Chapter 11

Native Title and Contemporary Agreement-Making in Australia: A de facto Treaty Process?

I. ILUAs: what, who, and why?
II. The agreement-making process
III. Managing native title – the philosophy of agreement-making
IV. Conclusion – a treaty by any other name?

Formal agreement-making between Aboriginal and non-Aboriginal people has been taking place in Australia for more than twenty years. This move towards ordering relations by consent rather than domination is undoubtedly a positive one. Some observers have even drawn an analogy between current agreement-making and Aboriginal-state treaties.\(^1\) Having looked into treaty theory, and the nature of treaty practice in another jurisdiction, I now contextualise agreement-making in Australia. In particular, I focus on the type of agreement

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that has been most directly advocated by the state, that is, the Indigenous Land Use Agreement, or ILUA. While a multitude of agreements of various types are being concluded outside the native title regime, I focus on ILUAs to test the emergence of a people-to-people relationship consistent with claims that these forms of agreements represent ‘treaties by any other name’.

I. ILUAs: what, who, and why?

Negotiated agreements between Aboriginal peoples and others have been a part of the Australian political scene at least since the first agreements were struck in the Northern Territory in 1978.3 While the idea of agreement-making with Aboriginal peoples has been around for more than two decades, it has been given new impetus following the recognition of native title in 1992, as well as international trends away from continued denial of Indigenous rights to and in land. There now exists a growing literature on the subject of negotiating agreements between Aboriginal and non-Aboriginal peoples, particularly in the context of commercial resource agreements, as well as those concerning joint management projects such as national parks.4 A good working definition of the concept was provided in 1994 by

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2 Marcia Langton and Lisa Palmer of the University of Melbourne are currently compiling a comprehensive database of agreements in Australia. See http://www.indigenous.unimelb.edu.au/arns
3 In November 1978 two agreements were signed between representatives of traditional owners, the federal government and the National parks and Wildlife Service. These were the Ranger Agreement, and the Kakadu National Park Memorandum of Lease. Marcia Langton and Lisa Palmer, 'Modern agreement-making in Australia: Issues and trends', Discussion paper prepared for AIATSIS, 11/11/02, p.3.
Diana Craig and Peter Jull. They suggested: 'a regional agreement is a way to organise policies, politics, administration, and/or public services for or by an Indigenous people in a defined territory of land (or of land and sea).'

Immediately the broad nature of regional agreements is apparent. They may come about anywhere Indigenous peoples may have an interest in a particular territory, and these interests need to be regulated in the face of co-existing, or competing, non-Indigenous interests. In settler societies, this refers to most land, and perhaps all land that is commercially viable. Given this situation, some states have begun moves to enter into comprehensive regional framework or statewide agreements. While I will address the concept of regional agreement, my primary focus remains on ILUAs. A member of the National Native Title Tribunal (NNTT) recently defined ILUAs thus: 'ILUAs are voluntary agreements between people who hold, or claim to hold, native title in an area, and people who have, or wish to gain, an interest in that area.'

Again, the potential breadth of ILUAs is evident. The immediate difference between regional agreements and ILUAs is the requirement of the latter that the Indigenous party to the agreement be a native title holder or claimant. The implications of this are discussed below, but it should be noted that this has the important effect of limiting the use of ILUAs to those peoples who have maintained some connection to traditional lands.


Craig and Jull, cited in Sullivan, *op cit.*

6 South Australia is currently furthest down this track. See http://www.iluasa.com/ which documents negotiations in this state. The site (and the negotiations) are a joint initiative by the Aboriginal Legal Rights Movement, the South Australian Government, the South Australian Farmers Federation and the South Australian Chamber of Mines and Energy.

