Addressing uncertainty in multiple use landscapes of desert Australia

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Abstract

This paper focuses on pastoral rangelands of arid Australia - multiple use landscapes, where extensive land uses such as livestock grazing and self drive tourism co-exist with indigenous peoples' access to and use of their traditional lands. Legal recognition of indigenous native title rights started only in the early 1990s. Native title overlays an array of 'terra nullius' institutions and its meaning continues to be contested. This paper explores how a polycentric change process has been progressively crafting more equitable and effective institutions for multiple use of rangelands that are responsive to the rights and interests of native title groups as well as those of other actors.

In South Australia, native title groups decided in 2000 to participate in a statewide approach to resolution of their native title claims with the vision that it would restructure the state's institutions "with native title built in". Five years on there has been some significant progress on this aim on pastoral lands, as well as other sectors, through negotiation at local and statewide levels. A strategic two-tiered approach to the negotiations has enabled legislative change to create incentives for local agreements and address barriers to sustainability of agreements. One of its hallmarks is its focus on building relationships between people. The approach has been effective in harnessing leadership for change and in being responsive to local actors' authority, concerns and accommodations about co-existing rights and interests. The approach is resource hungry and demanding of negotiating skills and innovation in approaches to entrenched issues and interests. However it is not only cheaper than the likely cost of litigation but, unlike adversarial strategies, is providing opportunities to develop partnerships for improved economic and social outcomes into the future.

Keywords

Native title, rangeland, pastoral lease, indigenous, Indigenous Land Use Agreement, multiple use, institutional change

1 Introduction

Australia was colonised without any treaties being made between the British Crown and indigenous peoples. Indigenous people have struggled since for recognition of their rights to land and resources. Negotiated agreements have become an important strategy in the last decade, with indigenous native title often providing an trigger for negotiations (see ATNS Data Base).

As a result of recognition being recent, dating only from 1992, native title overlays an array of 'terra nullius' institutions established by the state to govern the use and management of land and resources. The existence and contemporary meaning of native title continues to be subject to interpretation and contestation, notwithstanding its formal recognition as part of the common law of Australia.

Everybody affected by the legal recognition of native title wants assurance and acceptance that their endowments for use and management of land are supported by society. Everybody wants certainty and security. Processes to settle native title claims, established by the *Native Title Act, 1993* [Cwlth] (NTA) in the aftermath of the High Court's 1992 Mabo decision, are complex, time consuming and costly to pursue. Because they almost always focus on one native title claim or other tenure parcel at a time, the processes of the NTA are also limited in their capacity to effect change in higher order institutions which structure the operational rules governing use, management and benefit from land and resources.

This paper explores how a polycentric change process, the South Australian (SA) statewide native title negotiations process, has been modestly and progressively crafting more equitable and effective institutions - institutions that are responsive to the rights, interests and world views of native title groups as well as those of other actors. Keys to success of the process include its polycentric structure; engagement of industry peak bodies as well as government, native title groups and others with entitlements to land and resources on an equitable basis; its focus on building relationships amongst negotiating parties; strategic approaches by key actors; mobilisation and building of skills; and persistence.

Aboriginal Legal Rights Movement (ALRM) is a key actor in this process. ALRM is a legal aid and advocacy NGO established by and for Aboriginal people of SA. Since 1994 it has also held a statutory appointment as Native Title Representative Body under the NTA. In this role it supports native title holders to achieve recognition of their native title rights and interests.

From the outset of the SA native title negotiations process, ALRM envisioned that the process would reconfigure governance institutions 'with native title built in'. It recognized that at a local level, native title groups and other actors may be able to reach agreement about operational rules. However the scope of these agreements would be constrained by higher order institutions that predate the High Court recognition of native title. ALRM also recognized that once one seeks to recognize

and build native title into such institutions, many of them unravel because they are simply not structured in a way that can effectively recognize native title (Agius et al 2004: 206). ALRM's commitment to the polycentric approach of the SA statewide negotiations process stems from its vision of achieving change in these higher level institutions in order to effectively address the aspirations of native title groups.

SA presents something of an idealised situation to implement a process of institutional change to recognise indigenous people's customary property rights. Australia, compared to many other nations, has a high level of respect for the rule of law, transparency in government process, and little corruption. SA also has a tradition of bi-partisan approaches to indigenous affairs policy which has largely precluded native title from becoming a party political issue. These circumstances undoubtedly make institutional change more readily effected than in most of the many other nations where indigenous customary property rights have been ignored or overridden. They also make it easier to identify the key success factors of the negotiation process itself.

2 Focus and structure of the paper

The paper focuses on pastoral rangelands of South Australia - multiple use landscapes, where extensive land uses such as livestock grazing and self drive tourism co-exist with indigenous peoples' access to and use of their traditional lands. Rangelands encompass 81% of Australia. About half that area is held under pastoral lease tenures, used for extensive livestock grazing. Other uses of the land include 4WD tourism, mineral exploration and mining, co-existing with varying degrees of indigenous people's access to and use of their traditional lands. Here the activities, rights and interests of indigenous people are woven through the legal, historic and aspirational fabric of multiple use, whether visibly or not.

Indigenous people comprise up to half the population of service towns in these sparsely populated regions. Some also live in very small settlements, known as outstations or homelands, on land excised from pastoral leases to provide them with living areas on their traditional country. Indigenous people of these regions are amongst the poorest people in Australia. They want to use their traditional country to improve their own wealth and well-being. This presents substantial challenges as few of the natural resources on their country have high value, and indigenous people have few recognised rights to use and benefit from those resources.

Progressively since the Mabo decision, Australian society has come to accept that indigenous native title may co-exist with pastoral lease tenures. Native title holders, governments and other stakeholders such as pastoralists are establishing new operational rules through negotiation of Indigenous Land Use Agreements (ILUAs). SA is unique in pursuing such agreements - for pastoral leases and in other sectors such as fisheries, local government and mining - through a statewide polycentric process.

The statewide scale of this process is a paradox because the local is the only effective scale at which a native title group can operate. Indigenous customary laws and traditions only allow indigenous people to speak and act in relation to their own traditional estates. These laws and traditions are the origin of native title and of its contemporary meaning as a property right. They are localized systems even though they may extend and network over many thousands of square kilometres in rangeland environments. Pastoralists are also typically locally orientated, being self reliant and authoritative in their own patch (Gill 1997, Holmes and Day 1995, Smith 2003), albeit also being 'patches' that may encompass half a million hectares or more within their pastoral lease.

