repeat interactions, shared routines and shared information, the Study confirmed that it could be predicted to be moribund. The Study also confirmed the inherent vulnerability of an alliance with differently scaled organisations.

The Study contributed to regulatory theory by demonstrating the effectiveness of a transformative 'command & control' regulatory type in crystallizing *Bahnbrechen* change, particularly in a highly controversial political scenario. Regulatory change targeted at the economic improvement of an 'outlier' group appeared to require compulsory 'command and control' elements in order to improve impact on entrepreneurial opportunity. However, it also illustrated that maximization of the impact of transformative regulatory change upon entrepreneurial opportunity may require more. It suggests that less hierarchical alternative regulatory types, such as 'industry' self-regulation, co-regulation or no regulation options, could result in the regulatory change having a greater and more positive impact. It also invited enquiry as to how innovations in regulatory types themselves might be applied so as to influence the impact upon entrepreneurial opportunity.

Finally, the Study points to the need for entrepreneurship researchers to refine their consideration of regulation so as to distinguish the regulatory type to which their theory refers. The Study shows that different regulatory types can be expected to impact entrepreneurial opportunity in different ways and broad references to 'the rules of the game' or a grab-bag of regulatory burden are wildly insufficient for sound analysis.

7.5 RECOMMENDATIONS FOR FURTHER RESEARCH

As the literature review revealed, there has been only limited research undertaken as to the impact of regulatory change on entrepreneurial opportunity. For this reason, this Study was descriptive and exploratory and extensive further research is justified in multiple areas.

The Study used NTAct as its regulatory change study vehicle. The generality of its findings would be enhanced by further research using a transformative regulatory change, particularly a transformative regulatory change that provided a benefit that is not associated with either private property or a judicial trigger and which perhaps includes a knowledge element such as R&D or incubators. A regulatory change that responded to a new technological possibility would also further test the fundamentals of Schumpeter's *Bahnbrechen* notion. The Study revealed Schumpeter's Model as an excellent research tool and the author would strongly recommend further research based on the Model, applied to other regulatory change – or innovative situations that might explore the Baumol 'allocation' modification to it – with the 'regulatory change" the independent variable of the exogenous environmental. This recommendation is based upon the competition and equilibrium assumptions that Schumpeter's Model revealed within NTAct and the danger that such assumptions may pervade much contemporary transformative regulatory change. That said, there would also be benefit in further research that explored the Research Question using competition and equilibrium models or other non-Schumpeter approaches and comparing the various models.

Research could examine a transformative regulatory change that contained no tangible benefit, given this Study's finding of impact outside the Benefit Group. This would enable comparison of a transformative regulatory change favouring a specific Benefit Group with one benefiting anyone. Longitudinal studies would also be important, along with additional case studies particularly if they made comparison between Aboriginal and non-Aboriginal entrepreneurial opportunity impact.

Because this Study concerned the grant of new property right regulatory change, further research that compared other enterprise regulation for location-based enterprises might enhance theoretical understandings of links between land and entrepreneurial opportunity, including clusters and geographical networks. Such regulation might concern enterprises that exploit resources at a particular location, eg quarry, mining, forestry, or those which require

security over particular land, eg tollways or pipelines, or those concerning business activities in particular areas, eg regional assistance schemes.

This Study examined a Benefit Group at the extreme of economic and social vulnerability and a transformative regulatory change that removed fundamental principles of the Rule of Law, Liberalism and the free market. At these extremes, it found an entrepreneurial opportunity impact. Further research might compare and contrast the findings of this Study within a setting in which fundamental market and legal principles remain untouched and the regulatory change is more aligned to western legal, economic, social or cultural norms. The transformative regulatory change studied also imposed a very high level of bureaucratic involvement and contrast on this variable would also be useful.

To better understand how issues of voice and social capital-trust influence impact, further research could look at regulatory change where the targeted Benefit Group directs its terms, eg the disabled involved with building legislation, or a regulatory change that directly targets entrepreneurial opportunity. There is a need to directly extend the work of Putnam and Fukuyama into the regulatory change area, particularly as to its impact upon entrepreneurial opportunity (Fukuyama 1995, Putnam 1993, Putnam 1995, Putnam 2000). In the context of such further research, observation as to the potential influence of a pre-formed individual or group approach to interacting with regulatory change may be of interest.

The entire area of regulatory impact assessment needs further study to move it beyond conceptualizations of regulatory cost and burden. RIA at a minimum needs to assess the possibility of regulatory change impacting entrepreneurial opportunity and require that included in appropriate guidelines. There is scope to further develop, test and evaluate the Key Elements which this Study used to assess impact as a base for improved RIA parameters.

7.5.1 NTAct/ Indigenous Issues

More detailed national study comparing Aboriginal business venturing Before and After NTAct is most important and overdue. As raised by Martin and confirmed in this Study, issues of relatedness and ceremony between researcher and interviewee merit further research (Martin 2008). Comparison with other Indigenous Peoples might have merit.

7.6 IMPLICATIONS FOR POLICY AND PRACTICE

This section reviews how the findings of this Study may be put into practice, consistent with views that entrepreneurship can be managed (Knight 1985, Legge & Hindle 2004). New venture creation is extremely important to a nation's economic health, being responsible for the vast majority of job creation and growth (Audretsch & Thurik 2001, Birch 1987, Chell 2007, Kumar & Liu 2005). Western countries rely heavily upon regulatory change to address impediments to business or economic development and incentivate entrepreneurial endeavour (Acs et al 2004, Minniti, Bygrave & Autio 2006). Despite the significance of the regulatory setting, Government business innovation programs and funding for new venture stimulation tend to view regulatory change in terms of deregulation and reduction of regulatory burden, rather than an innovative moment for the creation of entrepreneurial opportunity.

This Study is important in guiding policy and practice by its description of the role of transformative regulatory change and its description of how impact upon entrepreneurial opportunity operates in the NTAct setting. It suggests how entrepreneurial opportunity may be achievable by transformative regulatory change, what may be required by economic incentives outside regulatory change and, by making the distinction among the grab-bag of different regulatory types, offers a path toward a more systematic approach to the use of different types of regulatory change.

As transformative regulatory change ties closely to a nation's history, cultural perspectives and traditions, the impact it is likely to create requires consideration of culturally acknowledged social and trading practices. Links between national sovereignty and transformative regulatory change must not be ignored.

The Study considers what might be achievable by transformative regulatory change. A regulatory change needs to avoid creating a core market or regulatory failure. In seeking to compensate those who might lose by the grant of benefits to the Benefit Group, it should not exclude the free market or principles of liberalism. Serious ramifications arise from removing basic trading and legal norms such as the right NOT to trade, which is not only a significant societal norm but a fundamental principle of western economics. Removal of a core right within a western market economy and its ramifications clearly have dramatic and important implications for entrepreneurial opportunity that go well beyond those of a disadvantageous consumer transaction.

A transformative regulatory change that frees a Benefit Group from Government interference or paternalism appears likely to result in stronger positive impacts on entrepreneurial opportunity, particularly in any sector with a history of substantial distrust of and by Government. Withholding information from Benefit Groups appears to hinder positive impact whilst involvement of the Benefit Group in its own regulation appears to improve impact. Regulatory drafting can improve entrepreneurial opportunity to a Benefit Group by ensuring the free flow of information to it. Regulatory purpose, if it were to optimize cumulative increase in entrepreneurial opportunity and ensure it retains control of that information, may need to include, at drafting stage, 'knowledge' options such as R&D, idea incubation, research parks, chambers of commerce or university-business knowledge links. It might also need to be somewhat tailored to 'best fit' with the existing circumstances of the targeted Benefit Group. Those framing the regulatory change, in seeking to optimise entrepreneurial opportunity, must take into consideration that, whilst the Benefit Group will adjust activity to seek productive benefit, so also will other parties. New regulatory provisions need to go beyond simply 'rights' endowment if they are to address entrepreneurial opportunity impacts. Careful attention is needed also to go beyond minimizing regulatory costs, both transaction and opportunity, to include methods by which regulatory change might maximize the cumulative effect of resource allocation and lift overall levels of entrepreneurial opportunity. Regulatory change agents, eg Parliamentary Counsel, need to include such considerations 'on their radar' and move beyond cost/burden or risk RIA notions. This is not to say that cost/benefit considerations are unimportant as certainly costs negatively impact entrepreneurial opportunity. Where the regulatory change is impenetrable, this hinders entrepreneurial opportunity by blocking dynamism within the Benefit Groups. Regulatory proscriptions, driven by Government accountability imperatives, hinder entrepreneurial opportunity. Likewise, where conflict is likely to arise between public accountability for the 'commons' and entrepreneurial opportunity, this needs to be overtly addressed at a policy level and clearly reflected in regulatory goals, with foresight at the outset given to full consideration of the implications of accountability proscriptions. Mandatory goals and structures for post-benefit Benefit Group entities need to facilitate entrepreneurial opportunity not just simply to address accountability but to optimise opportunity. For example, the tax issues facing such new ventures need pre-consideration rather than an after-the-event reaction. It is essential to fit the regulatory mandate properly with what might be called the 'industry'

culture of the Benefit Group. Time as a resource being allocated also needs to be recognized, especially where Government and bureaucracy is heavily implicated in regulatory change.

Framers of regulatory change need to include provisions that ensure that the policy change encapsulated in the regulatory change carries through all the regulatory provisions and is neither limited to the bestowing of rights nor brought into conflict with provisions benefiting others elsewhere in the regulation, including accountability priorities.

Regulatory change that creates an umbrella group 'above' the Benefit Group appears less-than-optimal in its impact on entrepreneurial opportunity. There appears to be considerable disconnect between the Benefit Group's entrepreneurial opportunity and a regulatory change creating and resourcing such an umbrella group.

Great care is needed to ensure that bodies responding to aspects of the regulatory change are not merged with or used to diminish the powers of other Benefit Group entities required in other areas eg education and social services.

Building and supporting existing trusting relationships should be the initial focus of regulatory change if it is to positively and productively shift allocation of entrepreneurial activity. Strong social capital may sit alongside critiques of Benefit Group behaviour, but this may merely be a reflection that the 'rules of the game' are causing allocation of entrepreneurial activity to unproductive or destructive activity, rather than productive activity. Rather than being a trigger for repressive or controlling regulatory change, such 'misbehaviour' might be a sign that the 'impact' setting of the regulatory change needs adjustment to encourage activity allocation more productively. Effort is needed to recognize and support the social capital that does exist and explore regulatory and operational ways of encouraging community allocation of resources productively. A regulatory model that actively involves the Benefit Group (i.e. industry self-regulation) is more likely to optimize impact upon entrepreneurial opportunity and effort should be made to consult beyond umbrella bodies directly with the Benefit Group.

The 'command and control' regulatory type is likely to constrain and unnecessarily limit impact upon entrepreneurial opportunity. That said, it is likely that a transformative regulatory change, strongly resisted by powerful interest groups, may only achieve impact on entrepreneurial opportunity by the use of 'command and control' regulatory type. However,

beyond the *Bahnbrechen*, careful consideration should be given to the use of a broader range of regulatory types with assessment of 'risk' in the choice of a regulatory type carefully done to avoid paternalism and create rather than hinder opportunity. There is scope, even within a 'command and control' transformative regulatory type, to incorporate other regulatory models and methods at points within the regulatory schema after the transformative action has occurred. For example, other regulatory methods might be preferrable after native title recognition.

Where regulatory arrangements create a mandatory alliance, public-private partnership or, even a *de facto* partnership, any impact on such partners needs to seriously address inherent power and resourcing imbalances and apply basic alliance theory to its design, future management, review and enforcement arrangements. This is especially the case in regulation of the 'commons'. It should avoid fixed goals and structures that lock up funds, but should facilitate entrepreneurial activity, ensuring good fit with existing partner organizations and relevant shared long-term goals.

Transformative regulatory change needs to recognize, address and express relationship with related regulation to optimise positive impact on entrepreneurial opportunity. RIAs need to recognise that entrepreneurial opportunity exists and included measures of entrepreneurial opportunity outcome along with adequate tools and methods to assess this. This Study, as an analytic aid, identified Key Elements from the literature which, when drawn together, comprised assessment criteria by which the impact of transformative regulatory change upon entrepreneurial opportunity might be assessed. These Key Elements need further testing for reliability and validity, but evolved as appropriate, they could be immediately applied to broaden existing RIA approaches away from the burden/costs and risk focus to a more enabling focus. As this Study shows, transformative regulatory change does impact entrepreneurial opportunity. Clearly, regulatory impact statements need to examine and consider entrepreneurial opportunity as a key element.

7.6.2 NTAct/Indigenous Issues

Finally, within the special area of NTAct, a comprehensive regulatory impact assessment is urgently required. This regulation seriously interferes with free market trading by Aboriginal native title holders and it is of great concern that it has substantially fallen outside any RIA

process for nearly twenty years. Greater connection between native title agreements and broad Government initiatives for Indigenous economic development needs to be developed and implemented urgently. Greater transparencies in agreements must be mandated 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 have upon the entrepreneurial opportunity impact. Funding needs to be sufficient to allow Benefit Groups to be adequately represented, with greater emphasis upon the individual Benefit Group than upon umbrella bodies. Indigenous Business Australia's (IBA) recent foundation of a native title division is potentially extremely 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 need to be created that build in consistent new venture performance indicators, including steps to monitor and enforce. In this way, Groups with limited resources and/or uninspired legal assistance will be assured, through template agreements, of minimal provisions to optimize entrepreneurial opportunity. There is need to modify NTAct to tailor it better to the 'lived' experience of the Benefit Group. A form of 'industry self-regulation' is needed and may take varied forms according to location and may ultimately include 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. Consideration of differences between Indigenous and non-Indigenous Approaches to Interacting the Regulatory Change, including the potential influence of a pre-formed individual or group approach may merit further attention in policy and practice. Likewise, more detailed national study comparing Aboriginal business venturing Before and After NTAct, along with collection and recording of statistics, date and information profiling Aboriginal business activity is most important and overdue in guiding national policy and practice

7.7 SUMMARY

This Study asked – *does transformative regulatory change impact entrepreneurial opportunity?* Within the context of the transformative regulatory change studied, it concluded that it did, with impacts both positive and negative and extending beyond the

Benefit Group. For those in 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. The Study revealed that it is possible for transformative regulatory change to create a positive impact upon entrepreneurial opportunity and produce a cumulative increase in allocations of productive entrepreneurial activity. Bureaucracy and government intervention were significant burdens to impact. Rather than a necessary consequence of transformative regulatory change, they arose from regulatory provisions. The Study recommends that regulatory change, particularly transformative regulatory change, attempts to carefully avoid increased bureaucratic and government involvement.

The Study confirmed the influence of voice and social capital–trust through relationships that build powerfully on existing networks and alliances. The Study suggested that transformative regulatory change may need, necessarily, to adopt a 'command and control' conventional type in order to force through the change, but 'industry' self-regulation models or innovative regulatory types offered potential for improved impact once benefit was secured.

Transformative regulatory change and entrepreneurial opportunity were shown to be strongly alive. As a life-force emerging from the chaos of *Bahnbrechen*, transformative regulatory change seeded, against all odds, an impact upon entrepreneurial opportunity.

BIBLIOGRAPHY

Abad, A.R. and A.V. Palacio, 1994, Modernization of government control systems in Argentina – a matter of accountability, *Optimum*, Vol. 24, No. 4, Spring,17.

Abdul-Rahman, Alferez, 2004, *A Framework for Decentralised Trust Reasoning*, PhD Thesis, Department of Computer Science, University College London.

Abraham, Morris, Tim Sullivan and Des Griffin, 2002, Implementing NAGPRA: the effective management of legislated change in museums, *Management Decision*, Vol. 40, No. 1, 3549.

ACMA (Australian Communications and Media Authority), 2010, *Optimal conditions for effective self- and co-regulatory arrangements: Occasional paper*, June, Commonwealth of Australia, viewed 16 September 2012, http://www.acma.gov.au/webwr/_assets/main/lib311886/self-_and_co-regulatory_arrangements.pdf

Acs, Z.J., D.B. Audretsch, P. Braunerhjelm and B.Carlsson, 2004, The missing link: The Knowledge Filter and Entrepreneurship in Endogenous Growth, *CEPS Discussion Paper No. 4783*, Center for Economic Policy Research, London.

Acs, Zoltan J., David Audretsch, Sameeksha Desai and Isabell Welpe, 2010, *Journal of Economic Behavior & Organization*, Vol. 76, Iss., 1-2.

Adams, J., B. Miller & P Venables, 1991, *Woyan Min Uwamp Ask Ngulakana: Finding the Right Road Ahead*, unpublished report, Aurukun Support Group.

Adler, J., 1989, A Historical Analysis of the Law of Vagrancy, *Criminology*, Vol. 27, 209.

Adorno, Thoedor W., 2006, *Minima Moralia: Reflections on a Damaged Life*, Verso.