7 Wade, *op cit.*
Sullivan suggested the primary stimulus for the negotiation of Indigenous Land Use or Regional Agreements was the recognition of native title, and there is no doubt about the strong relationship between the recognition of title in Mabo, and the trend towards agreement-making. Despite this, the original Native Title Act (NTA) only made what deputy-president of the NNTT Hal Wooten described as a ‘cryptic’ reference to negotiated agreements. Section 21(1) of the NTA 1993, stated:

Native title holders may, under an agreement with the Commonwealth, the State or the Territory:
(a) by surrendering the native title rights and interests in relation to land or waters of the Commonwealth, the State or the Territory (as the case may be) extinguish those rights and interests; or
(b) authorise any future act that will affect their native title.
While subsection 4 suggests:
4. Subsection (1) does not prevent agreements mentioned in that subsection being made by native title holders on a regional or local basis.

What is not cryptic is the fact that agreement-making was explicitly raised in the context of surrendering native title, rather than negotiating its continuity and coexistence. Native title could be surrendered on a regional or local basis, or acts affecting native title could be authorised on a regional or local basis. Reference to regional agreements was also made in the preamble to the NTA which suggested governments should, ‘where appropriate, facilitate negotiation on a regional basis’. Prime Minister Keating’s second reading speech contained the reference: ‘The bill recognises further, that there may be cases where regional negotiation

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8 Sullivan, *op cit*, 3.
10 *Native Title Act 1993 (Cth).*
is the most efficient way to resolve conflicts over land use for large areas.'\(^{12}\) The fact that the NTA contained any reference to agreement-making at all was due to the lobbying of Aboriginal leaders who wished to replicate beneficial outcomes of negotiation elsewhere, particularly Canada.\(^{13}\)

Enhancement of the provisions relating to agreement-making was the least controversial aspect of the 1998 process of amending the NTA.\(^{14}\) The National Indigenous Working Group called for agreement provisions that provided a ‘flexible, simple, efficient and certain alternative to the costly claim-based processes’.\(^{15}\) While the new provisions retained the flexibility of the former Act, it is difficult to describe them as ‘simple’. The extent to which they provide a real alternative to the claims process will be examined below.

The Native Title Amendment Act (NTAA) created three types of ILUAs which differ as to subject matter and those who may be a party.\(^{16}\) These are:

i. A Bodies Corporate Agreement – this must be with registered Native Title Body Corporate (the Prescribed Body Corporate) for whole area; the native title must be determined and holders identified;

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\(^{11}\) Wooten, \textit{op cit}, p.69.


\(^{16}\) \textit{Native Title Amendment Act 1998 (Cth)}, Part 2 Division 3B,C and D.
ii. An Area Agreement – for an area where native title has not yet been determined, the type most commonly used thus far; this includes a new class of people, the ‘native title group’; and

iii. An Alternative Procedure Agreements - providing a framework for other agreements about native title.\(^\text{17}\)

In a role somewhat analogous to the British Columbia Treaty Commission, the NNTT is not a party to agreements, but can be regarded (in BC terms) as ‘the keeper’ of the ILUA process. The tribunal is an impartial body whose role is to facilitate such agreements by providing assistance to participants, particularly by acting in the role of mediator between Indigenous and other interests. Unlike the BCTC, which emerged as the result of trilateral discussion between Federal and Provincial governments and Aboriginal peoples in Canada, the NNTT was born via the Commonwealth’s native title legislation,\(^\text{18}\) which also allowed for the states to set up their own arbitral bodies.\(^\text{19}\) ILUAs must conform to this legislation, as well as to the Native Title (Indigenous Land Use Agreements) Regulations 1999,\(^\text{20}\) which has specific requirements for an agreement to become entered upon the NNTT registry of agreements. Once the agreement appears on the register, the ILUA has the effect as if it were a contract, with all existing and potential native title holders bound by it.