However, as the Institutional Analysis and Development framework makes clear, the opportunities and constraints such people face, the information and benefits they obtain or are excluded from, and how they reason about the situations where they encounter each other, are all affected by the presence or absence of rules that are made by in other forums, beyond the immediate local situation (Ostrom 2005:1). In the case of native title on SA pastoral leases, institutional reform at broader levels – through changes to state legislation - has been necessary to allow pastoralists and native title groups to craft operational rules that reflect their norms.

This paper aims to show how institutional change is addressing uncertainty about the co-existing property rights of pastoralists and indigenous people and resolving issues important to both parties. It highlights the importance of institutional change at both local and broader scales in achieving these outcomes.

The paper first outlines the property rights encompassed by native title as relevant to the situation on SA pastoral leases, and the co-existence of native title and pastoral leases. It then describes the structure of the SA statewide native title negotiation process and the features of the first ILUA on a SA pastoral lease, the 2004 Todmorden ILUA. Changes to the *Pastoral Land Management and Conservation Act 1989* [SA] that were promulgated to give effect to the Todmorden ILUA and facilitate the negotiation of subsequent pastoral ILUAs are explained. The paper then outlines research and action by Aboriginal Legal Rights Movement to inform strategic institutional change. It concludes by discussing some ongoing challenges for institutional development that affect the capacity of indigenous people and other stakeholders to achieve their aspirations.

3 Native title as property right

Claims to native title are building new indigenous geographies in Australia – new patterns of relationship amongst people and to place (see Davies 2003). The patterns are new because the spatial boundaries of claims, and of any determinations of native title that might result, are not solely shaped by the geographies of indigenous customary law and cultural norms. They are shaped by acts and accidents of land tenure history and by the complexity of rules established

by the courts and governments for whether a claim to native title will be recognised and what property rights it will encompass.

Native title was recognised as part of the common law of Australia only in 1992. In making this recognition in the Mabo case, the High Court said that the common law of Australia would perpetuate injustice if it were "… to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land". The Court also concluded that native title could be recognised without 'fracturing the skeletal principles' of the Australian legal system. (Brennan 1992: 43,63).

Two things made the Mabo decision unprecedented. It was the first recognition in Australia that indigenous customary property rights form part of the Australian common law. In contrast, other earlier (and ongoing) mechanisms to recognize indigenous rights to land in Australia have involved land purchase and/or grants of land from the Crown. Secondly, the Mabo decision recognized native title as a property right that may co-exist with some other property rights that have been granted by the Crown or with public purpose uses that the Crown has authorised.

The position under Australian law is that native title survives where there has been no clear and plain intention to extinguish it by a Crown grant of an exclusive possession tenure or the use of land for public purposes in a manner that is inconsistent with the survival of native title. Typically such public purposes involve construction of buildings or infrastructure. In other cases, native title coexists with more extensive uses made of land by the public and the state, or by people authorized by the state. Pastoral lease tenures are the most widespread example, as further discussed below.

The NTA governs registration, mediation and determination of claims to native title and registration of the title itself. It also establishes the rules that the state must follow in granting other property rights. Native title claims are determined by the Federal Court, and the National Native Title Tribunal, established by the NTA, mediates between parties to a claim under the direction of the Court. The Court's determinations of native title establish the content of native title, where it is found to exist. Increasingly, as native title test cases have established precedents, parties to claims have been able to reach agreement about the content of native title allowing the Court to make consent determinations.

The 'recognition space' for native title, to use the term coined by Aboriginal leader Noel Pearson (1999), is actually quite limited. Generally native title is recognised as encompassing only limited rights of access, appropriation, management and exclusion. The most extensive rights have been recognised in circumstances where governments have not granted property rights to non-indigenous people so they tend to be in the least productive areas for agriculture or other industry use. The exact nature of native title rights depends on the laws and customs of the native title group and the nature of other co-existing property rights. Exclusion rights depend also on

the nature of the act involved, and on threshold dates set out in the NTA. The NTA accords native title claim groups some exclusion rights, known as the 'right to negotiate', that have no parallel in non-indigenous property rights. These are particularly significant to native title claim groups in relation to mining and exploration.

The native title claim process established by the NTA begins by making the boundaries of a native title group clear. Section 61 requires that when an application for determination of native title is lodged it must be authorised by all the people who hold native title according to their traditional laws and customs, and the claimants must be named or described clearly enough to establish if any particular person is part of this group.

To be recognised as registered native title holders, an indigenous group needs to establish its connection to the claim area. Importantly, this connection must exist as part of a normative system of traditional law and custom that the group acknowledge and observe and that unites them as a society or part of a society (see, for example, SA CSO 2004). The group must govern the distribution and exercise within the group of rights and responsibilities in relation to their traditional estates, and this governance must have its origin in the laws and customs that existed before the British Crown claimed sovereignty over the traditional estate.

Native title groups have potential to craft effective contemporary common property resource management institutions. The contemporary definition of the claim group established by the NTA addresses the first of Ostrom's (1990) design principles by establishing clear boundaries. The registration process for native title claims and for native title addresses the seventh design principle (recognition by others of the group's rights to organise). For design principles 2-6, many groups face considerable challenges in building capacity and establishing effective internal governance (Davies 2001). These challenges are compounded by their relatively recent recognition, lack of resources, and the overt focus in most native title action situations on making agreements, rather than effective implementation of agreements (see O'Faircheallaigh 2002, 2004). At the same time as they are evolving their own contemporary rules, native title groups face new challenges through their participation in crafting new institutions. The development of ILUAs for co-existing rights and interests on pastoral leases is an example.

4 Co-existence of native title on pastoral leases

The pastoral lease tenures of Australia's desert and savannah regions are the most extensive landscapes where both native title and other property rights are recognized as co-existing under Australian law. Pastoral lease tenures confer time limited or perpetual rights to use natural forage and water resources sustainably for the grazing of livestock and erect improvements necessary to do this. The exact nature of the rights varies between state/territory jurisdictions (see Productivity

Commission 2002). In SA, leases extend for 42 years and are renewed to full term every 14 years subject to land condition being satisfactory. A government program funded by lease rentals monitors land condition, applies graduated sanctions where warranted, and undertakes full assessment every 14 years. Young (1987: 175) characterises this as a system that mixes incentives, rewards and penalties all into one.