Adorno, T. W. and Max Horkheimer., 2002, *Dialectic of Enlightenment*, trans. Jephcott, Edmund, Stanford University Press, Stanford, 242.

Ahl, Helene, 2006, Why Research on Women Entrepreneurs Needs New Directions, *Entrepreneurship Theory and Practice*, September, 595-621.

AIATSIS, 2009, *National Assistance Available for Registered Native Title Bodies Corporate, Native Title Unit*, November, viewed 25 May 2010, http://www.aiatsis.gov.au/ntru/docs/resources/rntbc/toolkits2009/national09.pdf

AIATSIS, 2008a, Letter to Committee Secretary, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs regarding Inquiry into developing Indigenous enterprises from Professor Mick Dodson, 15 July

AIATSIS, 2008b, Submission attached to letter to AFTS Secretariat The Treasury Re: review of Australia's tax system from Dr Lisa Strelein, 9 October.

Aidis, Ruta, 2007, Illegal entrepreneurship experience: Does it make a difference for business performance and motivation?, *Journal of Business Venturing*, Vol. 22, Iss. 2, March, 283-310.

AIMSC (Australian Indigenous Minority Supplier Council), 2012, www.aimsc.org.au

Albrook, M. & M.A. Jebb, 2004, *Implementation and Resourcing of Native Title and Related Agreements*, NNTT, Perth, viewed 30 June 2007, http://www.nntt.gov.au/Publications -And-Research/Tribunal-Research/Documents/Implementation and resourcing of native title and related agreements.pdf

Akerele, O., 1995, Medicinal Plants and Protected Areas, in J.A. McNeely (ed.), *Expanding Partnerships in Conservation*, Island Press, Washington DC.

Akhmatova, Anna, 1940, *Epilogue II*, in Reeder, Roberta (ed.), 1997, *The Complete Poems of Anna Akhmatova*, trans. Judith Hemschemeyer, Zephyr Press, Mass., USA.

Aldrich, Howard E. and H. Cliff, 2003, The pervasive effects of family on entrepreneurship: Toward a family embeddedness perspective, *Journal of Business Venturing*, Vol. 18, 573-596.

Aldrich, Howard E. and C. Marlene Fiol, 1994, Fools Rush in? The Institutional Context of Industry Creation, *Academy of Management Review*, Vol. 19, No. 4, 645-670.

Altieri, M.A., 1987, Agroecology: The Scientific Basis of Alternative Agriculture, Westview Press, Boulder, CO.

Anderson, Ian and Bebe Loff, 2004, Voices Lost: Indigenous health and human rights in Australia, *The Lancet*, vol. 364, 1281-2.

Archibald, Jo-ann, 2001, *Indigenous Storywork: Educating the Heart, Mind, Body, and Spirit,* University of British Columbia Press, Vancouver, Canada

Arendt, Hannah, [1951] 1972, *Elemente und Ursprünge totaler Herrschaft*, trans.,The Origins of Totalitarianism, Schocken, New York, 3rd edition.

Arendt, Hannah, 1968, *Men in Dark Times*, Harcourt, Brace and World, New York.

Arendt, Hannah, 1965, *Eichmann in Jerusalem: A Report on the Banality of Evil*, revised edition, 1968, Viking, New York.

Arnold, P., 2009, Global financial crisis: The challenge to accounting research, *Accounting, Organizations and Society*, Vol. 34, No. 6 – 7, 803-809.

Arnold, T., 1935, *The Symbols of Government*, Harcourt Brace.

Asad, T., 1986, The concept of cultural translation in British social anthropology in J. Clifford and G.E. Marcus (eds.), *Writing Culture: The Poetics and Politics of Ethnography*, University of California Press, Berkeley.

Atiyah, Patrick.S., 1986, Contracts, Promises, and the Law of Obligations in *Essays on Contract*, Chapter 2, Clarendon Press.

ATSIC (Aboriginal and Torres Strait Islander Commission),1994, 'The Mabo Judgement', *ATSIC Information Kit on Native Title,* ATSIC Office of Public Affairs, Commonwealth of Australia Press, Canberra.

Aubert, V., 1952, White Collar Crime and Social Structure, *American Journal of Sociology*, Vol. 58, 263.

Audretsch, D.B. & M. Feldman, 1996, R & D Spillovers and the Geography of Innovation and Production, *American Economic Review*, Vol. 86, 253-273.

Audretsch, D.B. & R. Thurik, 2001, What's new about the new economy? Sources of growth in the managed and entrepreneurial economies, *Industrial and Corporate Change*, Vol. 10 No. 1, 267-315.

Auscript, 2012, Transcript of Proceedings, Federal Court of Australia, South Australia Registry, Mansfield J in No. SAD 6025 of 1998, *Arabana Peoples Native Title Claim and State of South Australia* and *Others*, 17 May, 3.

Austin, John, 1832, *The Province of Jurisprudence Determined*, Library of Ideas, London.

Australian Law Reform Commission, 2002, Principled Regulation: Federal Civil and Administrative Penalties in Australia, Report 95.

Australian Government 2010a, *Best Practice Regulation Handbook*, Commonwealth of Australia, Canberra, http://www.finance.gov.au/obpr/proposal/handbook/docs/Best-Practice-Regulation-Handbook.pdf

Australian Government, 2010b, *Inspire*, Indigenous Business Australia, Iss. 4, April.

Axelrod, Robert, 1984, The Evolution of Cooperation, Basic Books.

Aydalot, Ph., 1986. *Milieux Innovateurs en Europe*, GREMI, Paris.

Aydalot, Ph. and D. Keeble, (eds.), 1988, *High Technology Industry and Innovative Environment*, Routledge, London.

Ayres, Ian and John Braithwaite, 1992, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press.

Balasco, James, 1979, Teaching the Elephant to Dance in Tanner, David, *Total Creativity in Business & Industry: Road Map to Building a More Innovative Organization*, Advanced Practical Thinking Training Inc., Des Moines, IA, 89.

Bamford, James D. Benjamin Gomes-Casseres and Michael S. Robinson, 2003, *Mastering Alliance Strategy A Comprehensive Guide to Design, Management, and Organization*, Jossey-Bass, John Wiley & Sons Inc, San Francisco CA.

Bardach, Eugene, 1977, The implementation game: What happens after a bill becomes a law, MIT Press, Cambridge, Mass.

Barnes, Jillian, 2007, Resisting the Captured Image: How Gwoja Tjungurrayi, 'One Pound Jimmy', Escaped the 'Stone Age', in Ingereth Macfarlane and Mark Hannah (eds.)

Transgressions: Critical Australian Indigenous histories, Monograph 16, Aboriginal History Monograph Series, Canberra, Australia.

Barnes, Koolpinyah, 2009, Larrakia Signs Agreement with Impex, *Larrakia Development Corporation Newsletter*, Iss. 27 , December, viewed 12 September 2012, http://www.larrakia.com.au/downloads/newsletter_ldc27.pdf

Barreto, I., 2010, Dynamic capabilities: A review of past research and an agenda for the future, *Journal of Management*, Vol. 36, No. 1, 256-280.

Barrett, S., 2004, Implementation Studies: Time for a Revival, *Public Administration,*Vol. 82, 249.

Bartlett, R., 1989, *Economics and Power,* Cambridge University Press.

Bartlett, R, 2004, *Native Title in Australia*, Butterworths, Sydney.

Batty, Philip, 2006, White Redemption Rituals; Reflections on the Repatriation of Aboriginal Secret-Sacred Objects in Lea, Kowal and Cowlishaw (eds.) *Moving Anthropology: Critical Indigenous Studies*, Charles Darwin University Press, Darwin, p 55-65.

Bauman, T., C. Stacey and G. Lauder, 2012, *Joint management of protected areas in Australia: native title and other pathways towards a community of practice, Workshop Report,* AIATSIS Research Publications, Canberra.

Baumol, William J., 1990, Entrepreneurship: Productive, Unproductive, and Destructive, *The Journal of Political Economy*, Vol. 98, Iss. 5, Part 1, (October), 893-921.

Baumol, William J., 1968, Entrepreneurship in Economic Theory, *The American Economic Review*, Vol. 58, 64-71.

Becker, H., 1963, Outsiders: Studies in the Sociology of Deviance, Collier McMillan.

Bell, Derrick A., 1997, Gospel Choirs: Psalms of Survival for an Alien Land Called Home, Harper Collins.

Bell, Derrick A, 1995, Who's Afraid of Critical Race Theory?, *University of Illinois Law Review*, 893.

Bell, V. and Cooper, S., 2012, Internationalisation of Canadian Natural Health Products (Dietary Supplements) SMEs, 2012 *ACERE DIANA Conference*, Freemantle Western Australia, January-February.

Bellone, C.J. and G.F. Goerl, 1992, Reconciling public entrepreneurship and democracy. *Public*
Administration Review, Vol. 52, No. 2, 130-134.

Berg, S. (ed.), 2009, Coming to Terms: Aboriginal Title in South Australia, Wakefield Press.

Berg, S., 2012, Memorandum of Terms of Consent Determinations, unpublished.

Berg, S. & Diane Bell, 2012, *Recognition of Aboriginal law Systems*, publication pending.

Bernstein, M. 1955. *Regulating Business by Independent Commission*, Princeton University Press, Princeton.

Bertaux, D, 1981, From the life-history approach to the transformation of sociological practice, in D. Bertaux (Ed.) *Biography and Society*, Sage Publications, Beverley Hills.

Bert-Jaap Koops, Miriam Lips, Corien Prins, Maurice Schellekens 2006 (eds.), *Starting Points for ICT Regulations, Deconstructing Prevalent Policy One-Liners*, Information Technology and Law Series No. 9, Cambridge University Press, Cambridge.

Bertea, Stefano, 2005, The Arguments from Coherence: Analysis and Evaluation, *Oxford Journal of Legal Studies*, Vol. 25, 369-91.

Bhidé, Amarnath V., 2000, *The Origin and Evolution of New Business*, Oxford University Press, Oxford, especially Preface and Ch. 13.

Birch, D.L., 1987, Job Creating in America: How our smallest companies put the most people to work, Collier Macmillan, London.

Bird, H., D. Chow, J. Lenne and I. Ramsay, 2003, *ASIC Enforcement Patterns*, Centre for Corporate Law and Securities Regulation, University of Melbourne.

BIS, 2011, *Better Regulation*, Department for Business Innovation and Skills, viewed 13 June 2011, http://www.bis.gov.uk/bre

Bjorkman, H. and M. Sundgren, 2005, Political entrepreneurship in action research: learning from two cases, *Journal of Organizational Change Management,* Vol. 18, No. 5, 399-415.

Black, Julia, 2001, Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World, *Current Legal Problems* Vol. 54 No. 103-146.

Blaikie, N., 2009, *Designing social research*, Polity Press, England, 2nd ed.

Blomstermo, A., K. Eriksson, A. Lindstrand and D. Sharma, 2004, The perceived usefulness of network experiential knowledge in the internationalizing firm, *Journal of International Business Studies,* Vol. 22, No. 1, 33-46.

Blowes, R. and D. Trigger, 1999, Negotiating The Century Mine Agreements: Issues of Law, Culture and Politics, in M. Edmunds (ed.), *Regional Agreements in Australia: Vol. 2: Case Studies*, AIATSIS, Canberra.

Bolman, Lee and Deal, Terence, 1997, *Reframing Organizations* Jossey-Bass, A Wiley Company, San Francisco, CA.

Bork, Robert H., 1996, Slouching towards Gomorrah: Modern Liberalism and American Decline, Regan Books.

Bottomley, Stephen and Simon Bronitt, 2006, *Law in Context*, 3rd Ed., The Federation Press, Annandale, New South Wales.

Bourgeois, Louise, 1981, in Miller, Lynn F., Sally S. Swenson, Beryl K. Smith and Joan Arbeiter, *Lives and Works: Talks with Women Artists*, Scarecrow Press, Metuchen, New Jersey.

Bradford, Robert W., and Brian Tarcy, 2000, *Simplified Strategic Planning, The No-Nonsense Guide for Busy People Who Want Results Fast*, Chandler House Press.

Braithwaite, 2005, For public social science, *The British Journal of Sociology,* Vol. 56, Iss. 3, 345-353.

Braithwaite, John and Peter Drahos, 2000, *Global Business Regulation*, Cambridge University Press.

Brathwaite, Angela Cooper, 2003, Selection of a Conceptual Model/Framework for Guiding Research Interventions, *The Internet Journal of Advanced Nursing Practice,* Vol. 6, No.1., viewed 14 September 2012, http://www.ispub.com/journal/the-internet-journal-of-advanced-nursing-practice/volume-6-number-1/selection-of-a-conceptual-model-framework-for-guiding-research-interventions.html

Brennan, Frank, 1998, The Wik Debate Its Impact on Aborigines, Pastoralists and Miners, UNSW Press, Sydney, Australia.

Brennan, G. and J.M. Buchanan, 1985, *The Reason of Rules,* Cambridge University Press.

Bresnahan, T., A. Gambardella and A. Saxenian, 2001, 'Old Economy' Inputs for 'New Economy' Outcomes: Cluster Formation in the New Silicon Valleys, *Industrial and Corporate Change,* Vol. 10, No. 4, 835-860.

Breyer, Stephen (1983) *Regulation and Reform,* Harvard University Press, Cambridge.

Brigley, S., 1995, Business ethics in context: Researching with case studies, *Journal of Business Ethics,* Vol. 14, No. 3, 219-226.

Brindley, C., 2005, Barriers to Women Achieving Their Entrepreneurial Potential: Women and Risk, *International Journal of Entrepreneurial Behaviour and Research,* Vol. 11, No. 2, 144-161.

Brockner, J., 1992, The escalation of commitment to a failing course of action: Towards theoretical progress, *Academy of Management Journal,* Vol. 17, No. 1, 39-61.

Brody, H., 2000, The Other Side of Eden: Hunters, Farmers and the Shaping of the World, Douglas & McIntyre, Vancouver.

Brooks, Peter, 1996, The Law as Narrative and Rhetoric, in Peter Brooks & Paul Gewirtz, (ed.) *Law's Stories: Narrative and Rhetoric in the Law*, Yale University Press, New Haven and London, 14.

Brown, D. & R. Hogg, 1998, *Rethinking Law and Order*, Pluto Press, Sydney.

Bruni, Attila, Silvia Gherardi and Barbara Poggio, 2004, Gender and Entrepreneurship: An Ethnographic Account of Intertwined Practices, *Gender, Work and Organization*, Vol. 11 No. 4, 406-427.

Bryman, A. (1992) Quantitative and qualitative research: further reflections on their integration in Brannen, J. (ed.) *Mixing Methods: Qualitative and Quantitative Research*, Aldershot, Avebury.

Buchanan, J., 1984, Politics without Romance, in Buchanan, J., and R. Tollison (eds.), 1984, *The Theory of Public Choice – II*, University of Michigan Press, 13.

Buchanan, J.M. and G. Tulloch, 1962, *The Calculus of Consent*, University of Michigan Press.

Builth, D., 2002, *The Archaeology and Socioeconomy of the Gunditjmara: a Landscape Analysis from Southwest Victoria*, Australia, Ph.D. thesis, Department of Archaeology, Flinders University of South Australia.

Burns, J. & R. Scapens, 2000, Conceptualizing management accounting change: An institutional framework, *Management Accounting Research*, Vol. 11, 3-25.

Burnside, Sarah, 2009, Negotiation in Good Faith under the Native Title Act: A Critical Analysis, *Land, Rights, Laws: Issues of Native Title*, Native Title Research Unit, Vol. 4, Issue Paper No. 3, October.

Busenitz, L.W., G.P. West, D. Shepherd, T. Nelson, G.N. Chandler and A. Zacharakis, 2003, Entrepreneurship research in emergence: Past trends and future directions, *Journal of Management*, Vol. 29, 285-308.

Buultjens, J. & D. Fuller (eds.), 2007, *Striving for Sustainability: Case Studies in Indigenous tourism*, Southern Cross University Press, Lismore, NSW.

Camagni, R., 1991, Local 'milieu', uncertainty and information networks: towards a new dynamic theory of economic space, Ch. 7, 121-142 in Camagni R. (ed.) *Innovation Networks: Spatial Perspectives*, Belhaven Press, London.

Capello, Roberta, 2002, Spatial and Sectoral Characteristics of Relational Capital in Innovation, *European Planning Studies,* Vol. 10, No. 2, 177-200.

Capelleras, J. L., K.M. Mole, F.J. Greene and D.J. Storey, 2008, Do more heavily regulated economies have poorer performing new ventures? Evidence from Britain and Spain, *Journal of International Business Studies,* Vol. 39, No. 4, 688-704.

Carson, D., A. Gilmore, C. Perry and K. Gronhaug, 2001, *Qualitative Marketing Research,* Sage Publications, London.

Carson, W.G., 1974, Symbolic and Instrumental Dimensions of Early Factory Legislation in R.G. Hood (ed.), *Crime, Criminology and Public Policy*, Heinemann, 107-138.

Carson, W. & C. Neneberg, 1988, The Political Economy of Legislative Change: Making Sense of Victoria's New Occupational Health and Safety Legislation, *Law In Context,* Vol. 6 No. 2.

Casson, Mark, 1982, *The Entrepreneur,* Barnes and Noble, Totowa, NJ.

Centre for Aboriginal Economic Policy Research, 2010, Indigenous Community Organisations and Miners: Partnering Sustainable Regional Development, viewed 12 September 2012, http://www.anu.edu.au/caepr/mining.php

Chambliss, W.J., 1964, A Sociological Analysis of the Law of Vagrancy, *Social Problems*, Vol. 12, 67.

Chambliss, W.J., 1984, The Law of Vagrancy, in W.J. Chambliss (ed.), *The Criminal Law in Action*, Wiley.

Chaney, Fred, 2002, *Eddie Mabo Memorial Lecture*, 3 June, viewed 13 September 2012, http://www.nntt.gov.au/News-and-Communications/Speeches-and-papers/Documents/2002/Speeches%20Eddie%20Mabo%20memorial%20lecture%20Chaney%20June%202002.pdf

Chapman, Chris, 2011, *The 'convergence phenomena' from a regulator's perspective,* Speech to the Communications and Media Lawyers Association, May 30.

Chapman, Chris, 2008, *The flexibility benefits of Australia's co-regulatory approach*, Speech to 14th European Conference of Postal and Telecommunications Administrations (CEPT), Strasbourg, France, 17 April.

Chase, A., 1990, Anthropology and impact assessment: development pressures and indigenous interests in Australia, *Environment Impact Assessment Review*, Vol. 10, 11-25.

Chell, E., 2007, Social enterprise and entrepreneurship, *International Small Business Journal*, Vol. 25, No. 1, 5-26.

Cherry, Nita, 2005, *A framework for constructing and defending a methodology*, Notes prepared for DBA Course Swinburne University Hawthorn, January.

Chesbrough, H., 2007, Business model innovation: it's not just about technology anymore, *Strategy & Leadership*, Vol. 35, 12-17.

Chesterman, J. and B. Galligan, 1997, *Citizens without Rights: Aborigines and Australian Citizenship*, Cambridge University Press, Melbourne.

Chetty, S. & C. Campbell-Hunt, 2003, Explosive International Growth and Problems of Success amongst Small to Medium-Sized Firms, *International Small Business Journal*, Vol. 21, No. 5, 5-27.

Chetty, S.K. & H.I.M. Wilson, 2003, Collaborating with competitors to acquire resources, *International Business Review*, Vol. 12, No. 1, 61-81.

Chew, A. and S. Greer, 1997, Contrasting world views on accounting: Accountability and Aboriginal culture, *Accounting, Auditing and Accountability Journal*, Vol.10, No, 3, 276-298.

Christensen, Clayton M. & Joseph I. Bower, 1996, Customer Power, Strategic Investment, and the Failure of Leading Firms, *Strategic Management Journal*, Vol. 17, Iss. 3, March, 197-218.

Christo, P., R. Fink, L. Kelleher and K. Moppert, 2004, *Australian Indigenous Entrepreneurship*, Masters Degree Paper, Swinburne University, unpublished.

Claudie, David, 2007, 'We're tired from talking': The native title process from the perspective of Kaanju People living on homelands, Wenlock and Pascoe Rivers, Cape York

Peninsula, in Smith, Benjamin R. and Frances Morphy (eds.), 2007, *The Social Effects of Native Title: Recognition, Translation, Coexistence*, Research Monograph No. 27, ANU E Press, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra.

Coffee, J., 1981, 'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry Into the Problem of Corporate Punishment, *Michigan Law Review,* Vol. 79, 386.

Coffey, A., B. Holbrook and P. Atkinson, 1996, Qualitative Data Analysis: Technologies and Representations, *Sociological Research Online*, Vol. 1, No. 1.

Coglianese, Cary, 2002, Bounded Evaluation: Cognition, Incoherence, and Regulatory Policy, *Stanford Law Review*, 54: 1217-38.

Cohen W. M. and S. Klepper,1996b), Firm Size and the Nature of Innovation Within Industries: The Case of Process and Product R&D, *Review of Economics and Statistics,* Vol. 78 (2), May.

Collings, Neva, 2006, Protecting Indigenous Cultural Identity in *Indigenous Law Bulletin*, Vol. 6, Iss. 20, June/July.

Collins, H., 1989, *Marxism and Law*, Oxford University Press.

Collis, Jill and Roger Hussey, 2009, Business Research: A Practical Guide for Undergraduate and Post Graduate Student, Palgrave Macmillan, London 2nd ed.

Commonwealth of Australia, 2011, National Partnership Agreement on Energy Efficiency Incorporating the National Strategy on Energy Efficiency Annual report to COAG 2010–11, viewed 16 September 2012, http://www.coag.gov.au/sites/default/files/npa_ee_annual_report_to_coag_2010-11.pdf

Commonwealth of Australia, 2009, Guide to Sources of Assistance and Funding for Prescribed Bodies Corporation, National Native *Title* Tribunal, July.

Commonwealth of Australia, 2009a, *Powering Ideas – An Innovation Agenda for the 21st Century,* viewed 16 September 2012, http://www.innovation.gov.au/Innovation/Policy/Documents/PoweringIdeas.pdf

Commonwealth of Australia, 2009b, *Equipment Energy Efficiency Program, Achievements* 2008/9, December.

Commonwealth of Australia, 2009c, *Indigenous Small Business Owners in Australia,* Australian Taxation Office, Canberra, November.

Commonwealth of Australia, 2004, *Australia Gazette,* Budj Bim National Heritage Landscape Victoria, Listing, Australia's National Heritage, 20 July, viewed 13 September 2012, http://www.environment.gov.au/heritage/publications/about/pubs/national-heritage-budj-bim.pdf

Commonwealth of Australia, 1998, *A Guide to Regulation,* Office of Regulation Review, 2nd ed.

Commonwealth of Australia, 1993, National Competition Policy**,** Report by the Independent Committee of Inquiry, Australian Government Publishing Service, Canberra.

Cooper, S., 2001, Interorganizational relationships and firm size in Tayeb, Monir H. and F.J Contractor (eds.), *International Business Partnership: Issues and Concerns,* Chapter 7, Palgrave, Hampshire, 153-176.

Cooperrider, David L., 2001, Positive Image, Positive Act: The Affirmative Basis of Organizing, from Cooperrider, David L., Peter F. Sorensen, Jr., Therese F. Yaeger and Diana Whitney, (eds.), *Appreciative Inquiry: An Emerging Direction for Organization Development,* 8, Stipes Publishing L.L.C., Champaign IL, viewed 2 January 2008, www.stipes.com/aichap2.htm

Corbett, Tony and Cairan O'Faircheallaigh, 2006, Unmasking Native Title: The National Native Title Tribunal's Application of the *NTA's* Arbitration Provisions, *University of Western Australia Law Review,* Vol. 33, No.1, 153-177.

Cornell, Stephen and Joseph Kalt, 2003, Sovereignty and Nation-Building: the Development Challenge in Indian Country Today, *Joint Occasional Papers on Native Affairs No 2003-03,*

The Harvard Project on American Indian Economic Development, viewed 12 September 2012, http://nni.arizona.edu/resources/inpp/2003_CORNELL.kalt_JOPNA_sovereignty.nation-building.pdf

Cornish, W. R. & G. Clark, 1989, *Law and Society in England 1750-1950*, Sweet & Maxwell.

Cotterrell, R., 1995, Law's Community: Legal Theory in *Sociological Perspective*, Clarendon Press.

Council of Australian Governments (COAG), 2007, Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies, October.

Coutts, P.J.F., R.K. Frank and P. Hughes, 1978, *Aboriginal Engineers of the Western District, Victoria* Records of the Victorian Archaeological Survey 7.

Cowlishaw, Gillian, 2003, Euphemism, banality, propaganda: anthropology, public debate and Indigenous communities, *Australian Aboriginal Studies*, no. 1, 2-18.

Couzen-Hoy, David, 1981, *The Critical Circle*, University of California Press.

Creswell, J.W., 2003, Research Design: Qualitative, Quantitative and Mixed Methods Approaches, Sage, Thousand Oaks, Cal.

Crew, Michael A. and Paul R. Kleindorfer, 2002, Regulatory Economics: Twenty Years of Progress?, *Journal of Regulatory Economics*, Vol. 21, No. 1, 5-22.

Crook, T. Russell, Christopher L. Shook, Timothy M. Madden and M. Lane Morris, 2010, A review of current construct measurement in entrepreneurship, *International Entrepreneurship and Management Journal*, December, Vol. 6, Iss. 4, Springer, 387-398.

Dasguta, P., 1988, *Making and Breaking Cooperative Relations*, Basil Blackwell, New York.

Davidsson, Per, 2005, Methodological Approaches to Entrepreneurship: Past Research and Suggestions for the Future, *Small Enterprise Research*, Vol. 13, No. 1, 1-21.

Davidsson, P. & Honig, B., 2003, The role of social and human capital among nascent entrepreneurs, *Journal of Business Venturing*, Vol. 18 No. 3, 301-331.

Davis, Leon, 2002, Social Responsibility and Banking – Responding to the New Realities, *Australian Business In Europe Conference, Paris, France*, 24 May.

Dawson, J., 1881, Australian Aborigines: the Language and Customs of Several Tribes of Aborigines in the Western District of Victoria, Australia Australian Institute of Aboriginal Studies (facsimile edition published 1981).

De Bono, Edward, 1996, in David Tanner, 1997, *Total Creativity in Business & Industry: Road Map to Building a More Innovative Organization*, Advanced Practical Thinking Training Inc, Des Moines, IA.

De Bono, Edward, 1992, Serious Creativity: Using the Power of Lateral Thinking to Create New Ideas, Harper Collins, London.

De Bono, Edward, 1990, *The Use of Lateral Thinking*, Penguin Books, Toronto.

De Bono, Edward, 1985, *Six Thinking Hats*, Little, Brown & Co, Boston.

De Bono, Edward, 1970, *Lateral Thinking Step by Step*, Harper & Row, New York.

De Bono, Edward, 1969, *Mechanism of Mind*, Advanced Practical Thinking Training Inc, Des Moines, IA, reprint 1992 Intl Center for Creative Thinking.

Debrulle, J., J Maes & J Sels, 2012, Smells Like Team Spirit: How Experiential and Motivational Team Composition Affects Start-Up Value Added, paper presented to 2012 *ACERE DIANA Conference*, Freemantle Western Australia, January-February.

Delgado, Richard, 1989, Storytelling for Oppositionists and Others: A Plea for Narrative, *Michigan Law Review*, Vol. 87, 2411.

Delmar, F. & S. Shane, 2004, Legitimatising first: organization activities and the survival of new ventures, *Journal of Business Venturing*, Vol. 19, 385-410.

DeMichiel, Y., 1983, The Subjected Body: An Analysis of the Occupational Health and Safety Apparatus in New South Wales, *Australian Journal of Law and Society*, Vol. 1, 5.

Department of Planning and Community Development (DPCD), 2012, *Victoria Planning Provisions*, viewed 10 September 2012, http://planningschemes.dpcd.vic.gov.au/vpps/

Derrida, [1967] 2011, *La Voix et le phénomène*, Presses Universitaires de France, Paris, trans. Evantson, Leonard Lawlor, *Voice and Phenomenon,* Northwestern University Press, Ill.

Derrida, [1967] 1978, *L'Ecriture et la différence,* Seuil, Paris,Trans. Alan Bass, *Writing and Difference*, The University of Chicago Press, Chicago.

Derrida, [1967] 1974, *De la grammatologie*, Minuit, Paris, trans. Spivak, Gayatri Chakravorty, *Of Grammatology,* The Johns Hopkins University Press, Baltimore, MD.

De Saussure, Ferdinand**,** [1916] 1983, Cours de linguistique générale PA. Bally, trans. Roy Harris, (eds.) Charles and Albert Sechehaye, *Course in General Linguistics,* Open Court, La Salle, Illinois.

Dey, I., 1998, The Foundations of Social Research: Meaning and Perspective in the Research Process, Allen & Unwin, St Leonards.

Diamond Jared, 1997, Guns Germs & Steel*: A short history of everybody for the last 13,000 years,* Vintage, London.

Diamond, J., 2005, *Collapse: how societies choose to fail or succeed,* The Penguin Group, New York.

Dicey, Albert Venn, 1959, *Introduction to the Study of the Law of the Constitution*, 10th ed. Macmillan, London (first published) 1885.

Dickson, D.J., 1968, Bureaucracy and Morality: an organisational perspective on a moral crusade, *Social Problems*, Vol. 16, 143.

DiMaggio, D.J. & W.W. Powell, 1983, The iron cage revisited: Institutional isomorphism and collective rationality in organizational fields, *American Sociological Review,* Vol. 48, No. 2, 147-160.

Dingle A. E., 1988, *Aboriginal Economy,* McPhee Gribble Publishers, Australia.

Djankov, Simeon, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, 2002, The Regulation of Entry, *Quarterly Journal of Economics*, 1-37.

Dodd(a), Reginald, 2012, *Affidavit*, lodged in support of Interlocutory Application, Federal Court of Australia, South Australian Registry dated 11 May 2012 in No. SAD 6025 of 1998, *Arabunna Peoples Native Title Claim and State of South Australia* and *Others*, sworn 12th May.

Dorfman, 1978, Agenda for Research on the Transition and Effects of Regulation, Report of Conference, Washington DC, June, 2.

Drucker, Peter, 1985, Innovation and Entrepreneurship: Practice and Principles, Harper & Row, New York.

Drucker, Peter, 1983, Schumpeter and Keynes, *Forbes*, May 23, 124.

Dworkin, Ronald, 1997, In Praise of Theory, *Arizona State Law Journal*, Vol. 29, 353.

Dworkin, Ronald, 1996, *Freedom's Law: The Moral Reading of the American Constitution*, Harvard University Press, Cambridge Ma.

Dworkin, Ronald, 1986, *Law's Empire*, Harvard University Press, Cambridge Ma.

Dworkin, R., 1978, Liberalism in S. Hampshire (ed.), *Public and Private Morality*, Cambridge University Press.

Eades, D., 1995, Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia, University of New South Wales Press.

Eades, D., 1992, *Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients*, A Handbook for Legal Practitioners, Queensland Law Society, Brisbane.

Easterbrook, F., 1989, The Inevitability of Law and Economics, *Legal Education Review*, Vol. 1, 3.

Easterby-Smith, Mark, R. Thorpe and P. Jackson, 2008, *Management Research: Theory and Research*, Sage, London.

Eckhardt, Jonathan T. and Scott Shane, 2003, Opportunities and Entrepreneurship, *Journal of Management*, Vol. 29, No. 3, 333-349.

Edney, Richard, 2006, The Importance of Indigenous Stories: The Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody, *Indigenous Law Bulletin*, 6.

Edwards, W.H., 1992, Patterns of Aboriginal Residence in the North-west of South Australia, *Journal of the Anthropological Society of South Australia*, Vol. 30, Nos. 1 & 2, December.

Eggers, William D. and John O'Leary, 1995, Revolution at the roots: Making our government smaller, better, and closer to home, Free Press, New York.

Eisenhardt, K.M., 1989, Building Theories from Case Study Research, *Academy of Management Review*, Vol. 14, No. 4, 532-550.

Eisenhauer, J.G., 1995, The entrepreneurial decision: Economic theory and empirical evidence,
Entrepreneurship Theory and Practice, Summer, 67-79.

Ellerman, David , 2010, Pragmatism versus Economics Ideology in the Post-Socialist Transition: China versus Russia, *realworld economics review*, Iss. 52, 10 March, 2-27.

Ertel, Danny, Jeff Weiss and Laura J. Visioni, 2001, *Managing Alliance Relationships: Ten Key Corporate Capabilities*, Vantage Partners, Boston.

Euripides, *Medea*, Perseus, http://www.perseus.tufts.edu

Eyzaguirre, P., 2001, Global recognition of Indigenous knowledge: is this the latest phase of globalisation? *Indigenous Knowledge and Development Monitor*, Vol. 9, No. 2, 1-2, viewed 14 June 2010 http://www.iss.nl/ikdm/IKDM/IKDM/9-2/column.html

Farber, D. and P. Frickey, 1991, *Law and Public Choice: A Critical Introduction*, University of Chicago Press.

Farber, Daniel A. & Suzanna Sherry, 1996, Legal Storytelling and Constitutional Law: The Medium and the Message, in Peter Brooks & Paul Gewirtz, *Law's Stories: Narrative and Rhetoric in the Law*, Yale University Press, New Haven and London, 37.

Farnsworth, Clyde H., 1997, Burnum Burnum, 61, Fighter for Australia's Aborigines, *New York Times*, August 20, viewed 12 September 2012,

http://www.nytimes.com/1997/08/20/world/burnum-burnum-61-fighter-for-australia-s-aborigines.html

Fay, Brian, Contemporary Philosophy of Social Science, Wiley-Blackwell, Oxford.