In many situations pastoral leases and/or the legislation that governs them contain specific clauses that reserve rights to Aboriginal people, or otherwise provide for indigenous access to and use of the lease area. This is the case in SA where such provisions reflect an overt history of government intention to provide for the continuation of indigenous people's subsistence economic activity (Forster 1999).

Section 47 of the *Pastoral Land Management and Conservation Act* 1989 [SA] (PLMC Act), which governs pastoral lease tenures, provides for "rights of Aborigines" in the following terms:

> Despite this Act or any pastoral lease granted under this Act … an Aborigine may enter, travel across or stay on pastoral land for the purpose of following the traditional pursuits of the Aboriginal people. [1]

The PLMC Act and the management structures it establishes do not have mechanisms to enforce these provisions. Hence 'rules-in-use' are often very different to 'rules-in-form'. Indigenous people often cannot confidently access pastoral leases, and they tell of encountering locked gates or personal threats in some situations when they have tried to exercise their access rights. Overall the past 150 years of pastoral occupation of SA has psychologically conditioned indigenous people to not press the matter when access is difficult. Pastoralists also talk of indigenous people's access causing problems for them, such as disturbance to new born livestock, and about their own uncertainty about how to address such problems.

In general terms indigenous people look to their traditional country to sustain them, in non-material and material ways, including through cash income. The expectation extends to country in pastoral leases, though generally with respect for the livelihood of pastoralists and their families. Where indigenous people access pastoral leases it tends to be for hunting native animals for food, gathering medicine and food plants, caring for significant places through ceremony and by activities such as cleaning water sources, and camping – often with children, to teach them about country.

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[1] Section 3 of the PLMCA includes the following definitions:

> "Aboriginal people" means the people who inhabited Australia before European colonisation;
>
> "Aborigine" means a descendant of the Aboriginal people who is accepted as a member by a group in the community who claim descent from the Aboriginal people.

'Traditional pursuits' are not defined in the PLMC Act. Other legislation in SA adopts a definition that fully recognises 'tradition' as changing in adaptation to new circumstances.

Indigenous activities on pastoral leases are rarely part of the market economy. Exceptions include quite limited incidence of small-scale harvesting of raw materials for art and craft production, gathering bush foods for commercial sale, and guiding tourists. The former activities are often prohibited by legislation, at least without a licence from government. Institutional change has not yet addressed this conflict and these activities provide examples of where 'rules-in-use' accommodate indigenous aspirations much better than the 'rules-in-form'.

Non-pastoral resources on pastoral leases are common pool resources managed by the state subject to native title. Unpacking the meaning of this statement is a complex exercise, whether it is approached from the legal perspective prevalent in much consideration of native title, or from the point of view of pastoralists and native title groups. Natural resources on pastoral leases to which governments may grant private rights to use and benefit, separate to those conferred by the pastoral lease, include petroleum and minerals, water, soil, timber, seeds and other plant products, and kangaroos. Pastoralists' rights under the lease do not extend to resources such as biodiversity, cultural heritage, public access on foot or defined vehicle routes, outdoor recreation settings and aesthetically pleasing landscapes. The NTA now governs the process through which the state must take native title into account when establishing new third party rights and interests or government uses affecting such resources.

Where uses of the resources are economically significant, the state has generally developed coherent formal institutions to manage them. Examples are water, minerals and kangaroos. Each of these institutions interfaces differently with native title. Few formal institutions exist to manage recreation uses and tourism. For example, SA pastoral legislation provides for public access along designated routes – a major use in some areas - with planning underway in recent years to consolidate this public access system. However there are no institutions that are structured or resourced to sustainably manage the common pool resources represented by the recreation and outback tourism settings.

In practice, pastoral lease holders enclose these resources, capturing such economic benefits as are available from recreation and outback tourism resources on public access routes or on other parts of the lease area. For example, 10% of leases in SA are advertising to attract tourists instead of, or as well as, running cattle and/or sheep. Such 'diversification' is tolerated, and has often been encouraged, by the state as a strategy to reduce risk for pastoral lease holders from reliance on livestock production, even though the PLMC Act provides that a pastoral lease is a lease "for pastoral purposes". This might be characterised as a frontier mode of resource exploitation wherein "property rights are attained at the point of capture, [and] ownership is created through possession" (Connor and Dovers 2002 after Hanna 1997).

The Productivity Commission, the principle review and advisory body to the Australian government on microeconomic policy and regulation, reviewed non-

pastoral land uses in 2002. The review makes the point that current pastoral institutions are not well structured to manage non-pastoral land uses. They typically inhibit competition between pastoral and non-pastoral land uses and the realization of broader policy goals in relation to the resources on pastoral lease land, potentially including sustainable management of natural resources (Productivity Commission 2002).

The significance to governments of policy goals for indigenous social and economic development (see SCRGSP 2005) indicates that these goals should be an important consideration in institutional re-design for areas where pastoral leases are the dominant tenure. However, in examining approaches to resolution of native title in various state/territory jurisdictions in 2004, the Australian Aboriginal and Torres Strait Islander Social Justice Commissioner concluded that SA is one of only two jurisdictions whose approach to native title is structured in a way that might take these goals into account (ATSISJC 2004). The key in SA is the polycentric structure adopted for negotiated resolution of native title claims.

5 The South Australian statewide negotiations process

The SA statewide approach to native title negotiations is cross sectoral and places considerable emphasis on reciprocity and building relationships (see www.iluasa.org, ATSISJC 2004, Agius et al 2003, 2004, Dixon et al 2004, Dixon and McKenzie 2005). Its structure is polycentric, with independent but linked spheres of operation at statewide and local spheres. The structure allows it to effect changes in legislation and policy where this is necessary to ensure that locally negotiated Indigenous Land Use Agreements (ILUAs) can make effective operational rules.

ILUAs were introduced into the NTA in 1998 as a flexible mechanism for native title groups and other parties to make legally binding agreements about native title (see Neate 1999, Smith 1999). They can be applied in very wide variety of situations. Developing ILUAs involves negotiations between native title groups and other stakeholders. Resulting agreements are registered after a statutory objection period. Native title groups may negotiate and conclude ILUAs whether or not they have lodged a native title claim or had it determined. Negotiations may seek the native title group's agreement to their native title being extinguished where this is required to allow grant of exclusive property rights to another party. Equally, the state, native title groups and third parties whose rights are impacted by native title can use the ILUA provisions of the NTA to make local scale agreements that establish operational rules amongst themselves. This can be an effective way of addressing uncertainty about how their respective rights and interests interface.