Feaver, Donald and Nicola Durrant, 2008, A Regulatory Analysis of International Climate Change Regulation, *Law & Policy*, Vol. 30, No. 4, October, 394.

Feldman, M. and D. Audretsch, 1999, Innovation in cities: science-based diversity, specialisation and localised competition, *European Economic Review,* Vol. 43, 409-429.

Fischer, E., A. Reuber, M. Hababou, W. Johnson and S. Lee, 1997, The role of socially constructed temporal perspectives in the emergence of rapid growth firms, *Entrepreneurship: Theory & Practice,* Vol. 22, 13-30.

Fish, Stanley, 1995, Professional Correctness: Literary Studies and Political Change, Oxford University Press.

Fish, Stanley, 1982, Interpretation and the Pluralist Vision, *Texas Law Review*, Vol. 60, 495.

Fisse, B. and J. Braithwaite, 1993, *Corporations, Crime and Accountability,* Cambridge University Press.

Florin, J.M., 1997, Organising for Efficiency and Innovation in Beamish, Paul W. and J. Peter Killing (eds.), *Cooperative Strategies – North American Perspectives*, The New Lexington Press, New York.

Foley, Dennis Lance, 2010, 'Murray River country: An ecological dialogue with traditional owners', *Anthropological Forum*, Vol. 20,178-180.

Foley, Dennis, 2007, What has native title done to the urban Koori in New South Wales who is also a traditional custodian?, in Smith, Benjamin R. and Frances Morphy (eds.), *The Social Effects of Native Title: Recognition, Translation, Coexistence*, Research Monograph No. 27, ANU E Press, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra.

Foley, Dennis, 2006, Indigenous Australian entrepreneurs: Not all community organisations, not all in the outback, *Centre for Australian Economic Policy Research, Discussion Paper 279 / 2006*, ISSN 1036 1774, ISBN 0 7315 5654 2.

Foley, Dennis, 2005/2006, Indigenous Standpoint Theory, *The International Journal of the Humanities*, Vol. 3, Number 8. 27-30 citing Foley, D., 2005, *Understanding Indigenous Entrepreneurship*, Unpublished Thesis, School of Management, The University of Queensland.

Foley D, 2002, A Case Study Analysis of Indigenous Australian Entrepreneurs Exploring the Retention of Indigenous Values, The University of Tasmania, Hobart, Australia.

Foley D, 2000, *Successful Indigenous Australian Entrepreneurs: A Case Study Analysis*, Aboriginal & Torres Strait Islander Studies Unit Research Report Series, Volume 4, University of Queensland, Brisbane, Australia.

Foley, D & B. Hunter, 2008, *Developing Indigenous enterprises: the road to economic independence*, Submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry, Canberra

Foley, Gary, 2007, The Australian Labor Party and the *Native Title Act* in Aileen Moreton-Robinson (ed.), *Sovereign Subjects Indigenous Sovereignty Matters*, Allen & Unwin, Crows Nest NSW, 118-139.

Foley, Gary, 1999, Reconciliation: Fact or Fiction? *The Koori History Website*, viewed 12 September 2012, http://www.kooriweb.org/foley/essays/essay_6.html.

Foroohar, Rana, 2012, The Case for Banking Regulation, *Time*, Time Inc. New York NY, US, Vol. 179, No. 22, June 4, 14.

Foucault, M., [1979] 2000, For an Ethic of Discomfort in Faubion, J. (ed.) trans. Hurley, Robert & ors., *Power The Essential Works of Michel Foucault 1954-1984*, Vol. 3, New Press, New York.

Foucault, M., 1982, The subject and power, in Dreyfus, H. and P Rabinow (eds.) *Michel Foucault: Beyond Structuralism and Hermeneutics*, University of Chicago Press, Chicago, IL., 208-226.

France, Anatole, 1894, *Le Lys Rouge, The Red Lily*, Chapter 7, viewed 11 November 2011, http://www.scribd.com/mobile/documents/48196059/download?commit=Download+Now&secret_password=

Freire, P., 1970, *Pedagogy of the Oppressed*, trans. Ramos, M.B., The Seabury Press, New York, NY.

French, Justice Robert, 2008, Plus Ca Change, Plus C'est La Meme Chose? – The 2007 Amendments to the Native Title Act, *Land, Rights, Laws: Issues of Native Title*, Native Title Research Unit, Vol. 3, Issue Paper No. 12, February.

Frug, G., 1989, A Critical Theory of Law, *Legal Education Review*, Vol. 1, 43.

Fry, C., 2012, Native Title: Pathways to Economic Development—Indigenous Business Australia's role in building wealth with native title organisations, *Echos of Mabo: Honour and Determination, National Native Title Conference*, Townsville, June 5.

Fukuyama, Francis, 1995, *Trust: The Social Virtues and the Creation of Prosperity*, Free Press Paperback, New York, NY.

Fuller, T, L. Warren and P. Argyle, 2008, Sustaining entrepreneurial business: a complexity perspective on processes that produce emergent practice, *International Entrepreneurship and Management Journal*, Vol. 4, 1-17.

Gadamer, Hans-George, 1975, Hermeneutics and Social Science, *Philosophy Social Criticism/Cultural Hermeneutics* Vol. 2, 307-316.

Gallhofer, S., & Chew, A., 2000, Introduction: Accounting and indigenous people, *Accounting, Auditing and Accountability Journal*, Vol. 13 No. 3, 256–267.

Galliher, J.F. & A. Walker, 1978, The Politics of Systematic Research Error: the Case of the Federal Bureau of Narcotics as a Moral Entrepreneur, *Crime and Social Justice*, 29.

Gambetta, Diego, 1988, Can We Trust Trust? in Gambetta, Deigo (ed.), *Trust Making and Breaking Cooperative Relations*, Basil Blackwell.

Gans, Joshua S., David H. Hsu and Scott Stern, When does start-up innovation spur the gale of creative destruction?, *RAND Journal of Economics,* The RAND Corporation, Vol. 33, No. 4, Winter 571-586.

Gartner, W., 2001, Is there an elephant in entrepreneurship? Blind assumptions in theory development, *Entrepreneurship Theory and Practice,* Vol. 25, No. 4, 27-39.

Geisler, C.C., 1993, Rethinking SIA: why ex ante research isn't enough, *Society and Natural Resources,* 6, 372-338.

Gernet, Katharina, 2005, The Effects of Free Market Economy on Reindeer Herding in the Bystrinskyi National District, Central Kamchatka, *Journal of Small Business and Entrepreneurship,* Vol. 18, No. 2, Spring, 201-206.

Gewirtz, Paul, 1996, Narrative and Rhetoric in the Law, in Peter Brooks & Paul Gewirtz, *Law's Stories: Narrative and Rhetoric in the Law*, Yale University Press, New Haven and London, 2.

Ghoshal, S. and Moran, P., 1996, Bad for Practice: A Critique of the Transaction Cost Theory, *Academy of Management Review*, Vol. 21 No.1, 13-47.

Gillies, Peter, 2004, *Business Law,* 12th ed., The Federation Press, Leichardt, NSW.

Ginsburg, T., 2002, Ways of Criticising Public Choice: The Uses of Empiricism and Theory in Legal Scholarship, *University of Illinois Law Review*, 1139.

Glaser, B.G., 1978, Theoretical Sensitivity: advances in the methodology of grounded theory, Sociology Press, Mill Valley, CA.

Glaser, B.G. & A.L. Strauss, 1967, *The Discovery of Grounded Theory: Strategies for Qualitative Research,* Aldine Transaction, Rutgers, Piscataway, NJ.

Glaskin, Kate, 2007, Claim, culture and effect: property relations and the native title process, in Smith, Benjamin R. and Frances Morphy (eds.), 2007, *The Social Effects of Native Title: Recognition, Translation, Coexistence,* Research Monograph No. 27, ANU E Press, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra.

Glassman, Edward, 1991, Creativity Handbook: Shift Paradigms and Harvest Creative Thinking at Work, The LCS Press, Chapel Hill, NC.

Goldwasser, V., 1999, The Enforcement Dilemma in Australian Securities Regulation, *Australian Business Law Review,* Vol. 27, 482

Goot, Murray and Tim Rowse (eds.), 1994, *Make A Better Offer: The Politics of Mabo* Pluto, Leichhardt, NSW.

Gordon, R., 1993, *Collaborative Linkages, Transnational Networks and New Structures of Innovation in Silicon Valley's High Technology Industry*, Report No. 1 to Datar, Paris, Silicon Valley Research Group, University of California, Santa Cruz, January.

Gordon, Alta, undated, *Notes on a Visit to Marree, Social Science Research Council of Australia - Aboriginal Project*, referred to in Rowley, C.D., 1970, footnote 2, 79, *The Remote Aborigines,* Social Science Research Council of Australia, Penguin Books, Ringwood, Victoria.

Government of Victoria, 2011, *Victorian Guide to Regulation*, Department of Treasury and Finance, State of Victoria, Melbourne, Edition, 2.1, August

Gray, P. R. A., 2000, Do the Walls Have Ears? Indigenous Title and Courts in Australia, *Australian Indigenous Law Reporter*, viewed 22 January 2008, http://www.austlii.edu.au/au/journals/AILR/2000/1.html.

Grabosky, P. & J. Braithwaite, 1986, Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies, Oxford University Press.

Greer G, 2003, *Whitefella Jump Up: The Shortest Way to Nationhood*, Quarterly Essay, Iss. 11 Black Inc, Melbourne, Australia.

Grieves V, 2004, *Aboriginal Philosophy,* University of Newcastle, viewed 30 June 2009, <http://www.newcastle.edu.au/group/amrhd/awaba/culture/wisdom.html>

Griffiths, J. 1979, Is Law Important, *New York University Press,* Vol. 53, 339.

Grosz, E., 1994, *Volatile Bodies: Towards a Corporeal Feminism,* Bloomington: Indiana University Press.

Grondin, Jean, 1994, *Introduction to Philosophical Hermeneutics*, Yale University Press.

GS1 Australia, 2012, *Strategic Alliance Partners*, viewed 12 September 2012, http://www.gs1au.org/membership/our_partners/strategic_partners.asp

Guastello, S., 1995, Chaos, Catastrophe, and Human Affairs: Applications of Nonlinear Dynamics to Work, Organizations, and Social Evolution, Erlbaum, Mahway, NH.

Guba, E. G., 1978, Toward a methodology of *naturalistic* inquiry in *educational evaluation*, School of Education, Center for the Study of Evaluation, University of California, Los Angeles.

Guba, E.G. and Y.S. Lincoln, 1994, Competing Paradigms in Qualitative Research in Denzin, N.K. and Y.S. Lincoln (eds.) *Handbook of Qualitative Research*, Sage, California, 105-117.

Gulati, Ranjay, 1995, Does Familiarity Breed Trust? The Implications of Repeated Ties for Contractual Choice In Alliances, *Academy of Management Journal*, Vol. 38, No. 1, 85-112.

Gummerson, E., 2000, *Qualitative Methods in Management Research,* Sage Publications, Newbury Park.

Gunningham, N., 1987, Negotiated Non-Compliance: A Case Study of Regulatory Failure, *Law and Policy*, Vol. 9, 69.

Gunningham, N., R.A. Kagan and D. Thornton, 2002, *Social Licence and Environmental Protection: Why Businesses go Beyond Compliance*, London School of Economics Centre for Analysis of Risk and Regulation, Discussion Paper 8, October.

Gusfield, J., 1963, *Symbolic Crusade,* University of Illinois Press.

Habermas, Jürgen, [1981] 1984, Theorie des kommunikativen Handelns, Vol. 1: *Handlungsrationalität und gesellschaftliche Rationalisierung.* Vol. 2: *Zur Kritik der funktionalistischen Vernunft,* Suhrkamp, Frankfurt am Main; trans. McCarthy, T., *The Theory of Communicative Action.* Vol. I: *Reason and the Rationalization of Society*, Beacon Boston.

Haggis, J., 2004. Beyond race and whiteness? Reflections on the new abolitionists and an Australian critical whiteness studies, *Borderlands E-Journal*, Vol. 3, No. 2, viewed 14 September 2012, http://www.borderlands.net.au/vol3no2_2004/haggis_beyond.htm

Hammersley, M., 1990, Reading Ethnographic Research: A Critical Guide, Longman London.

Hamilton, Clive, 2006, What's Left? The Death of Social Democracy, *Quarterly Essay*, vol. 21.

Haraway, D., 1990, A Manifesto for Cyborgs in L. Nicholson, *Feminism/Postmodernism*, New York, Routledge.

Haraway, Donna, 1988, Situated Knowledge: The Science Question and the privilege of partial perspective in *Feminism*, Vol. 14 No. 3, 575-599.

Hay, Douglas, 1975, Property, Authority and the Criminal Law, in Hay, Douglas, Peter Linebaugh, John G. Rule, E. P. Thompson and Cal Winslow**,** *Albion's Fatal Tree*, Allen Lane, London, 17-63.

Hayek, F., 1960, *The Constitution of Liberty*, Chicago University Press.

Hayek, Friedrich, [1954], 1964, *Studies in Philosophy, Politics and Economics*, University of Chicago Press, Chicago, 339-341.

Hayek, Friedrich, 1948, *Individualism and Economic Order*, The University of Chicago Press.

Hazen, M. A., 2006, Silences, perinatal loss, and polyphony A post-modern perspective, *Journal of Organizational Change* Management, Vol. 19, No. 2, 237-249.

Hedges, A., 1985, Group Interviewing in Walker, R. (ed.), *Applied Qualitative Research*, Gower, Aldershot.

Heidegger, Martin, 1971, The Origin of the Work of Art, *Poetry, Language, Thought*, Harper Collins, NY, Trans Albert Hofstadter,

Heidegger, Martin, [1927] 1962, Sein und Zeit, Max Niemeyer Verlag, Tuebingen, trans. Macquarrie, John and Edward Robinson, Being and Time, SCM Press, London.

Henry, Ken, 2007, Creating the Right Incentives for Indigenous Development, address by Secretary to the Treasury to the Cape York Institute Conference, *Strong Foundations – Rebuilding Social Norms in Indigenous Communities*, Cairns, 26 June.

Hercus, Luise and Peter Sutton, 1986. *This Is What Happened: Historical narratives by Aborigines*, Australian Institute of Aboriginal Studies, Canberra.

HREOC (Human Rights and Equal Opportunity Commission), 1997, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Commonwealth of Australia.

Herman, Judith, 1997, Trauma and Recovery: The Aftermath of Violence – from Domestic Abuse to Political Terror, Basic Books, New York.

Herrmann, Ned, 1997, Foreword in David Tanner, *Total Creativity in Business & Industry: Road Map to Building a More Innovative Organization*, Advanced Practical Thinking Training Inc, Des Moines, IA.

Heywood, C. & R. Kenley, 2008, The sustainable competitive advantage model for corporate real estate, *Journal of Corporate Real Estate*, Vol. 10 No. 2, 85-109, viewed 9 September 2012, http://www.finance.gov.au/obpr/about/

Hidayat, Tony, 2012, Managing Reputational Risk in Islamic Banking, *Business Islamica*, June 15th, viewed 16 September 2012, http://businessislamica.com/2012/06/15/managing-reputational-risk-in-islamic-banking/

Hill, Melvyn A., 1979, The Fictions of Mankind and the Stories of Men in *Hannah Arendt: The Recovery of the Public World, 275.*

Hinchman Sandra K. and Lewis P. Hinchman, 1994, *Hannah Arendt: Critical Essays*.

Hindle, K., 2010, How community context affects entrepreneurial process: A diagnostic framework, *Entrepreneurship and regional development*, Vol. 22, No. 7 – 8, 599-647.

Hindle K & Lansdowne M, 2005, Brave Spirits on New Paths: Toward a Globally Relevant Paradigm of Indigenous Entrepreneurship Research, *Journal of Small Business and Entrepreneurship*, Vol. 18, No. 2, Spring, 131-142.

Hine, Damian and David Carson, 2007, *Innovative Methodologies in Enterprise Research*, Edward Elgar Publishing.

Hirschman, A. O., 1970, *Exit Voice and Loyalty: Responses to Decline in Firms, Organizations, and States* (Economie humaine ed.), Harvard University Press, Cambridge MA.

Hoang, H. & B. Antoncic, 2003, Network-based research in entrepreneurship: A critical review, *Journal of Business Venturing,* Vol. 18, No. 2, 165-187.

Hofer, C.W, and W.D., Bygrave, 1992, Researching Entrepreneurship, *Entrepreneurship: Theory & Practice*, Vol. 16, No. 3, 91-100.

Hoehmann, Hans-Hermann and Friederike Welter (eds.), 2002, Entrepreneurial Strategies and Trust: Structure and Evolution of Entrepreneurial Behavioural Patterns in East and West European Environments – Concepts and Considerations, *Forschungsstelle Osteuropa Bremen Arbeitspapiere und Materialien,* No. 37, Universitaet Bremen, June.

Holland, J., 1998, *Emergence: From Chaos to Order,* Perseus Books, Cambridge, MA.

Hopkins, A., 1989, Crime Without Punishment: The Appin Mine Disasters in P. Grabosky and A. Sutton (eds.), *Stains on a White Collar: Fourteen Studies in Corporate Crime or Corporate Harm,* Federation Press, 160.

Hopwood, A.G., 2009, The economic crisis and accounting: Implications for the research community, *Accounting, Organizations and Society,* Vol. 34, No. 6 -7, 797-802.

Howitt, R., 2001, Rethinking Resource Management: Justice, Sustainability and Indigenous Peoples, Routledge, London.

Huang, Yanzhong and Dali , L., Yang, 1996, The Political Dynamics of Regulatory Change: Speculation and Regulation in the Real Estate Sector, *Journal of Contemporary China,* Vol. 5, Iss 2, July.

Huggins, J., 2009, The Theory, the Practice and the Frustration, *Women Writing: Views & Prospects 1975-1995*, National Library of Australia On Line, an interview from Maddison, Sarah, 2009, *Black Politics: Inside the Complexity of Aboriginal Political Culture,* Allen & Unwin Australia, viewed 9 September 2012, http://www.nla.gov.au/events/huggins.html

Humphrey, Albert, 2005, SWOT Analysis for Management Consulting, *SRI Alumni Newsletter,* SRI International, viewed 12 September 2012, http://alumni.sri.com/newsletters/Dec-05.pdf.

Hunt, A., 1985, The Ideology of Law: Advances and Problems in Recent Applications of the Concept of ideology to the Analysis of Law, *Law and Society Review,* Vol. 19, 11.

Hunt, L., 1999, Cross cultural issues: implications for procedural fairness, *Australian Institute of Administrative Law Forum,* No 20, 13.

Huntington, S. 1952. The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest, *Yale Law Journal,* Vol. 614, 467-509.

Hussey, J. and R. Hussey, 1997, Business Research: A practical guide for undergraduate and postgraduate students, Basingstoke, Macmillan

Hutter, B., 2001, Regulation and Risk: Occupational Health and Safety on the Railways, Oxford University Press.

Hutter, B., 1997, Compliance: Regulation and the Environment, Clarendon Press.

Hyde, A., 1983, The Concept of Legitimation in the Sociology of Law, Wisconsin Law Review, 379.

IBM, 2006, *Expanding the Innovation Horizon Global CEO Study 2006*, New York, viewed 1 September 2009, http://www-935.ibm.com/services/uk/bcs/html/t_ceo.html. Executive Summary, viewed 16 September 2012, http://www-07.ibm.com/sg/pdf/global_ceo_study.pdf

ICA, 2011, Independent Contractors Australia News, 19 November.

ILC, 2012, viewed 12 September 2012, www.ilc.gov.au

Industry Commission 1997, *Regulation and Its Review 1995-1996*, Office of Regulation Review, Canberra.

Jaulin, R., 1979, Le Mythe technologique, *Revue de l'entreprise,* Vol. 26: Special Ethnotechnology Issue, March.

Jarvelin, Kalervo and T.D. Wilson, 2003, On conceptual models for information seeking and retrieval research, *IR information research*, Vol. 9, No. 1, October,

Jaworski, B.J. & A. K. Kohli, 1993, Market orientation: antecedents and consequences, *Journal of Marketing*, Vol. 57, July, 53-70.

Jennings, D.F., 1994, *Multiple Perspectives of Entrepreneurship*, South Western Publishing, Ohio.

Jiobu, R.M., 1988, Ethnic Hegemony and the Japanese of California, *American Sociological Review*, Vol. 53, 353-367.

Johnson, Vivien, 2010, *Once Upon a Time in Papunya*, University of New South Wales Press Ltd, Sydney.

Jones, Philip, 1990, Unaipon, David (1872 - 1967), *Australian Dictionary of Biography*. Australian National University, Canberra, viewed 12 September 2012, http://adb.anu.edu.au/biography/unaipon-david-8898

Kallberg, J.G. C.H. Liu and D.W.Greig, 1996, The role of real estate in the portfolio allocation process, *Real Estate Economics*, Vol. 24 No. 3, 359-377.

Katz, J. & W. Gartner, 1988, Properties of emerging organizations, *Academy of Management Review*, Vol. 13, 429-441.

Kalu, K., 2003, Entrepreneurs of Conservators? Contractarian Principles of Bureaucratic Performance, *Administration & Society*, Vol. 35, November.

Kaufmann, Stuart A., 1993, The Origins of Order: self-organisation and selection in evolution, Oxford University Press, New York.

Kearins, J., 1991, Factors Affecting Aboriginal Testimony, *Legal Services Bulletin*, Vol. 16, No. 1, Feb., 3.

Keeble, D. and F. Wilkinson (eds.), 2000, *High-Technology Clusters, Networking and Collective Learning in Europe*, Ashgate Publisher, Avebury.

Kelleher, Leonie M., 2012, Native Title Act and Entrepreneurial Opportunity – A Case Study, *Echos of Mabo: Honour and Determination*, National Native Title Conference 2012, Townsville."

Kelleher, Leonie M., 2010, Entrepreneurship and Regulatory Change, paper delivered to *7th AGSE International Entrepreneurship Research Exchange*, Queensland, Australia, 2-5 February.

Kelleher, Leonie M., 2009a, Entrepreneurial Research-Lessons Learned from Scott Shane's Intensive PhD Seminar in Entrepreneurship, paper delivered to *6th Australian Graduate School of Entrepreneurship Annual Conference*, Adelaide, February.

Kelleher, Leonie, M., 2009b, Schumpeter, Legal Bahnbrechen, Entrepreneurship, Silence and Story Australian Native Title, paper delivered to *6th International Critical Management Conference,* Warwick UK, May.

Kelleher, Leonie, M., 2008, Storytelling, Silence and Voice**,** paper delivered *The Annual Conference of the Australian Sociology Association International Conference,* University of Melbourne, December.

Kelman, M., 1984, On Democracy Bashing, *Virginia Law Review,* Vol. 74, 199.

Kelsen, Hans, 1967, *Pure Theory of Law,* 2nd ed. California University Press, trans. M Knight.

Kelsen, Hans, 1961, *General Theory of Law & State,* Russell & Russell, trans. A. Wedberg.

Kelton, M.H. Jnr and M.S. Givel, 2008, Public Policy Implications of Tobacco Industry *Smuggling* through Native American Reservations into Canada, *International Journal of Health Services,* Vol. 38, No.3, 471-487.

Kennedy, Sen. Robert, F., 1968, *Remarks on the death of the Reverend Martin Luther King at a rally*, Indianapolis, Indiana, April 4 in Schlesinger, Jr., Arthur M., 1978, *Robert Kennedy and His Times*, Houghton Mifflin Company, Boston, 875, 1010 n. 84, from Aeschylus, 458BC, *Agamemnon,* paras 179-183, trans. Hamilton, Edith, 1930, *The Greek Way*, W.W. Norton & Company Inc., New York.

Kerfoot, K. and Knights, 1996, The Best is Yet to Come?: The Quest for Embodiment in Managerial Work, in D. Collinsons and J. Hearn, *Men as Managers, Managers as Men*, Sage, London.

Kets de Vries, Manfred.F.R., 1977, The entrepreneurial personality: A person at the crossroads, *Journal of Management Studies*, February, 34-57.

Keuschnigg, C. & S. B. Nielson, 2001, Public policy for venture capital, *International Tax and Public Finance*, Vol. 8, No. 4, 557-572.

Kidd, R., 1997, *The Way We Civilise: Aboriginal Affairs – the Untold Story*, University of Queensland Press, St Lucia.

Kidder, R. L., 1983, Connecting Law and Society: An Introduction to Research and Theory, Prentice-Hall.

Kimberley Land Council, 2006, *Koolan Island mining agreement delivers for Dambima-Ngardi people*, 26 April, viewed 1 June 2009, http://www.abc.net.au/message/news/stories/s1624169

King George III, 1787, *Governor Phillip's Instructions* (draft), 25 April, Public Record Office London (CO 201/1 ff 29–45v), *Historical Records of New South Wales*, Vol. 2, Part 2, viewed 11 September 2012, http://foundingdocs.gov.au/resources/transcripts/nsw2_doc_1787.pdf

Kirca, A.H., S Jayachandran & W.O. Bearden, 2005, Market orientation: A meta-analytic review and assessment of its antecedents and impact on performance, *Journal of Marketing*, Vol. 69, 24-41.

Kirzner, I., 1997, Entrepreneurial discovery and the competitive market process: An Austrian approach, *Journal of Economic Literature*, Vol. 35, 60-85.

Kirzner, Israel, M., 1973, *Competition and Entrepreneurship*, The University of Chicago Press, Chicago.

Klevorick, A., 1975, Law and Economic Theory, *American Economic Review*, Vol. 65, 237.

Kloosterman, R. & J. Rath, 2001, Immigrant entrepreneurs in advanced economies: mixed embeddedness further explored, *Journal of ethics and migration studies*, Vol. 27, No. 2, April, 189-202.

Knack, S. and P. Keefer, 1997, Does Social Capital Have an Economic Payoff? A Cross-Country Investigation, *Quarterly Journal of Economics*, Vol. 112 No, 4, 1251-1288.

Knight, Frank H., 1921, *Risk, Uncertainty, and Profit*, Hart, Schaffner & Marx, Boston, MA, Houghton Mifflin Co.

Knight, R.M., 1985, *Corporate Innovation and Entrepreneurship – A Canadian Study*, Working Paper Series NC 85-09, School of Business Administration, University of Western Ontario, Canada.

Kreide, Regina, 2003, Self-employment of Women and Welfare-state Policies in Apitzsch, Ursula and Maria Kontos (eds.), Self-employment, Gender and Migration in *International Review of Sociology* Vol. 13, No.1, Monographic Part, Taylor & Francis, London, 205-219.

Kripke, Saul A., 1982, *Wittgenstein on Rules and Private Language*, Harvard University Press.

Kumar, S. and D. Liu, 2005, Impact of globalization on entrepreneurial enterprises in the world markets, *International Journal of Management and Enterprise Development*, Vol. 2 No. 1, 46-64.

Kurzban , Robert, John Tooby and Leda Cosmides, 2001, Can race be erased? Coalitional computation and social categorization, *Proceedings of the National Academy of Sciences*, Vol. 98, No. 26, 15387–15392.

Kuznets, Simon, 1940, Schumpeter's *Business Cycles*, *American Economic Review*, Vol. 30, 257–271.

Laffont J. J. and J. Tirole, 1991, The politics of government decision making. A theory of regulatory capture, *Quarterly Journal of Economics* Vol. 106 No. 4, 1089-1127.

Lahn, Julie, 2007, Native Title and the Torres Strait: Encompassment and Recognition in the Central Islands in Smith, Benjamin R. and Frances Morphy (eds.), 2007, *The Social Effects of Native Title: Recognition, Translation, Coexistence*, Research Monograph No. 27, ANU E

Press, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra.

Lane, M.B., 1997, Aboriginal participation in environmental planning, *Australia Geographical Studies*, 35, 308-323.

Lane, M.B. and S. Cowell, 2001, Land and resource planning and indigenous interests, in O. Yiftachel, J. Little, D. Hedgcock & I. Alexander (eds.), *The Power of Planning: Spaces of Control and Transformation*, Kluwer, Dordrecht, Netherlands, 155-169.

Lane, M.B. and D. Yarrow, 1998, Development on native title land – integrating the right to negotiate with the impact assessment process, *Environmental and Planning Law Journal*, Vol. 15, 147-155.

Langbein, J.H., 1983, Albion's Fatal Flaws, *Past and Present*, Vol. 98, 96-12-.

Langton, M and L. Palmer, 2003, Modern Agreement Making and Indigenous People in Australia: Issues and Trends, *Australia Indigenous Law Reporter*, Vol. 8, No. 1.

Langton, M. & Z. Ma Rhea, 2005, Traditional Indigenous biodiversity-related knowledge, in M. Nakata and M. Langton (eds.) *Australian Indigenous Knowledge and Libraries*, Australian Library and Information Association, Kingston ACT.

Larson, Andrea, 1992, Network Dyads in Entrepreneurial Settings: A Study of the Governance of Exchange Relationships, *Administrative Science Quarterly*, Vol. 37, 76-104.

Laster, Kathy, 2001, *Law as Culture*, The Federation Press, Leichardt, NSW.

Laster, Kathy and Veronica Taylor, 1994, The Legal Interpreter as Conduit? *Interpreters and the Legal System*, Federation Press.

Lawrence, Charles B. III, 1987, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, *Stanford Law Review*, Vol. 39, 317, 343.

Leedy, P. D.,1997, *Practical research: planning and design*, 6th ed., Prentice-Hall, Inc., Upper Saddle River, NJ.

Legge, John M. & Kevin G. Hindle, 2004, *Entrepreneurship – Context, Vision and Planning*, Palgrave Macmillan, Houndmills, Basingstoke, Hampshire, 2nd Ed.

Leonidou, L, 2004, An analysis of the barriers hindering small business export, *Journal of Small Business Management,* Vol. 42, No. 3, 279-302.

Levine, Michael E., 1975-6, Financial Implications of Regulatory Change in the Airline Industry, *Southern California Law Review,* Vol. 49, 645.

Levine, M. E. and J.L. Forrence, 1990, Regulatory capture, public interest, and the public agenda. Toward a synthesis, *Journal of Law Economics & Organization* Vol. 6, 167-198.

Lin, Nan, 2001, *Social Capital,* Cambridge University Press.

Lord High Admiral of Great Britain, 1768, *Additional Instructions for Lt James Cook Appointed to Command His Majesty's Bark The Endeavour,* Letterbook, http://foundingdocs.gov.au/item-sdid-67.html

Luhmann, Niklas, 1969, *Legitimation durch Verfahren,* Luchterhand, Neuweid.

Luhmann, Niklas, [1993] 2003, *Das Recht der Gesellschaft,* Suhrkamp, Frankfurt. trans. Ziegert, Klaus A, 2004, *Law as a Social System*, Oxford University Press, Oxford.

Lukes, S., 1978, Power and Authority in Bottomore, Tome and R. Nisbet (eds.), *A History of Sociological Analysis,* Heinemann, Ch. 16.

Lyotard, Jean-Francois, [1979], 1984, *The Postmodern Condition: A Report on Knowledge*, trans. G. Bennington and B Massumi, Theory and History of Literature, Vol. 10., University of Minnesota Press, Minneapolis.

Macaulay, S., 1979, Lawyers and Consumer Protection Laws, *Law and Society Review*, Vol. 14, 115.

Macaulay, Stewart, 1963, Non-Contractual Relations and Business: A Preliminary Study, *American Sociological* Review, Vol. 28, 55-69.

McAuslan, P., 1989, Public Law and Public Choice in *Modern Law Review,* Vol. 51, 682.

McCormick, R.E. and R. Tollison, 1981, *Politicians, Legislation and the Economy*, Martinus Nijhof.

McCraw, Thomas, K., 2007, *Prophet of Innovation: Joseph Schumpeter and Creative Destruction*, The Belknap Press of Harvard University Press, Cambridge Massachusetts & London, England.

McCraw, Thomas, 1984, *Prophets of Regulation*, The Belknap Press.

McDonald, L., 2004, The Rule of Law in The 'New Regulatory State' *Common Law World Review*, Vol. 33, 197.

MacDonald, Roderick Alexander and Thomas McMorrow, 2007, Wedding a Critical Legal Pluralism to the Laws of Close Personal Adult Relationships, *European Journal of Legal Studies*, Vol. 1.

McDougall & Vines, 2009, *Finniss Springs Pastoral Station and Mission: Conservation Management Plan*, McDougall & Vines, Conservation & Heritage Consultants, Norwood, SA.

McFarlane, Ian, 1999, Encyclopedia entry for 'Yothu Yindi', *Encyclopedia of Australian Rock and Pop*, Allen & Unwin.

McGrath, R.G. and Ian C. MacMillan, 2000, The Entrepreneurial Mindset: Strategies for Continuously Creating Opportunities in an Age of Uncertainty, Harvard Business School Press.

McGrath, R. G. and A. Nerkar, A., 2004, Real Options Reasoning and a new look at the R&D Investment Strategies of Pharmaceutical Firms, *Strategic Management Journal*, Vol. 29, 1-21.

McKelvey, B., 2004, Toward a complexity science of entrepreneurship, *Journal of Business Venturing*, Vol. 19, 313-344.

MacKenzie, Robert and Lucio M. Martinez, 2005, The Realities of Regulatory Change Beyond the Fetish of Deregulation, *Sociology*, Vol. 39, No. 3, 499-517.

McKeown, T. and P. Leighton, 2012, The Skilled and Professional Self Employed: Challenges for Regulation?, *ACERE DIANA Conference*, Freemantle Western Australia, January-February.