ILUAs cannot themselves determine the nature or content of a group's native title, since the NTA establishes that this is a matter for the Federal Court. However applications to the Federal Court for consent determinations of native title are

facilitated where effective operational rules for the co-existence of native title and other property rights have resulted from ILUA negotiations.

ILUAs also cannot in themselves change existing rules that derive from legislation. They are not valid unless they are consistent with legislation. Thus, for example, when the statewide negotiations process started an ILUA could not recognize the right of a native title group to exclude other indigenous persons from its traditional lands even though such exclusion rights are generally fundamental to indigenous custom and tradition. This is because of the wording of the statutory right under section 47 of the PLMC Act of any Aboriginal person to access a pastoral lease for traditional pursuits. Even if the pastoralist and native title group made an agreement about how native title holders could access the lease in a way that met both parties' requirements, indigenous people would not have been effectively bound by those rules. Local negotiation processes are not able to readily command the authority to change legislation. However the polycentric approach to agreement making adopted in SA has been able to do so.

5.1 Peak body forums

The fundamental aim of the statewide process is to resolve native title matters by negotiation rather than through litigation. The ultimate objective of the negotiating parties is to: ".. achieve certainty over access to and sustainable use of land, water and resources through negotiated recognition and just settlement" (Dixon et al 2004, Dixon and McKenzie 2005). The process was formally initiated by the Attorney General of South Australia in 1999 and gained early and ongoing support from the SA Chamber of Mines and Energy and SA Farmers Federation. By 2003 the process also had involvement and support from the SA Local Government Association and peak fishing industry bodies.

The statewide process involves policy discussions through a peak forum – the Main Table – and through Side Tables on sectoral issues (pastoral, mining, local government, fisheries, parks) and on the cross cutting issue of "relationships to land and water". It also involves local level negotiations between native title groups and other parties over their whole claim area or specific issues or tenure parcels within the claim area. The Main Table establishes priorities for addressing sectoral issues and for local scale negotiations and maintains a strategic plan for the overall statewide process. Main Table and Side Table forums involve representatives of ALRM, industry peak bodies and government.

The 23 native title groups whose claims cover most of SA are directly involved in local negotiations through the Native Title Management Committees (NTMCs) that they have established to manage their claims, the 'named applicants' who have lodged the claim, and other members authorized by the group for particular negotiations. Conditions that native title groups are required to satisfy if they are to get support through the statewide process for their local negotiations are that:

- spatial overlaps between their claim area and others have been resolved (requiring agreement amongst the relevant native title groups, facilitated by ALRM)

- the group is reasonably cohesive and stable

- the group is willing to negotiate.

As well as local negotiations, native title groups are involved in the statewide process through their participation in the Congress of NTMCs. The Congress is a 'United Voice' that the NTMCs established in 2000 as a statewide forum for them to consider approaches to issues that have impact beyond the scale of their individual claims. The members of the Congress are the NTMCs, such that the NTMCs and the Congress constitute a multi-layered nested enterprise. This allows native title groups to act together on shared interests without detracting from the locally based authority of each NTMC.

ALRM is a key player in the negotiations, involved in the Main Table, Side Table and all local negotiations. The statewide process itself has developed with significant leadership input from Parry Agius as Executive Officer of Native Title Unit of ALRM. In its role as Native Title Representative Body for SA under the NTA, ALRM supports native title holders to assert and manage their native title rights and interests, working closely with the Congress and with the NTMCs. It acts as a secretariat and a research organization for the Congress. In local scale negotiations, it supports individual NTMCs and their constituents.

ALRM has done a lot of work in building the capacity of native title groups to participate in the negotiations process. This has included facilitating the establishment of NTMCs and of the Congress and development of their governance capacity. While legal expertise is important to native title groups as for other negotiating parties, ALRM has ensured it has retained a range of other expertise in specific industry sectors and in negotiations processes and conflict resolution. This has been necessary to support the key roles that ALRM, NTMCs and Congress have in the negotiations process. In this ALRM works to the principle that 'native title is about people, not about legal technicalities' (Agius et al 2004: 205).

The Side Tables, as statewide forums, consider how policy and legislation affects the capacity of local scale negotiations to resolve issues that are important in local situations and they develop proposals to overcome barriers. Their deliberations are not characterized or structured as negotiations. They are referred to as 'talks' to underscore that negotiation about the co-existence of property rights is not the proper business of peak bodies. It must be undertaken by the people who hold native title and those who hold other property rights (Agius et al 2004:205)..

Side tables have developed templates for ILUAs as a guide to people involved in local negotiations. Development of the templates has in some cases progressed from experience of pilot local negotiations. In the case of negotiations about mineral

exploration, a template was prepared prior to local negotiations commencing. However this has not been done as a 'blueprint' solution to be imposed onto local situations. Rather templates provide an agreed reference point between government, relevant industry sectors and ALRM (Dixon and McKenzie 2005).

The Todmorden ILUA shows the impact that the SA process has had on institutional change in the pastoral sector by operating at both local and statewide levels.

5.2 The Todmorden Indigenous Land Use Agreement

Local negotiations led to an ILUA being signed in March 2004 by the SA Government, pastoral lease holders of Todmorden station in northern SA, and six named applicants registered under the NTA as native title claimants. As is provided for by the NTA, the named applicants were authorized by and acting on behalf of Yankunytjatjara/Antakarinja people in relation to a native title claim area that includes Todmorden pastoral lease.

The Todmorden ILUA is recognized as having mutual respect and cooperation at its heart (NNTT 2004). Its provisions build from principles of reciprocal recognition and responsibility amongst the parties.

The Todmorden ILUA addresses issues that are important to the native title holders, the pastoralist and/or the government. It sets up straightforward rules that govern such things as privacy of both parties in relation to each others' uses of the land, protocols for minimizing impacts of each party's use of the land on the other party, decision making in relation to future proposals for use of the land, and dispute resolution.

Several provisions are locally important but were only able to be achieved because of the polycentric nature of the SA native title negotiations process. These are:

- Authority of native title group to control access to the lease by other Aboriginal people

- Binding future lessees to the terms of the ILUA

- Protection for ILUA parties in relation to civil liability

- Provision for public access rights to be modified by an ILUA where necessary to protect specific interests of the native title holders

- Extending to native title holders the same provisions as pastoral lessees enjoy in relation to trespass.