MacKinnon, Catharine A., 1996, Law's Stories as Reality and Politics in Brooks, Peter and Paul Gewirtz, *Law's Stories: Narrative and Rhetoric in the Law*, Yale University Press, New Haven and London, 232.

MacKinnon, Catharine A., 1989, Sexuality, Pornography, and Method: 'Pleasure Under Patriarchy', *Ethics* Vol. 314, 99.

MacKinnon, Donald, 1997, Foreward in Tanner, David, *Total Creativity in Business & Industry: Road Map to Building a More Innovative Organization*, Advanced Practical Thinking Training Inc., Des Moines, IA, 89.

McSweeney, B., 2009, The roles of financial asset market failure denial and the economic crisis: Reflections on accounting and financial theories and practices, *Accounting, Organizations and Society*, Vol. 34, No. 6 -7, 835-848.

Macey, J., 1988, The Myth of Deregulation, *Washington and Lee Law Review*, Vol. 45, 1279.

Maes, Pattie, 1997, On Software Agents: Humanizing the Global Computer (Interview), *IEEE Internet Computing*, Vol. 1 No. 4, 10-19.

Maillat, D., M. Quevit and L. Senn, 1993, Reseaux d'Innovation et Milieux Innovateurs: un Pari pour le Developpement Regional, EDES, Neuchatel.

Malmstrom, M., P. Kallgarn and J. Johansson, 2012, Deinstitutionalization Resistance – The Case of Implementing an Entrepreneurial Pedagogy in a Military Academy, 2012 *ACERE DIANA Conference*, Freemantle Western Australia, January-February.

Manderson, D., 1993, From Mr Sin to Mr Big – A History of Australian Drug Laws, Oxford University Press.

Mantziaris, C. and D.F. Martin, 2000, *Native Title Corporations: A Legal and Anthropological Analysis*, Federation Press, Sydney.

Marika, Banduk, Colin Lane, Helen Smith and Leanne Reinke, 2004, Working towards an Indigenous training model: Learning from Gamarrwa Nuwul Landcare, Yirrkala in Bowman, Kaye (ed.), *Equity in Vocational Education and Training: Research Readings,* Australian National Training Authority, 2004 National Centre for Vocational Education Research Ltd,

viewed 12 September 2012, http://www.scribd.com/doc/45025639/NCVER-Equity-in-Vet-Research-Readings-Research-Proj-Nr2201

Marrie, Henrietta, 2007, Indigenous sovereignty rights: International law and the protection of traditional ecological knowledge, in Aileen Moreton-Robinson (ed.), *Sovereign Subjects Indigenous Sovereignty Matters*, Allen & Unwin, Crows Nest NSW, 47-62.

Marshall, C. & G Rossman, 1995, *Designing Qualitative Research*, 2nd ed., Sage Publications, 111-119.

Martin, D. F., 2004, Designing institutions in the 'recognition space' of native title, in S. Toussaint (ed.), *Crossing Boundaries: Cultural, Legal, Historical and Practice Issues in Native Title*, Melbourne University Press, Melbourne.

Martin, D.F., 1997, Regional agreements and localism: a case study from Cape York Peninsula: Discussion Paper, Centre for Aboriginal Economic Policy Research, No. 146.

Martin, Karen L., 2008, Please Knock Before You Enter: Aboriginal Regulation of Outsiders and the Implications for Researchers, Tenneriffe, Postpressed, Brisbane.

Matlay, H. and P. Westhead, 2005, Virtual Teams and the Rise of e-Entrepreneurship in Europe. *International Small Business Journal* Vol. 23 No. 3, 279-302.

Mattingley C. and K. Hampton, 1998, *Survival in Our Own Land Aboriginal Experiences in 'South Australia' since 1836,* Australian Scholarly Publishing, Kew, Victoria, Australia.

Maturana, Humberto R. and Francisco Varela, 1980, *Autopoiesis and Cognition: The Realization of the Living*, Reidel, Dordrecht.

Mayer, Roger C., James H. Davis and F. David Schoorman, 1995, An Integrative Model of Organizational Trust, *Academy of Management Review*, Vol. 20, No.3, 709-734.

Meidinger, Errol, 1987, Regulatory Culture: A Theoretical Outline, *Law & Policy*, Vol. 9, 355-86.

Memmott, Paul, 2010, Demand-responsive services and culturally sustainable enterprise in remote Aboriginal settings: A case study of the Myuma Group, *DKCRC Report 63*. Ninti One Limited, Alice Springs.

Memmott, Paul and Peter Blackwood, 2008, Holding Title and Managing Land in Cape York – Two Case Studies, *Research Discussion Paper, No. 21*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Michaels, E., 1986, *Aboriginal Invention of Television in Central Australia 1982-1986*, Australian Institute of Aboriginal Studies, Canberra, 4 in Gray, Peter R A, 2000, *Do the Walls Have Ears?* Indigenous Title and Courts in Australia, *Australian Indigenous Law Reporter*, 1, viewed 22/01/2008, http://www.austlii.edu.au/au/journals/AILR/2000/1.html

Migue, Jean-Luc, 1979, Nationalistic Policies in Canada: An Economic Approach, Howe Institute, Montreal.

Miles, M.B. and A.M. Huberman, A. M., 1994, *Qualitative Data Analysis: An Expanded Sourcebook*, Sage publications, Thousand Oaks, CA.

Miller, P. and N. Rose, 1990, Governing Economic Life, *Economy and Society*, Vol. 19, No. 1, 1–31.

Miller, K. & E. Tsang, 2011, Testing management theories: Critical realist philosophy and research methods, *Strategic Management Journal*, Vol. 32, 139-158.

Ministerial Committee on Mabo, 1993, *Mabo: The High Court Decision on Native Title*, Ministerial Committee on Mabo, Australian Government, June.

Minniti, M., 2008, The Role of Government Policy on Entrepreneurial Activity: Productive, Unproductive, or Destructive?" *Entrepreneurship Theory and Practice*, Vol. 32, No. 5, 779-790.

Minniti, M., W. Bygrave & E. Autio, 2006, *2005 Global entrepreneurship monitor report*, London Business School and Babson College, London; Babson Park, MA.,

MMC, 2010, *Manage My Complaints*, viewed 15 August 2012, http://www.managemycomplaints.com/financial-services-fsa-regulations.phpsource

Moe, R. (1994). The 'reinventing government' exercise: Misinterpreting the problem, misjudging the consequences. *Public Administration Review*, Vol. 54, No. 2, 111-123.

Monod, Jacques, 1971, *Chance and Necessity*, tran. Wainhouse, A., Knopf, New York.

Moore, M and Leonie Kelleher, 2010, *Submission in Support of Application for Registration on The National Heritage List*, http://trove.nla.gov.au/work/156934574?q=finniss+springs&c=book

Moreton-Robinson, A., 1999, *Talkin' Up to the White Woman: Indigenous Women and Feminism*, University of Queensland Press, St Lucia.

Moreton-Robinson, A., 2003, I Still Call Australia Home: Indigenous Belonging and Place in a White Postcolonizing Society in Ahmed, S., C. Castaneda, A. Fortier, and M. Sheller (eds.) *Uprootings/Regroundings: Questions of Home and Migration.* Berg, Oxford, 23-40.

Morgan, G., 1983, (Ed.), *Beyond Method: Strategies for Social Research*, Sage Publications, Beverley Hills.

Morphy, Frances, 2007, Performing law: The Yolngu of Blue Mud Bay meet the native title process, in Smith, Benjamin R. and Frances Morphy (eds.), 2007, *The Social Effects of Native Title: Recognition, Translation, Coexistence*, Research Monograph No. 27, ANU E Press, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra, 31.

Morris, B., 2003, Anthropology and the State: The Ties that Bind in B. Morris and R. Bastin (eds.), *Expert Knowledge: First World Peoples, Consultancy, and Anthropology*, Special Issue, *Social Analysis*, Vol. 47 No. 1, 137-144.

Morrish, Sussie & Deborah Levy, 2012, How Entrepreneurs View and Use Property: An SME Perspective, presentation to the conference, *ACERE DIANA Conference*, Freemantle Western Australia, January-February.

Morrish, Sussie, Deborah Levy & Zhi Dong, 2009, The Role of Property in the Portfolio of Small and Medium Enterprises, *Pacific Rim Property Research Journal*, Vol. 15, No. 13, 261.

Morrison, Mike, 2012, *SWOT Analysis (TOWS Matrix) Made Simple*, RapidBI, Business & Organizational Development tools, training & services – Human Resources, OD & Leadership, http://rapidbi.com/swotanalysis/

Mueller, D., 2003, *Public Choice III*, Cambridge University Press.

Museum Victoria, 1929, Correspondence from Heinrich to Croll, *Croll Manuscripts*, Museum Victoria.

Nakata, Martin, 2008, *Disciplining the Savages Savaging the Disciplines*, Aboriginal Studies Press, Canberra.

National Distributor Alliance, (NDA), 2012, viewed 12 September 2012, http://www.natdistalliance.com.au/

National Competition Council, 2010, *Legislation Review Comepndium*, 6th ed., Commonwealth of Australia, Melbourne.

Native Title Payments Working Group, 2008, *Native Title Payments Working Group Report*, Australian Government, viewed 25 August 2009, http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Working +Group+report+-+final+versions.DOC/$file/Working+Group+report+-+final+version.DOC.

Neale, Margot, 2003, *AIATSIS Seminar Series, Series 1: Intellectual Property and Indigenous Knowledge*, AIATSIS, Canberra.

Neate, G, 1997, Proof of Native Title in Horrigan, B. and S. Young (eds.) *Commercial Implications of Native Title*, Federation Press, 254-257.

Nelson, Richard R. and Sidney G. Winter, 1982, *An Evolutionary Theory of Economic Change*, Belknap Press of Harvard University Press, Cambridge, MA.

Neu, Dean E., 2000, Locating Accounting, *Accounting, Auditing and Accountability Journal*, Vol. 13, No. 3, 268-288.

Neuman, Lawrence W.,1997, *Social research methods: Qualitative and quantitative approaches*, Allyn & Bacon Boston, 3rd ed.

Nielson, P., 2012, The Context and Design of Entrepreneurship Policy Implementation Structures – An Exploratory Case Study, 2012 *ACERE DIANA Conference*, Freemantle Western Australia, January-February.

Nieuwenhuizen, C., 2003, The nature and development of entrepreneurship, in Nieman, Hough & Nieuwenhuizen (eds.), *Entrepreneurship: a South African Perspective,* Van Schaik, Pretoria, 3-26.

North, Douglass, C., 1995, Douglass C. North in William Breit and Roger W. Spencer, (eds.), *Lives of the Laureates: Thirteen Nobel Economists*, 3rd ed. MIT Press, Cambridge, Mass., 254.

North, Douglass, C., 1994, *The Wall Street Journal*, July 29, p.B1.

North, Douglass, C., 1991, Institutions, *The Journal of Economic Perspectives*, Vol, 5 No, 1, 97–112.

North Douglass, C.,1990, *Institutions, Institutional Change, and Economic Performance***,** Cambridge University Press**.**

OBPR (Office of Best Practice Regulation), 2012, *Best Practice Regulation Report 2010-2011*, Department of Finance and Deregulation, Canberra.

OBPR (Office of Best Practice Regulation), 2010, *Best Practice Regulation Report 2009-2010*, Department of Finance and Deregulation, Canberra.

OBPR (Office of Best Practice Regulation), 2009, *Best Practice Regulation Report 2008-2009*, Department of Finance and Deregulation, Canberra.

OBPR (Office of Best Practice Regulation), 2008, *Best Practice Regulation Report 2007-2008*, Department of Finance and Deregulation, Canberra.

OBPR (Office of Best Practice Regulation), 2007, *Best Practice Regulation Report 2006-2007*, Department of Finance and Deregulation, Canberra.

O'Connor, E., 2004, Storytelling to be Real: Narrative Legitimacy Building and Venturing, in Hjorth D. & C. Steyaert (eds.), *Narrative and Discursive Approaches in Entrepreneurship*, Elgar, Cheltenham.

OECD (Organisation for Economic Cooperation and Development), 2010, *Regulatory Policy and the Road to Sustainable Growth*, OECD Publishing, Paris.

OECD, (Organisation for Economic Cooperation and Development), 2009, *Regulatory Impact Analysis: A Tool for Policy Coherence*, viewed 16 September 2012, http://www.oecd.org/regreform/regulatorypolicy/regulatoryimpactanalysisatoolforpolicycoherence.htm

OECD, (Organisation for Economic Cooperation and Development), 2002, *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance*, OECD Publications, Paris.

OED (*Oxford Dictionary of English*), 2010, (ed.) Stevenson, Angus, Oxford University Press, Oxford Reference Online, viewed 17 September 2012, <http://0-www.oxfordreference.com.library.vu.edu.au/views/ENTRY.html?subview=Main&entry=t140.e0435260

O'Faircheallaigh, C., 2007, Native Title and Mining Negotiations: A Seat at the Table, But No Guarantee of Success, *Indigenous Law Bulletin*, 21, viewed 18 February 2010, http://www.austlii.edu.au/au/journals/ILB/2007/21.html

O'Faircheallaigh, C., 2004, Native Title and Agreement Making: Focusing on Outcomes for Indigenous Peoples, *Land, Rights, Law: Issue of Native Title*, Vol. 2, No. 24, http://ntru.aiatsis.gov.au/ntpapers/ipv2n25.pdf

O'Faircheallaigh, C., 2002, Implementation: The Forgotten Dimension of Agreement-Making in Australia and Canada, *Indigenous Law Bulletin*, Vol. 5, No. 20, 14-17.

O'Faircheallaigh, C. and Tony Corbett, 2005, Indigenous Participation in Environmental Management of Mining Projects: The Role of Negotiated Agreements, *Environmental Politics*, Vol. 14, No. 5, November, 629-647.

Ogus, A., 1994, *Regulation: Legal Form and Economic Theory*, Oxford University Press.

Oldfield, M.L. and J.B. Alcorn, 1991, Conservation and Traditional Agroecosystems, in L. Oldfield and J.B. Alcorn (eds.) *Biodiversity: Culture, Conservation and Ecodevelopment*, Westview Press, Boulder, CO, 37-58.

Oliver, C., 1991, Strategic responses to institutional processes, *Academy of Management Review*, Vol. 16, No. 1, 635-652.

Olson, M., 1965, *The Logic of Collective Action*, Harvard University Press, Cambridge.

One World, 2012, viewed 12 September 2012, http://www.gs1au.org/membership/our_partners/strategic_partners.asp

Oreskes, Naomi and Erik M. Conway, 2010, Merchants of Doubt – How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming, Bloomsbury Press, USA.

Osborne, David and Ted Gaebler, 1992, Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector, Addison Addison-Wesley Publ. Co.

Pagden, Anthony, 1988, The Destruction of Trust and its Economic Consequences in the Case of Eighteenth-century Naples in Gambetta, Diego, (ed.), *Trust,* Basil Blackwell, Oxford.

Parker, C., 2004, Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings, *Modern Law Review,* Vol. 67, 209.

Parker, C., 2003, Regulator-Required Corporate Compliance Program Audits, *Law and Policy,* Vol. 25, 221.

Parker, C. and J. Braithwaite, 2003, Regulation in Cane P. and M. Tushnet (eds.) *The Oxford Handbook of Legal Studies,* Oxford University Press, referring to Teubner, Gunther Juridification: Concepts, Aspects, Limits, Solutions in Teubner, Gunther (ed.), 2003, *Juridification of Social Spheres: A Comparative Analysis of the Areas of Labor, Corporate, Antitrust, and Social Welfare Law,* Walter de Gruyter GmbH & Co.

Parker, C., C. Scott, N. Lacey and J Braithwaite, 2004, Introduction, in C. Parker et al (eds.) *Regulating Law,* Oxford University Press.

Parker, Darren, 2012, The Exclusivity of Inclusive Democracy: An Aboriginal Jurisprudential Examination of ATSI Constitutional Recognition, *IGSA Seminar,* Melbourne Institute for Indigenous Development Murrup Barak, www.murrupbarak.unimelb.edu.au/content/pages/igsa-seminar.

Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, 2000, Sixteenth Report: Consistency of the Native Title Amendment Act 1998

with Australia's international obligations under the Convention on the Elimination of all Forms of Racial Discrimination (CERD), Canberra.

Pashigian, B. Peter, 1983, The Effect of Environmental Regulation on Optimal Plant Size and Factor Shares, *Working paper 025,* Centre for the Study of the Economy and the State, Working Paper Series, Chicago Ill., April.

Passi, Reverend Dave, 1993, …I think it came very strongly…, in Sharp, Nonie, *Stars of Tagai,* Aboriginal Studies Press, 1090110.

Paternoster, Raymond and S.S. Simpson, 1996, Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime, *Law & Society Review*, Vol. 30, 549-83.