Most of these issues were among those identified as 'very challenging' by meetings of the Pastoral Side Table of the statewide negotiations process in 2002. The Pastoral Side Table meetings involved people working for or representing the SA Government, ALRM and the SA Farmers Federation. These meetings ran in parallel

with and independently to negotiations between the SA Government, Todmorden lesees and native title holders that resulted in the Todmorden ILUA.

Progressively parties to the Pastoral Side Table meetings identified more than one hundred issues relevant to ILUAs. When each party analysed these issues, they agreed that there were only a few 'very challenging' issues since local scale negotiations such as those being conducted at Todmorden station could resolve most issues. The Pastoral Side Table initiated a proposal to amend the PLMC Act in relation to several of the 'very challenging' issues. Amendments were passed by the SA Parliament in August 2004, thereafter allowing those provisions of the Todmorden ILUA which relied on such amendments to operate. The amendments are significant in establishing a framework for locally negotiated ILUAs such as that at Todmorden to deal more reciprocally with each party's interests than the PLMC Act would otherwise allow.

In empowering native title groups to control all Aboriginal access onto a pastoral lease for 'traditional pursuits' the PLMC amendments address a potential free rider problem that could otherwise undermine the effective operation of pastoral ILUAs in SA. Without this amendment the traditional laws and customs of the native title group cannot be used by the group to manage how its own members or other Aboriginal people access the lease area because section 47 of the PLMC Act provides for any Aboriginal person to have access. Nor would it be possible for pastoralists or the state to have a mechanism to hold Aboriginal people accountable to their responsibilities under the ILUA.

The amended PLMC Act now provides for any Aboriginal person to have access for traditional pursuits except where an ILUA exists, in which case access for such purposes is in accordance with the terms of the ILUA. The template pastoral ILUA developed by the Pastoral Side Table from the experience of the Todmorden ILUA suggests that pastoral ILUAs in SA may provide for such access by members of the native title group, or by their invitees including both Aboriginal or non-Aboriginal people. The latter is a practical recognition of the extent of intermarriage and other networks between group members and others.

The amendment of the PLMC Act to bind future holders of a pastoral lease to the terms of an ILUA is significant. This is because while the NTA provides that an ILUA affects the exercise of a native title group's property rights in perpetuity[2], it does not have that impact on other parties' property rights. The PLMC Act provisions establish some reciprocity, and make long term return more likely on the investment of time and other resources that parties to the ILUA have made to conclude the agreement.

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[2] Unless the ILUA is made for a defined time period and does not extinguish native title.

The issue of liability has been a concern to pastoralists in relation to Aboriginal access to leases, raising fears of litigation for injury or damage that Aboriginal people might suffer while on the lease. The PLMC Act amendments establish that no civil liability attaches to a party to an ILUA for injury, damage or loss caused by another party to the ILUA; or suffered by a person who is lawfully on pastoral land the subject of the ILUA, except in cases of intentional injury or gross negligence (s46B). This provision is particularly significant because of the burden that liability might have otherwise put on native title holders and pastoralists. For example native title holders who are parties to pastoral lease ILUAs in Western Australia are required by the ILUA to have current public liability insurance when they access the pastoral lease. They have found that the cost and other difficulties in getting insurance cover effectively make the ILUA a barrier, rather than a pathway, to their access (Riley 2002).

Issues of authority and confidentiality were paramount in the way that the statewide process managed interface between the Todmorden negotiations and the amendments to the PLMC Act. It was necessary for the local negotiations to operate quite independently of the Pastoral Side Table because the authority for the negotiations is vested locally. As ALRM has articulated in the principles that guide its approach to the statewide process: it is the Aboriginal claimants who have standing as principals in the negotiation process since they are the people who hold native title rights (Agius et al 2004: 205). Hence the Pastoral Side Table had no role in directing the local negotiations. Confidentiality provisions agreed amongst parties to the local negotiations also could not be confidently maintained if there was a process of reporting from the local negotiations to the Pastoral Side Table. Instead the links between the two processes were through the participation in both processes of a small number of people from ALRM, SA Farmers Federation representing all pastoralists, and the government. These networks facilitated congruence between the conclusion of the Todmorden ILUA and the amendments to the PLMC Act.

5.3 Outcomes from the statewide process

The Todmorden ILUA was the first ILUA in SA involving a pastoral lease. It took two years to negotiate. Since then development of pastoral sector ILUAs has gathered pace in SA. A second ILUA was concluded in 2005 through local negotiations involving a different native title group, a template for pastoral ILUAs was developed by the Pastoral Side Table, and negotiations commenced in two other regions of South Australia involving multiple pastoral lessees within two native title claim areas. (Dixon et al 2005, Dixon and McKenzie 2005). Similar advances have been made in other sectors of the negotiations such as mining and local government, such that the statewide process is now characterised as having the potential to rapidly resolve native title claims throughout SA (Dixon and McKenzie 2005: 3).

It is misleading, however, to resort to a list of ILUAs as defining the outcomes of the statewide process. The enduring outcomes that will allow the ILUAs to be effective

in implementation are in the relationships formed amongst the negotiating parties, both locally and at peak industry body level. Participating parties identify broader benefits from the statewide process as including:

- the development of partnerships at many levels that will provide for improved economic and social outcomes for all communities into the future.
- better frameworks for sharing responsibility for land and water management
- better frameworks for recognition and protection of Aboriginal heritage

(Dixon et al 2005; Dixon and McKenzie 2005).

The statewide process has placed considerable emphasis on building relationships, ensuring that this occurs before negotiating parties enter into substantive discussions about issues. Relationship building, commitment to open communication, equity and collective ownership of the process, provide the foundation for mutual respect amongst the negotiating parties.

Establishing the process and sticking with it to the point where tangible outcomes are realisable has demanded persistence, strategy and innovation. These challenges are here discussed with particular reference to ALRM's role in the pastoral ILUA negotiations.

5.4 ALRM approaches

ALRM's engagement with other parties at the Pastoral Side Table, and in local negotiations, has progressively changed the perception that pastoral ILUA negotiations are a zero sum game where indigenous people only 'win' if pastoralists 'lose'. ALRM's approach to the negotiations has aimed to be reciprocal and mutual. This commitment to fairness for all parties is one of the core principles embedded in ALRM's vision from the start of its participation in the negotiations process and made increasingly explicit as the process has progressed (Agius et al 2004: 205). ALRM also recognized that relationships amongst people will determine whether agreements are a foundation for native title groups to achieve their goals or merely window dressing.

Seven broad headings were established by ALRM, NTMCs and Congress as indicative of the scope of the goals of the native title groups:

- recognition
- past injustice
- protection of important country
- access
- benefits (commercial and non-commercial)

- participation in government decision making, and
- resources to support the implementation of the agreements.

However ALRM recognized that all parties to the negotiations are actually seeking outcomes in relation to these headings.

One of ALRM's early initiatives was to propose the establishment of the Side Table on Relationships to Land and Water involving ALRM, government and all peak industry bodies. In establishing this forum Parry Agius of ALRM expressed the view that all parties to the SA statewide process have a relationship to land that they value, that is grounded in tradition and that they want recognised. By drawing attention away from the privileged position of its own clients in having the longest standing and the only 'indigenous' relationship to land, ALRM laid important groundwork for enduring relationships to be developed amongst the negotiating parties. The work of this Side Table has included developing guidelines for formal processes of relationship building between negotiating parties, and a glossary of key terms evolved through dialogue amongst Side Table participants about the meanings these terms hold for their constituents (Dixon et al 2004, Dixon and McKenzie 2005).

5.4.1 The impact of 'uncertainty' in pastoral negotiations

The overall aim of all parties to the statewide process to achieve 'certainty' has a particular resonance in the arid rangeland environment where SA pastoral leases are located, and in the advocacy of pastoral industry groups. The stochastic rainfall regimes of much of rangeland Australia make uncertainty pervasive for pastoral production. Uncertainty has also long been a major issue in relation to property rights in these environments. For Aboriginal people uncertainty has manifested in the difficulties they express in achieving secure and confident access to pastoral leases, notwithstanding legal rights of access for traditional pursuits. Some pastoralists and rural industry lobbies have long characterized pastoral lease tenures as uncertain, because of the limited property rights they confer. For pastoralists and for the state, uncertainty about pastoral property rights was heightened by the High Court's Mabo decision and compounded by the High Court's 1996 Wik decision, which first confirmed that native title and pastoral leases could co-exist at law.

The Wik decision led to some farming interests pursuing confrontational politics. Indigenous interests argued that co-existence was very workable, and that certainty for all parties could come through negotiated agreements. However some farmer interest groups, particularly the National Farmers Federation (NFF), argued that native title created intolerable uncertainty for the future of the farming industry. NFF's advertising campaign presented native title as a major problem for the rural community with doubts about security of tenure having a severe negative impact on

rural industry (NFF 2005). The solution advocated was to extinguish native title on pastoral leases[3].

The underlying philosophy driving these views was that native title is a barrier to the 'natural evolutionary progression' of property rights from limited term pastoral lease to exclusive possession leases or freehold tenures[4]. These views continued to be very strongly held and expressed by rural industry advocates while negotiations for the Todmorden ILUA were underway. They attracted renewed support when the Federal Court found in December 2002 that although native title could co-exist at law on the de Rose Hill pastoral lease in far north SA, the Yankunytjatjara native title group had not established the survival of their customs and traditions on the lease, such that native title no longer exists in practice[5].

The trajectory for private property rights in Australian rangelands to be progressively extended to enclose public and native title rights and interests would perhaps have been seen by many Australians as self evidently 'a good thing' under former productivist paradigms (Holmes 2002). But, as Holmes argues, these paradigms are now historic relics, superseded by the widespread recognition of non-market, post-productivist values of arid and savanna rangelands.

Arguably this value shift is not before time, as pastoral land use has very limited positive impact on the economy (Fargher et al 2003). Profit at full equity (a calculation of the return to land, water, capital and managerial skill from agricultural/pastoral activities) shows that pastoral land uses in arid Australia achieve marginal positive returns at best (Howard and Hajkowicz 2002). Any deal that benefits pastoralists at the expense of native title holders by extending their property rights could risk facilitating diversification into practices that have proved to be unsustainable in Australian rangelands - such as land clearing and cropping. This would impose further costs on taxpayers from land degradation (Damania 1998).

The spectre of uncertainty raised by the rural industry lobby in the aftermath of the Wik decision was actually without foundation in relation to pastoral uses of pastoral lease areas. This is because the High Court had in fact found that while both pastoral leases and native title may co-exist, pastoral leases prevail in the event of any inconsistency. Nevertheless the Australian government amended the NTA in 1998 to address the rural lobby's concern that native title was a barrier to diversification into non-pastoral activities on pastoral leases.

The 1998 NTA amendments provide for pastoral lessees' rights to be extended by the state beyond extensive grazing, the current dominant activity, without legally

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[3] Press release by NFF President, Donald McGauchie, dated 31 January 1997.

[4] NFF President McGauchie expressed this opinion in an interview on the 1997 ABC TV Four Corners program *Wik, the Law and the Land* .

[5] The judgement was later appealed by the claimants and the outcome is not finalised.

impacting on native title holders rights. The extension potentially includes any land use encompassed by the very broad definition of 'agricultural pursuits' used in taxation legislation, as well as farm stay tourism. Commitment by the SA government to ensuring sustainable use of rangelands makes most of the substance of the amendment largely irrelevant to SA pastoralists. However the amendment reduced the likelihood of native title claims providing any trigger for negotiations with pastoralists that might allow native title groups to bring forward their own goals.

The SA government's willingness to negotiate about native title, and ALRM's approach to the negotiations as a reciprocal and mutual process, were in stark contrast to the adversarial political climate generated nationally in the aftermath to the Wik decision. However the adversarial climate meant that ALRM has had to be innovative and strategic in relation to pastoral lease negotiations. This has been necessary in order to get pastoralists interested in negotiating, and in order to ensure that the negotiations pursued recognition of indigenous goals, rather than extinguishment of native title. Key elements that informed ALRM's approach to the negotiations and its input to the Pastoral Side Table are outlined below.

5.4.2 Building relationships

Throughout its central involvement in the SA statewide process, ALRM has taken the view that the foundational challenge is mutual recognition and acknowledgement and that achieving good process is the critical issue (Agius et al 2003). These principles have been applied in its own work with its clients, the native title groups, as well as with other parties to the negotiations.