Paterson, A.G., 1999, *Confronting the Sources: The Archaeology of Culture-Contact in the South-Western Lake Eyre Basin, Central Australia*, PhD Thesis, Department of Prehistoric and Historical Archaeology, University of Sydney, May 16.

Patton, M., 1990, *Qualitative Evaluation and Research Methods,* Sage, Newbury Park. Sage, Newbury Park.

PCAST (President's Committee of Advisers on Science and Technology), 1998, *Teaming with Life: Investing in Science to Understand and Use America's Living Capital*, Panel on Biodiversity and Ecosystems, PCAST Secretariat, Washington DC.

Pearce, F. and S. Tombs, 1998, Toxic Capitalism: Corporate Crime and the Chemical Industry, Ashgate.

Pearse, G., 2009, Quarry Vision, *Quarterly Essay,* Vol. 33.

Pearson, Noel, 2009, Calma approach proves too timid, *The Weekend Australian,* August 29-30, 21.

Pearson, Noel, 1997, The Concept of Native Title at Common Law, in G. Yunupingu (ed.) *Our Land is Our Life,* University of Queensland Press, St. Lucia.

Pederson, Kris, 2006, Expanding the Innovation Horizon, The Global CEO Study 2006, IBM Global Business Services, viewed 16 September 2012,

http://www.slideshare.net/Alistercrowe/expanding-the-innovation-horizon-the-global-ceo-study-2006

Peled, A., 2001, Network, coalition and institution: The politics of technological innovation in the public sector, *Information Technology & People*, Vol. 14, No. 2, 184.

Peltzman, J., 1976, Towards a More General Theory of Regulation, *Journal of Law and Economics,* Vol. 19, 211.

Penrose, E., ([1959] 1995), *The Theory of the Growth of the Firm*, Basil Blackwell, Oxford.

Pereira, W. and A.K. Gupta, A Dialogue on Indigenous Knowledge, *Honey Bee*, Vol. 4, No. 4, 6-10.

Perry, C, Y. Alizadeh and A. Riege, 1997, 'Qualitative methods in entrepreneurship research' in *Proceedings of the Small Enterprise Association of Australia and New Zealand Conference*, Southern Cross University, Coffs Harbour, NSW, 21-23 September 1997.

Perry, C. and L. Coote, 1994, Processes of a cases study research methodology: tool for management development?, *Australia and New Zealand Association for Management Annual Conference*, Victoria University of Wellington, New Zealand.

Peters, Tom and Robert H. Waterman Jnr., 1982, *In Search of Excellence*, Harper & Row, New York, London.

Peterson, Mark F. and Jaime Roquebert, 1993, Success Patterns of Cuban-American Enterprises: Implications for Entrepreneurial Communities, *Human Relations,* August, Vol. 46, Iss. 8, 928-938.

Pettus, M.L, Y.Y. Kor and J.T. Mahoney, 2009, A theory of change in turbulent environments: the sequencing of dynamic capabilities following industry deregulation, *International Journal of Strategic Change Management,* Vol. 1, No. 3, 186-211.

Phillips, K., 2008, *Independence and the Death of Employment*, Connor Court Publishing
Philosophy Professor, 2007, viewed 2 February 2012, http://www.philosophyprofessor.com/philosophers/wilhelmdiltyey.php

Pigou, A. C., 1932, *The Economics of Welfare*, 4th ed., MacMillan.

Pollitt, C., S. Harrison, R. Bal, G. Dowswell and S. Jerak, 2007, *The nature of performance measurement in government*, Opening remarks of the workshop of the Study Group on Performance, Annual EGPA Conference, Madrid, September.

Poppo, Laura and Todd Zenger, 2002, Do Formal Contracts and Relational Governance Function as Substitutes or Complements?, *Strategic Management Journal*, Vol. 23, 707-725.

Porter, Michael, 1990, *The Competitive Advantage of Nations*, Free Press, New York.

Porter, M.E., 1980, Competitive Strategy: Techniques for Analyzing Industries and Competitors, The Free Press, New York.

Posner, Richard A., 2009, *Law and Literature*, 3rd ed., Harvard University Press, Cambridge, Mass.

Posner, Richard, 1998, *The Economic Analysis of Law*, 5th ed., Little Brown.

Posner, R. A., 1974, Theories of Economic Regulation, *Bell Journal of Economics*, Vol. 5, 335.

Prahalad, C.K. & Gary Hamel, 1990, The Core Competence of the Corporation, *Harvard Business Review*, May-June.

Priest, Marcus, 2006, 'Brand New Day?, *The AFR Magazine*, 28 July.

Productivity Commission, 2012, *Regulatory Impact Analysis: Benchmarking*, Draft Research Report, Canberra.

Productivity Commission 2006, *Regulation and Its Review 2005-2006*, Annual Report Series, Productivity Commission, Canberra.

Productivity Commission 2005, *Regulation and Its Review 2004-2005*, Annual Report Series, Productivity Commission, Canberra.

Productivity Commission 2004, *Regulation and Its Review 2003-2004*, Annual Report Series, Productivity Commission, Canberra.

Productivity Commission 2003, *Regulation and Its Review 2002-2003,* Annual Report Series, Productivity Commission, Canberra.

Productivity Commission 2002, *Regulation and Its Review 2001-2002,* Annual Report Series, Productivity Commission, Canberra.

Productivity Commission 2001, *Regulation and Its Review 2000-2001,* AusInfo, Canberra.

Productivity Commission 1998, *Regulation and Its Review 1997-1998,* AusInfo, Canberra.

Prosser, B., 2009, Seeing Red: poetry and metaphor as responses to representational challenges in critical narrative research, *International Journal of Qualitative Studies in Education*, Vol. 22, No. 5, 607-622.

Prosser, Tony, 1997, *Law and the Regulators*, Oxford University Press, Oxford.

Puia, G. & W. Missis, 2007, The effects of policy frameworks and culture on the regulation of entrepreneurial entry, *Journal of Applied Management and Entrepreneurship*, Vol. 12, No. 4, 36-50.

Punch, Keith F., 2005, *Introduction to Social Research–Quantitative & Qualitative Approaches***,** Sage, London.

Putnam, Robert, 2000, Bowling Alone: The Collapse and Revival of American Community, Simon & Schuster.

Putnam, R. D., 1995, Bowling Alone: America's Declining Social Capital, *The Journal of Democracy*, Vol. 6, No. 1, 65-78.

Putnam, Robert, Robert Leonardi and Raffaella Nanetti, 1993, *Making Democracy Work: Civic Traditions in Modern Italy*, Princeton University Press.

Quinn, John and Michael J. Trebilcock, 1982, Compensation, Transition Costs, and Regulatory Change, *University of Toronto Law Journal,* Vol. 32, 7.

Radaelli, Claudio M., 2005, Diffusion without convergence: how political context shapes the adoption of regulatory impact assessment, *Journal of European Public Policy,* Vol. 12, No. 5, October, 924-943.

Randall, B., 2003, Songman: The Story of an Aboriginal Elder, ABC Books, Sydney.

Rashid, Senator Brennan & Corrs Chambers Westgarth, 1999, *Review of Native Title Representative Bodies*, Canberra.

Ratti, R., A. Bramanti and R. Gordon, R. (eds.), 1997, *The Dynamics of Innovative Regions:The GREMI-Approach,* Ashgate, Aldershot.

Raz, Joseph, 1992, The Relevance of Coherence, *Buffalo Law Review*, Vol. 72, 273-324.

Reconciliation Australia, Strategic Plan, 2001-2003, Banking on Indigenous Communities. Issues, Options & Australian & International Best Practice, Background briefing paper for workshop on *Improving banking & financial services for Indigenous Australians*, 8-9 May.

Reddan, Jean, 2012, *Digital Marketing and reputational risk*, Lloyds Banking Group, viewed 16 September 2012, http://www.ftbusiness.com/erm/images/contentpage/riskpresentationjr.pdf

Reich, R. B., 2008, The Case Against Corporate Social Responsibility, *Goldman School of Public Policy Working Paper No. GSPP08-003*, University of California, Berkeley.

Reiss, A.J., 1984, Selecting Strategies of Social Control over Organizational Life in *Enforcing Regulation,* (ed.) Hawkins, K. and J.M. Thomas, Kluwer-Nijhoff, Boston.

Reynolds, D., 1982, The search for effective schools. *School Organisation,* Vol. 2, No. 3, 215-37.

Ricoeur, Paul, [1975] 1978, *The Rule of Metaphor: Multi-Disciplinary Studies in the Creation of Meaning in Language*, trans. Czerny, Robert with Kathleen McLaughlin and John Costello, Routledge and Kegan, London.

Riley, M., 2002, Winning Native Title: The Experience of the Nharnuwangga, Wajarri and Ngarla People, *Land, Rights Laws: Issues of Native Title*, Vol. 2, No. 19.

Ritter, David, 2009, *The Native Title Market*, University of Western Australia Press, Crawley, Western Australia.

Roberts, Nancy C. and Paula J. King, 1996, *Transforming Public Policy: Dynamics of Policy Entrepreneurship and Innovation*, Jossey-Bass Publishers, San Francisco, CA.

Robins, Nick, 2003, *Loot: in search of the East India Company*, January 22, viewed 5 September 2012, http://www.opendemocracy.net/theme_7-corporations/article_904.jsp

Robson, C., 1993, Real world research: a resource for social scientists and practitioner researchers, Blakewell, Cambridge, USA.

Rose, Deborah Bird, 1996, *Nourishing terrains: Australian Aboriginal views of landscape and wilderness*, Commonwealth of Australia, Australian Heritage Commission, Canberra.

Roshier, B. & H. Teff, 1980, *Legislation and Society in England*, Tavistock.

Ross, Thomas, 1990, The Rhetorical Tapestry of Race: White Innocence and Black Abstractions, *William and Mary Law Review*, Vol. 32, 1, 40.

Rowley C.D., 1970, *The Destruction of Aboriginal Society*, Australian National University Press, Canberra.

Rubin, E., 1989, Law and Legislation in the Administrative State, *Columbia Law Review*, Vol. 89, 369.

Rudd, Kevin, 2006, The Politician as Entrepreneur, *Australia Prospect*, Interview by Peter Botsma, 4 December, viewed 4 December 2006, http://www.workingpapers.com.au/publishedpapers/2385.html

Rumelt, Richard P., Dan Schendel and David Teece, 1991, Strategic Management and Economics in *Strategic Management Journal [Special Issue]* Vol. 12, 5-29.

Samuelson, Paul A., 1981, Schumpeter's Capitalism, Socialism and Democracy, in Heertje, Arnold (ed.), *Schumpeter's Visions: Capitalism, Socialism and Democracy after 40 Years, Praeger*, New York, 21.

Sarasvathy, Saras D., 2001, Causation and Effectuation: Toward a Theoretical Shift From Economic Inevitability to Entrepreneurial Contingency, *Academy of Management Review,* Vol. 26, No. 2, 243-263.

Sarat, A. & W Felstiner, 1995, Divorce Lawyers and Their Clients – Power and Meaning in the Legal Process, Oxford University Press, USA.

Sardar, Ziauddin, 1998, Postmodernism and the Other: The New Imperialism of Western Culture, Pluto Press, London.

Sawicki, J., 1991, *Disciplining Foucault.* Routledge, New York .

Scambury, Benedict, 2007, 'No Vacancies at the Starlight Motel': Larrakia Identity and the Native Title Claim Process, in Smith, Benjamin R. and Frances Morphy (eds.), 2007, *The Social Effects of Native Title: Recognition, Translation, Coexistence*, Research Monograph No. 27, ANU E Press, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra, 151.

Schade, Christian & Katrin Burmeister-Lamp, 2009, Experiments on Entrepreneurial Decision Making: A Different Lens Through Which to Look at Entrepreneurship, *Foundations and Trends in Entrepreneurship*, Vol. 5, No. 2,81-134.

Scheppele, Kim Lane, 1989, Foreword: Telling Stories, *Michigan Law Review*, Vol. 87, No 8, August, 2073-2098.

Schumpeter, J., [1911] (1934), Theorie der wirtschaftlichen Entwicklung, Verlag von Duncker & Humboldt, Leipzig, trans Opie, R., *The Theory of Economic Development: An Inquiry into Profits, Capital, Credit, Interest and the Business Cycle*, Harvard University Press, Cambridge, MA.

Schumpeter, J., 1939, Business Cycles: A Theoretical, Historical, and Statistical Analysis of the Capitalist Process, Macmillan, New York.

Schumpeter, J., [1942] 2006, *Capitalism, Socialism and Democracy*, Routledge, London, 6th ed.

Schumpeter, J., 1949, Science and Ideology, *American Economic Review*, Vol. 39, No. 2, March, 346-359.

Schumpeter, J., 1954, *History of Economic Analysis*, Oxford University Press, New York.

Schumpeter, J., 1991, Comments on a Plan for the Study of Entrepreneurship, unpublished paper in the Schumpeter papers, HUA, printed in Richard Swedberg, (ed.), *Joseph A. Schumpeter: The Economics and Sociology of Capitalism*, Princeton University Press, Princeton N.J.

Scott, W.R. & D.F. Davis, 2007, Organization and organizing, Rational natural and open system perspectives, Pearson Prentice Hall, New Jersey.

Seidman, Harold, and Robert Gilmour, 1986, Politics, Opposition and Power: From the Positive to the Regulatory State, Oxford University Press.

Seiler, M.J., J.R. Webb and F.C.N. Myer, 1999, Diversification issues in real estate investment, *Journal of Real Estate Literature*, Vol. 7 No. 2, 163-179.

Selznick, P., 1957, Leadership in Administration: A Sociological Interpretation, Harper & Rowe, New York.

Sengupta, K., T. Abdel-Hamid, L. Van Wassenhove, 2008, The experience trap, *Harvard Business Review*, Vol. 157 No. 3, 94-101.

Seynard, J., E. Smith, T. Baker, P. Steffens & P Davidsson, 2012, Stop Whining and Make the Best of It: A Cross-National Comparison of Responses to Regional Disadvantage in the Wine Industry, 2012 *ACERE DIANA Conference*, Freemantle Western Australia, January-February.

Shane, Scott, 2012, Reflections on the 2010 *AMR* Decade Award: Delivering on the Promise of Entrepreneurship As a Field of Research, *Academy of Management Review*, January 1, Vol. 37 No. 1, 10-20.

Shane, Scott, 2009, Why encouraging more people to become entrepreneurs is bad policy, *Small Business Economics*, Vol. 33, 141-149,

Shane, Scott A., 2008, The Illusions of Entrepreneurship: The Costly Myths That Entrepreneurs, Investors, and Policy Makers Live By, Yale University Press, New Haven.

Shane, Scott and S.Venkataraman, 2000, The promise of entrepreneurship as a field of research, *The Academy of Management Review*, Vol 25(1), 217-226.

Shelley, Mary, 1831, Introduction, *Frankenstein or the Modern Prometheus*, 2nd ed., Henry Colburn and Richard Bentley, London, October 15.

Shiel, Fergus, 2004, *Yorta Yorta win historic deal*, May 1, viewed 11 September 2012, http://www.theage.com.au/articles/2004/04/30/1083224579722.html

Shiva, M.P., 1998, *Inventory of forestry resources for sustainable management and biodiversity conservation*, Indus Publishing Company, New Delhi.

Shover, Neal, Donald Clelland and John Lynxwiler, 1986, *Enforcement or Negotiation? Constructing a Regulatory Bureaucracy*, State University of New York Press, Albany.

Shughart II, W.F., 1990, Antitrust Policy and Interest-Group Politics, Quorum.

Simpson, A.W.B., 1987, Legal Theory and Legal History – Essays on the Common Law, Hambledon Press.

Sinclair, A., 1998, Doing Leadership Differently: Gender, Power and Sexuality in a Changing Business Culture, Melbourne University Press, Melbourne.

Sinclair, A., 2001, Body and Pedagogy, Conference Proceedings, *Gender, Work and Organization Conference*, Keele, UK.

Slovic, Paul, 2000, *The Perception of Risk*, Earthscan, London.

Smallbone, D. and F. Welter, 2001, The Distinctiveness of Entrepreneurship in Transition Economies, *Small Business Economics*, Vol. 16, 249-262.

Smart, C., 1990, *Feminism and the Power of Law*, Routledge.

Smilor, R., 1997, Entrepreneurship: Reflections on a subversive activity, *Journal of Business Venturing*, Vol. 12, No. 5, 341-345.

Smith, B. R. and D. Claudie, 2003. 'Developing a land and resource management framework for Kaanju homelands, central Cape York', *CAEPR Discussion Paper No.* 256, Centre for Aboriginal and Economic Policy Research, The Australian National University, Canberra.

Smith, Benjamin R. and Frances Morphy, 2007, The social effects of native title" recognition, translation, coexistence in Smith, Benjamin R. and Frances Morphy (eds.), 2007, *The Social Effects of Native Title: Recognition, Translation, Coexistence*, Research Monograph No. 27, ANU E Press, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra.