ALRM has actively sought to understand the different perspectives of parties to the pastoral sector negotiations. It has used this understanding to identify how relationship building and institutional change can foster incentives for pastoralists to negotiate ILUAs while also achieving outcomes for native title groups. At the start of this effort ALRM Board members participated in a relationship building workshop with representatives of the SA Farmers Federation. Local scale negotiations between native title groups and pastoralists have also been preceded by joint field visits and informal meetings for people to get to know each other. The aim is that people develop rapport and respect for each other at a personal level, before starting to address substantive issues.

As the local scale negotiations developed at Todmorden, ALRM approached other pastoralists who are industry leaders. Informal discussions canvassed how native title affects pastoralists' interests, and how ILUA negotiations might contribute to resolving uncertainty or other issues. From such discussions, ALRM has developed an understanding of the challenges that pastoralists face in coming to the negotiating table. Family members need to be convinced that negotiation is the right approach and fears about not knowing how to talk to Aboriginal people need to be overcome. Complex documentation can readily be intimidating. These challenges are in fact very similar to those faced by native title groups.

At the same time as building such relationships, ALRM undertook a number of policy and research initiatives and progressively engaged other members of the Pastoral Side Table in considering their findings. These initiatives are summarised below:

5.4.3 'Secure Futures' framework

The ALRM framework for 'secure futures on pastoral country' gives balanced attention to Aboriginal, pastoralist and public interests and to external drivers impacting on the future of Australian rangelands. It draws attention to the tri-fold duty of care that operates on pastoral leases – a duty of care towards the land by pastoralists, native title holders, and the state acting in the public interest. Each stakeholder also has a duty of care in relation to each other's rights and interests. The framework emphasises the significant role of the state in managing public goods and services on leases. The state has a responsibility to the public interest as well as to native title groups and pastoralists. Thus, ALRM has argued, the state needs to be proactive in negotiations about pastoral ILUAs, rather than seeing its role as facilitating and supporting agreements that pastoral and indigenous interests may reach.

5.4.4 Reciprocal planning model

This conceptual procedural model canvasses the interests of pastoralists and native title holders in relation to property management planning. It draws parallels between the business interests of pastoralists (in relation to their enterprises) and those of native title groups (in relation to their customary law and culture). It establishes that both groups have matters related to their business where confidentiality is required and sets out a planning process to facilitate both groups pursuing their business interests on the same land.

The approach unsettles the privileged attention accorded to native title groups, as holders of 'secret' cultural information, and to pastoralists, as having interests that are of paramount importance because they are commercial. The issue of 'secret' cultural information is a common stumbling block in making agreements about land use. Pastoralists express willingness to help ensure heritage sites are protected from damage, but frustration that they do not have information about the location and significance of the sites that would allow them to do so. In practice the building of relationships between pastoralists and native title groups catalysed by the statewide process is leading to trust and sharing of key information. The reciprocal planning model offers a more formalised process where necessary, such as for conflict resolution, which was the context where it was first piloted by ALRM in the Flinders Ranges in 1996.

5.4.5 Incentives from changed pastoral property rights

ALRM commissioned rangeland geographer Emeritus Professor John Holmes (1992, 1996, 2000, 2002) to give expert advice on what potential changes to property rights and duties of pastoralists could provide incentives for pastoralists to negotiate ILUAs,

taking into account the rural industry lobby's views about the uncertainty caused by native title. Together with other initiatives this advice informed ALRM's role in the Pastoral Side Table's development of proposals to amend the PLMC Act.

Holmes observed that SA was breaking new ground in addressing co-existence of indigenous, pastoralists and the public interest, and there were no external models for guidance. Resource contexts and institutions in other countries are very different to those of SA. Also SA's PLMC Act, with its strong focus on sustainable management and public interests, had already provided a model for reforming pastoral institutions in other Australian states. Holmes considered that any reforms in SA that would grant freehold title or exclusive possession to pastoralists would be unsound public policy even without taking indigenous interests into account. However some changes to the PLMC Act in relation to issues such as liability and trespass might help provide incentives for pastoralists to negotiate ILUAs without significantly altering pastoralists' property rights.

5.4.6 Pastoral financiers' perspectives

ALRM researched the views of rural sector managers of those financial institutions engaged with pastoral businesses in SA in order to better understand the impact of risk and uncertainty on pastoral businesses. The research found that neither pastoral lease tenure nor native title have much influence on financiers' decisions about lending money to pastoral businesses since pastoral financiers consider they do not result in any significant uncertainty for pastoral businesses. However there are other reasons why financiers may be wary about lending money to pastoral enterprises such as the risk of overcapitalisation in the arid environment of SA rangelands.

Through these initiatives, ALRM formed the view that any uncertainties that native title and other indigenous rights and interests may present for pastoral businesses can be effectively managed through relationship building, planning, negotiations, the establishment of new operational rules through ILUAs and some targeted changes to legislation to allow such operational rules to be effective. These strategies and the commitment of leading pastoralists to enter ILUA negotiations have progressively dissipated the political impact of the confrontational rural industry lobby.

5.5 On going challenges

In SA institutional change is addressing uncertainty about the co-existing property rights of pastoralists and indigenous people and resolving issues important to both sets of stakeholders in multiple use landscapes. The SA experience highlights the importance of institutional change at both local and broader scales in achieving these outcomes. In the Todmorden ILUA, the pastoralist, native title holders and the state have negotiated operational rules to govern their conduct in relation to each other's interests in the lease. The state has amended legislation to enable effective operational rules to be negotiated in that collective choice situation.

This polycentric process of institutional change, accompanied by strong attention to fostering and building relationships between negotiating parties, is leading increasing numbers of pastoralists and native title groups to enter into ILUA negotiations. The approach has been effective in harnessing leadership for change and in being responsive to local actors' authority, concerns and accommodations about co-existing rights and interests. Key factors that have helped to make it successful include:

- a resourced presence at the table of industry peak bodies as well as other actors
- local negotiations being pursued where parties want to develop relationships and talk together, rather than being driven by a need to resolve specific local or broader conflicts
- a focus on involvement of native title groups directly, not only through professionals representing their interests
- commitment of peak bodies involved to dialogue and to understanding each others' issues and interests
- leadership and innovation from peak body representatives, the independent chair of the process, and SA government ministers
- effective knowledge management within the process – tracking key issues and proposals, by peak bodies with their constituents, with the media and with professional peers.

This is not a trivial or cheap exercise. It costs several million dollars annually across all industry sectors. All parties need to be resourced in order for the process to proceed and at various times discontinuities in funding to one or other of the parties have stalled the process. The process is also demanding of skills and innovation in approaches to entrenched issues and interests. However it is not only cheaper than the likely cost of litigation but, unlike adversarial strategies, is providing opportunities to develop partnerships for improved economic and social outcomes into the future.

In spite of these outcomes, marginalisation of native title holders in political and economic geographies presents significant barriers to them securing commercial benefit from most of the resources on land within pastoral leases. If multiple use management on pastoral leases is to be truly responsive to indigenous social and economic goals, then native title groups need to be able to exclude others from commercial use of unallocated non-pastoral resources. This would give native title holders some leverage for achieving their own land use and economic aspirations and help build pathways to reduce the significant disparities in wealth between indigenous and non-indigenous people in remote regions. Arguably sustainable improvements in health and well-being amongst indigenous people in pastoral regions will not be achieved without a reduction in the large differences in income levels between indigenous and non-indigenous populations (Wilkinson 1996).

However the reality of other political and economic interests means that recognition of native title groups as holding rights to commercial use of non-pastoral resources will prove difficult. They are likely to achieve rights to develop cultural tourism, focused on indigenous heritage and landscapes. Since tourism developments often have multiple components, this right will provide incentives for other parties to negotiate with native title groups to joint venture for new tourism developments. However in order to gain leverage for any significant economic and social outcomes, native title groups are likely to be seeking stronger property rights than this. These could, for example, involve a 'right to negotiate' about pastoralists or other parties' use of non-pastoral resources, similar to what native title groups have now for mining tenements. Achieving this continues to be a very challenging issue.

6 A valuable role for commons research

As a body of empirical and theoretical work 'commons research' (Ostrom et al 2002) provides a valuable standpoint for reflecting on the progress and outcomes from the SA statewide native title negotiations process and understanding its effectiveness. However it has very had little direct impact on the process as its precepts and analytical approaches are not at all widely known amongst the people involved. This is partly explained by the fact that legal argument dominates in almost all Australian analysis of native title, its nature, impact and implications. Practitioners and analysts who are contributing most strongly to commons research in Australia[6] tend to be little involved with issues for indigenous people and not very familiar with the cultural context of these issues.

In contrast to the typical dominance of legal perspectives in native title, ALRM has approached the SA process with the aim of putting people first. It has had a specific concern that decisions about native title are the responsibility of native title holders themselves, not ALRM or technical or legal advisers (Agius et al 2004: 204). Commons research provides insights and guidance on the challenges involved.

It has been important, as Adams et al (2003) argue, to understand that the origins of conflict arise at a deep cognitive level, related to differences in knowledge, understanding, preconceptions and priorities amongst stakeholders, not just differences in material interests. Hence "policy dialogue needs to be structured so that differences in knowledge, understanding, ideas and beliefs in the public arena are recognized" (Adams et al 2003: 1916). The key to this in the SA native title negotiations has been the focus on dialogue amongst peak bodies as well as local actors, and on building relationships.

Native title groups are crafting new institutions for common property resource management. Their basis is indigenous customary law but the action situations they

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[6] Eg Brunkhorst, Marshall (2005), Connor and Dovers

are engaged in are new. They are needing to make decisions about the extent to which customary norms are feasible, appropriate or sufficient for their governance. The development in SA of the Congress of Native Title Management Committees as a nested institution for native title governance is unique in Australia to our knowledge. Among other things it provides a forum for native title groups to transmit information amongst themselves about what is working or not working well in particular situations, helping to extend the positive impact of local institutional innovation.

Ostrom's (1990) design principles for effective self governing institutions present an agenda for the development of these new institutions. Particular challenges they face are the establishment of a fair system relating inputs by native title group members to benefits obtained, effective monitoring and enforcement of graduated sanctions and conflict resolution. The nature of such challenges are highlighted by the spatially dispersed membership of many native title groups and limits on their resources and those of Native Title Representative Bodies such as ALRM (ATSISJC 2004).

ILUAs are new co-management institutions. In the pastoral sector, such as is considered in this paper, they are contributing to the evolution of management institutions along the spectrum that Hanna (1997) describes from 'frontier' to 'commons'. In this evolution there has been an institutional shift from undefined access to the resource by 'indigenous people' to access being limited to users sanctioned as legitimate by the native title group. This was achieved by legislative change, representing the 'constitutional' level (Ostrom 2005: 58ff) of the polycentric structure of the SA native title negotiations process. Property rights for the pastoralist are unchanged at law, but the new institutions limit the likelihood of pastoralists simply capturing any newly identified resources. Instead institutions are directed at maintaining pastoralists' stable access to the resource system coordinated with that of native title groups and the public interest.

Hanna (1997) makes the point that the skills and traits of people who are successful in 'frontier' conditions are different to those needed for sustainability. On the frontier individualistic, development-orientated risk takers are successful, whereas sustainability is promoted by characteristics of commons institutions: aversion to the risk created by natural variability, a long term commitment to the resource, and an orientation to stewardship. It is notable that the pastoralists who have become involved in the development of ILUAs in SA are amongst those with a long standing public commitment to sustainable resource use. In assessing the effectiveness of pastoral ILUAs over time, one appropriate measure will be the emergence of norms and rules for sustainable resource use that are shared by pastoralists and native title groups.

The gathering pace of agreement making in SA will stretch resources available to support and monitor their implementation. Practical tools developed from commons research could help. The impact of commons research is limited by the paucity of

practical tools that translate its theory and the empirical research on which it is based for the actors involved in policy forums and locally based development of new institutions.

Ostrom (2005: 271) provides "a good beginning" for this task in translating design principles into questions for local resource users to consider[7]. More development and use of practical and educational tools would facilitate the development of a shared set of concepts and vocabulary amongst the people involved in SA agreements, encouraging them to reflect together on success and limitations. This would contribute to the agreements becoming cornerstones of adaptive systems for sustainability. We expect there are many other places, where institutional change is much harder to realize than it is in Australia, that would also find application and benefit from such tools.

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[7] The video on 'Crafting institutions for sustainable irrigation management' (Workshop in Political Theory and Policy Analysis, Indiana University, 1992) is also valuable. Indigenous people in Australia with experience in community governance find much to relate to in its presentation of the design principles, in spite of its resource use context being very different to their own experience.

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