Smith, Benjamin R. and Frances Morphy (eds.), 2007, *The Social Effects of Native Title: Recognition, Translation, Coexistence*, Research Monograph No. 27, ANU E Press, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra.

Solomon, A., 1997, Mediation and Negotiation: 'Yes, But I have a Life Too', in L. Strelein (ed.), *Working with the Native Title Act: Alternatives to the Adversarial Method,* proceedings from a workshop held 4-5 June 1997, Native Title Research Unit, AIATSIS, Canberra.

Sontag, Susan, 2002, On Being Translated in *Where The Stress Falls*, Jonathan Cape, London, 340.

South Australian Centre for Economic Studies, 1994, *Economic Study of the Anangu Pitjantjatjara Lands* prepared for ATSIC (Aboriginal and Torres Strait Islander Commission).

Spanjol, Jelena and Leona Tam, 2010, To Change or Not to Change: How Regulatory Focus Affects Change in Dyadic Decision-Making, *Creativity and Innovation Management,* Vol. 19, No. 4, 346.

Spinoza, Charles, Fernanado Flores and Hubert L. Dreyfus, 1997, Disclosing NewWorlds**:** entrepreneurship, democratic action, and the cultivation of solidarity, MIT.

Stake, R.E., 2000, Case Studies, in Denzin, N.K. & Y.S. Lincoln (Eds.), *Handbook of Qualitative Research,* Sage Publications Inc., Thousand Oaks, CA.

Stake, R.E., 1995, *The Art of Case Study Research,* Sage, Thousand Oaks, CA.

Stanner, W.E.H., 1979 (1958), Continuity and change among the Aborigines in W.E.H. Stanner, *White Man Got No Dreaming: Essays 1938-1973,* Australian National University Press, Canberra, first published, 1958-59, *The Australian Journal of Science,* Vol.21 .

Stevenson, Howard, H., H. Irving Grousbeck, Michael J. Roberts and Amarnath V. Bhidé, 2000, *New Business Ventures and the Entrepreneur,* 5th ed., Irwin McGraw-Hill International Editions, Boston Ma, USA. Singapore.

Stevenson, H. & J. Jarillo, 1990, A Paradigm of Entrepreneurship: Entrepreneurial Management, *Strategic Management Journal*, Vol.11, 17-27.

Stigler, G.J., 1971, The Theory of Economic Regulation, *Bell Journal of Economics* , Vol. 2, 3.

Stigler, G.J., 1964, Public Regulation of the Securities Market, *Journal of Business,* Vol. 2, 117.

Stigler, George J., 1954, Schumpeter's History of Economic Analysis, *The Journal of Political Economy,* Vol. 62, 344-345.

Stigler, G.J. and C. Friedland, 1982, What Can Regulators Regulate: The Case of Electricity, *Journal of Law and Economics*, Vol. 5, 1.

Strelein, L., 2007, *Maximising the benefits*, presentation to the Mining, Petroleum & Gas Symposium: Indigenous involvement in resources and extraction industries, Broome, Western Australia, 9 July.

Sullivan, Patrick, 2007, *Yawoorroong Miriuwung Gajerrong Yirrgeb Noong Dawang Aboriginal Corporation East Kimberley, Western Australia* in Bauman, T., L. Strelein and J. Weir (eds.), *Post native title determinations: what then?: RNTBC case studies and polic*y (tentative title), AIATSIS Research Publications, Canberra, forthcoming.

Sullivan, Tim, Lynda Kelly and Phil Gordon, 2003, Museums and Indigenous People in Australia, A Review of Previous Possessions, New Obligations: Policies for Museums in Australia and Aboriginal and Torres Strait Islander Peoples, *Curator*, Vol. 46, 2 April, 208-227.

Sumner, C., 1979, *Reading Ideologies: An Investigation into the Marxist Theory of Ideology and Law*, Academic Press.

Sunstein, Cass, 1990, *After the Rights Revolution*, Harvard University Press, Cambridge.

Susman, G.I. & R.D. Everard, 1978, An assessment of the scientific merits of social research, *Administrative Science Quarterly*, 23, 582-603.

Sutton, Peter, 2009, *The Politics of Suffering: Indigenous Australia and the end of the liberal consensus*, Melbourne University Press, Carlton.

Szabla, A., 2007, Multidimensional view of resistance to organizational change: Exploring cognitive, emotional, and intentional responses to planned change across perceived change leadership strategies, *Human resource development quarterly*, Winter Vol. 18. No.14.

Tanner, David, 1997, *Total Creativity in Business & Industry: Road Map to Building a More Innovative Organization*, Advanced Practical Thinking Training Inc, Des Moines, IA.

Taylor, J., 2002, Population futures in the Australian desert, 2001–2016, *Discussion Paper No. 231/2002*, Centre for Aboriginal Economic Policy Research.

Temins, Davia, 2012, *Reputation Agenda for Directors*, What Directors Need to Know about Reputational Risk, *Directors & Boards* magazine, September 12,

Terry, L.D.,1993, Why we should abandon the misconceived quest to reconcile public entrepreneurship with democracy, *Public Administration Review*, Vol. 53, No. 4, 393-395.

Teubner, Gunther, 1984, Autopoiesis in Law and Society: A Rejoinder to Blankenburg, Sociological Perspectives on Law 11, *Law and Society Review*, Vol. 18, No. 2.

The Aurora Project, 2012, *What is an Aurora Internship?*, viewed 12 September 2012, http://www.auroraproject.com.au/node/398

The Commission to Inquire into Child Abuse, 2009, *The Report of the Commission to Inquire into Child Abuse* (Ryan Report), Dublin, Ireland, viewed 22 July 2009, http://www.childabusecommission.com/rpt/01-01.php

The Macquarie Dictionary, 2009, Butler, Susan (ed.), Macquarie Dictionary Publishers, Sydney, New South Wales, 5th ed.

The Minister for Lands, 1990, *Certificate of Alteration 7046627*, 7 March.

The Scottish Government, 2010, *Scottish Planning Policy*, Crown copyright

Thomson, D.F., 1935, The joking relationship and organised obscenity in north Queensland, *American Anthropologist*, vol. 37, 460-490.

Thorpe, R. and R. Holt, 2008, *The SAGE Dictionary of Qualitative Management Research*, What is Management? Sage, London.

Tihanyi, L., A. E. Ellstrand, C.M., Daily & D.R. Dalton, 2000, Composition of the top management team and firm international diversification, *Journal of Management*, Vol. 26, 1157-1167.

Timmons JA, 1999 *New Venture Creation: Entrepreneurship For The 21st Century*, Irwin/McGraw-Hill, Boston, USA, 5th ed.

Todeva, Emanuela & David Knoke, 2005, Strategic Alliances and Models of Collaboration, *Management Decision*, Vol. 43, No. 1

Tomasic, R. and S. Bottomley, 1993, Directing the Top 500: Corporate Governance and Accountability in Australian Companies, Allen and Unwin.

Tool, M. and W. Samuels, 1989, Introduction, in Tool, M. and W. Samuels (eds.) *State, Society and Corporate Power*, 2nd ed., Transaction Publishers, viii.

Topsfield, Jewel, 2009, Aborigines Lack Proof of Identity, *The Age*, January 23, viewed 12 September 2012, viewed 12 September 2012, http://www.theage.com.au/national/aborigines-lack-proof-of-identity-20090122-7nx3.html#ixzz26EUVoozd

Tornikoski, E. & S. Newbert, 2007, Exploring the determinants of organizational emergence: A legitimacy perspective, *Journal of Business Venturing*, Vol. 22, 311-335.

Trudgen, Richard, 2000, Why warriors lie down & die: towards an understanding of why the Aboriginal people of Arnhem Land face the greatest crisis in health and education since European contact: djambatj mala, Aboriginal Resource & Development Services Inc, Darwin.

Tyler, Tom, 1990, *Why People Obey the Law*, Yale University Press.

Ucbasaran, D., P. Westhead & M. Wright, 2008, Opportunity identification and pursuit: Does an entrepreneur's human capital matter?, *Small Business Economics*, Vol. 30, No. 2, 153-173.

Unger, R.M., 1989, Liberal Political Theory in *Critical Legal Studies*, Chapter 2, Rowan and Littlefield, MA.

Van Maanen, John, 2011, *Tales of the Field: On Writing Ethnography*, The University of Chicago Press, Chicago.

VCEC (Victorian Competition & Efficiency Commission), 2011, Strengthening Foundations for the Next Decade: An Inquiry into Victoria's regulatory framework, April.

Veljanovski, Cento, 2006, The Economics of Law, *Hobart Paper No. 157*, Institute of Economic Affairs.

Veljanovski, Cento, 1982, *The New Law and Economics*, Oxford.

Venkataraman, S., 1997, The Distinctive Domain of Entrepreneurship as a Field of Research: An Editors Perspective, *Advances in Entrepreneurship, firm emergence and growth*, Vol. 3, JAI Press, Greenwich, CT, 119-138.

Victorian Law Reform Commission, 2012, Birth registration and birth certificates: consultation paper, Victorian Law Reform Commission, http://www.lawreform.vic.gov.au/sites/default/files/1387-VLRC_BirthReg-ConsultationPaper%28W%29_forweb.pdf

Vincent, J., 1996, Managing risk in public services: A review of the international literature, *International Journal of Public Sector Management*, Vol. 9, No. 2, 57-64.

Vogel, D., 1995, Trading Up: Consumer and Environmental Regulation in a Global Economy, Harvard University Press, Cambridge.

Von Hippel, E., 1994, Sticky information and the locus of problem solving: implications for innovation, *Management Science*, Vol. 40, No. 4, 429-439.

Vygotsky, L.S., 1971, *The psychology of art*, MIT Press, Cambridge, MA, (not pub in lifetime, 1925 dissertation).

Wagner, J. & R. Sternberg, 2004, Start-up Activities, Individual Characteristics, and the Regional Milieu: Lessons for Entrepreneurship Support Policies from German Micro Data, *The Annals of Regional Science*, Vol. 3, 219-240.

Walker, Nicolas, 2012, *Regulatory Review of Native Title Act & Subordinate Instruments*, Research Memorandum, Kellehers Australia, 18 September, updated 27 September.

Watson, D., 2002, *Death Sentence: The Decay of Public Language*, Knopf, Milsons Point (NSW).

Watson D, 1989, Caledonia Australis – Scottish Highlanders on the Frontier of Australia, William Collins Pty Ltd, Sydney.

Watson, Irene, 2007, Settled and unsettled spaces, in Aileen Moreton-Robinson (ed.), *Sovereign Subjects Indigenous Sovereignty Matters*, Allen & Unwin, Crows Nest NSW, 15-62.

Watson, Irene, 2002, Aboriginal Laws and the Sovereignty of *Terra Nullius, Borderlands E-Journal*, Vol.1 No.2, viewed 12 September 2012, http://www.borderlands.net.au/vol1no2_2002/watson_laws.html

Wei, David, 2010, *Indigenous Entrepreneurs Banking Support memo*, unpublished paper prepared for Kellehers Australia.

Wegrich, Kai, 2008, *Regulatory Innovation and Multi-Level Gaming. The Europeanization of Better Regulation Policy*, (draft only), viewed 6 June 2009, http://www.eur.nl/fileadmin/ASSETS/fsw/Tufan/EGPA2008/Papers/PSG5/Wegrich.pdf

Wegrich, Kai, 2009, The Administrative Burden Reduction Policy Boom in Europe: Comparing Mechanisms of Policy Diffusion. *ESRC Centre for Analysis of Risk and Regulation Discussion Paper 52*, London School of Economics, London, March, viewed 9 September 2012, http://www.lse.ac.uk/collections/CARR/pdf/DPs/Disspaper52.pdf

Weir, Jessica, 2009, *The Gunditjmara Land Justice Story*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Wells, C., 2001, *Corporations and Criminal Responsibility*, Oxford University Press.

Wells, Orson, 1962, *Before the Law*, Franz Kafka read by Orson Wells, http://www.youtube.com/watch?v=SrIrVNv7jK8&feature=related.

Westgaard, S., A. Eidet, T.C. Grosas and S. Frydenberg, 2008, Investigating the capital structure of UK real estate companies, *Journal of Property Research,* Vol. 25 No. 1, 61-87.

Whalen, Charles J., 2000, America's Hottest Economist Died 50 Years Ago, *Business Week,* December 11, viewed 30 August 2009, http://www.businessweek.com/stories/2000-12-10/commentary-todays-hottest-economist-died-50-years-ago

Williamson, O.E., 1996, *The Mechanisms of Governance,* Oxford University Press.

Williamson, O.E., 1985, *The Economic Institutions of Capitalism*, The Free Press, New York.

Williamson, O.E., 1975, Markets and Hierarchies: Analysis and Antitrust Implications, The Free Press, Collier MacMillan.

Wilson, J.Q. (ed.), 1980, *The Politics of Regulation*, Basic Books.

Wilson, Shawn, 2009, *Research Is Ceremony: Indigenous Research Methods*, Fernwood Publishing Company, Limited.

Wilson, K. and A. Portes, 1980, Immigrant enclaves: An analysis of the labor market experiences of Cubans in Miami, *American Journal of Sociology,* Vol. 86, 295-315.

Winborg, J. and H. Landstrom, 2001, Financial Bootstrapping in Small Businesses: Examining Small Business Managers' Resource Acquisition Behaviors, *Journal of Business Venturing,* Vol. 16 No. 3, 235-254.

Winiata, Whatarangi, 1998, *Reducing The Socio-Economic Disparities in Housing, Employment, Health & Education*, 8 December, viewed 13 September 2012, http://www.wairaka.net/ubinz/Hikoi/MaoriSolutionWiniata.html

Wittgenstein, Ludwig, 1958, *Philosophical Investigations*, trans. Anscombe, G.E.M., Macmillan, New York, trans. 3rd ed., 139-210.

Wolfe, P., 1999, Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event, Cassell, London.

Wooton, Hal, 1995, The end of dispossession? Anthropologists and lawyers in the native title process in Julie Finlayson and Diane Smith, *The Native Title Era: Emerging Issues for*

Research, Policy and Practice, papers from a session on 'The Anthropology of Native Title Claims: Emerging Research Issues' convened at the Australian Anthropological Society Conference, 27-29 September 1995, University of Adelaide, Research Monograph 10/1995, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 101-118, viewed 12 September 2012, http://caepr.anu.edu.au/sites/default/files/Publications/mono/RM10j_Wootten.pdf

World Bank, 2004, *Doing business in 2004: Understanding regulation*, Oxford University Press, Oxford.

Yang, Xiutai & Long, Yong, 2001, *Unequal Strategic Alliance: An Analysis on the Institution of Chinese Enterprises' Overseas Cooperation,* Chongqing Publishing House, Chongqing.

Yin, R. K., 2009, *Case Study Research Design and Methods*, 4th ed., Sage Publications Inc, Thousand Oaks, CA.

Zachary, R.K. a. M. and S. Chandra, 2011, The Future of Entrepreneurship Research: Calling All Researchers, *Entrepreneurship Research Journal*, Vol. 1, No. 1, Article 1.

Zikmund, W. G., 1994, *Business Research Methods*, The Dryden Press Fort Worth.

Legal Authorities

(Arabana) *Dodd v. State of South Australia* [2012] FCA 519.

Commonwealth v. Tasmania, 1983, [1983] HCA 21 (1983) 158 CLR 1 (1 July 1983).

(Dodd) Interlocutory hearing in *Dodd v. State of South Australia* [2012] FCA 519, 15th and 17th May 2012.

Gibbs v. Capewell & ors [1995] 128 ALR 577 (1995) 54 FCR 503 (3 February 1995).

Lovett on behalf of the Gunditjmara People v. State of Victoria [2007] FCA 474 (30 March 2007

Mabo & Others v. Queensland (No. 2), [1992] HCA 23; (1992) 175 CLR 1.

Members of the Yorta Yorta Aboriginal Community v. Victoria, 2002, HCA 58; 214 CLR 422; 194 ALR 538; 77 ALJR 356 (12 December 2002).

Members of the Yorta Yorta Aboriginal Community v. State of Victoria (Including Corrigendum dated 21 March 2001), [2001] FCA 45 (8 February 2001).

Members of the Yorta Yorta Aboriginal Community v. Victoria & Ors, [1998] FCA 1606 (18 December 1998).

Sampi v. Western Australia [2005] FCA 777 (10 June 2005)

Shaw v. Wolf & ors (1998) 163 ALR 205, 211–212.

The Wik Peoples v. The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors (1996) 187 CLR 1; (1996) 141 ALR 129; (1996) 71 ALJR 173; [1997] 1 Leg Rep 2, B8/1996, 12 June [1996] HCA 40; (23 December 1996).

TVA v. Hill 437 US 153 (1978).

Western Australia v. Ward [2002] HCA 28; 213 CLR 1; 191 ALR 1; 76 ALJR 1098 (8 August 2002).

Legislation

Native Title Act 1993 (Commonwealth of Australia)