As at 9 October 2002, the figures on registered ILUAs were as follows:\(^\text{21}\)

| Total number of registered ILUAs in Australia | 54 |
| Area Agreements                              | 49 |
| Body Corporate Agreements                    | 5  |

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18 *Native Title Act 1993* (Cth), s.107.
19 To date the only state to exercise this option has been South Australia, who has set up an alternative right to negotiate scheme covered by a number of acts, including the *Native Title (South Australia) Act* 1994, and the *Land Acquisition (Native Title) Amendment Act* 1994.
20 These can be found at http://scaletext.law.gov.au/cgi-bin/download.pl?/scale/data/pastereg/3/1571
Total number of registered ILUAs per state/territory:

<table>
<thead>
<tr>
<th>State/Territory</th>
<th>Number</th>
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<tbody>
<tr>
<td>Queensland</td>
<td>32</td>
</tr>
<tr>
<td>Western Australia</td>
<td>1</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>9</td>
</tr>
<tr>
<td>Victoria</td>
<td>7</td>
</tr>
<tr>
<td>New South Wales</td>
<td>4</td>
</tr>
<tr>
<td>South Australia</td>
<td>1</td>
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One of the biggest advantages of ILUAs is the potential for a wide array of matters to be included for negotiation. In fact, Smith suggested that as with treaties, the content of ILUAs is entirely at the discretion of the parties involved. Sulliv22 listed the potential benefits of ILUAs as including:

- avoiding the cost of native title compensation claims, and the cost of defending them;
- achieving progress in a shorter time;
- both sides gain ‘political credibility’ by showing the ability to put aside ideology for sake of coexistence;
- complex outcomes, such as conservation, may be more easily negotiated rather than litigated;
- reducing uncertainty which inhibits planning; and that
- building in continuing Indigenous control may be better than winning title, but lacking power.23

It is fair to say that the reality of completed agreements has yet to live up to their potential.

The subject matter of agreements either concluded or currently under negotiation has covered

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22 Diane Smith, ‘Finding a way to just and durable agreements’, p.6.
23 Sullivan, op cit, p.5.
a range of subject matter, but has tended to concentrate on matters more obviously important to non-Indigenous interests. Thus agreements have covered matters of access (6), consultation protocol (4), development (6), extinguishment (4), and government (5); but the vast majority have dealt with infrastructure (20), and mining (21).\textsuperscript{24}

Potentially, one of the most important uses for ILUAs concerns the exercise of native title rights. While the Federal Court makes a determination as to the existence of native title, it does not determine either the scope of rights which attach to such a finding, or the way in which such native title rights will interact with other private and commercial rights to land and resources, or Commonwealth and state regulatory regimes. This regulation of competing rights could be facilitated by ILUAs in that they involve recognising native title claimants as having a legitimate interest in land. This must be accommodated through a process of negotiation rather than mere consultation. This would appear to be in line with the stated aims of Prime Minister Keating's native title legislation, which included not just the facilitation of development, but also the recognition and protection of native title.

The concept of agreement-making has emerged to take up a central position in the negotiation of Indigenous-state relationships. This significance was evident as early as 1996 when a meeting of peak Aboriginal and industry bodies endorsed negotiation as the favoured means of managing relations between competing interests in land. They resolved that 'voluntary agreements about native title and the use of traditional Aboriginal and Torres Strait Islander lands and waters are the preferred option for resolving Indigenous land use issues and native

\textsuperscript{24} Langton and Palmer, \textit{op cit}, p.18.
title claims'.

This reflects a widespread commitment to negotiation, at least if the rhetoric of various parties is to be believed. Attorney-General Daryl Williams suggested that one of the government's main objectives in proposing amendments to the 1993 NTA was to facilitate the negotiation of ILUAs. The potential for negotiated agreements to benefit Aboriginal peoples has been noted by a number of commentators. It has been seen as a mode of self-determination, with many specifically pointing out the potential of ILUAs to substantially alter the relationship between Aboriginal and non-Aboriginal Australians. The popularity of the concept has seen it likened to a 'magical formula' for managing Indigenous and non-Indigenous relations. However, it may be more accurate and useful to suggest, as Lane and McRae do, that the Mabo decision produced 'a new set of rules' for the relationship between Aboriginal and Torres Strait Islander people and other Australians. One of those rules now means that Indigenous interests in land must be taken account of, not as a matter of grace and favour as in the past, but as a matter of law. Mabo, and the negotiating processes that followed it, thus open up the space for a new relationship between Aboriginal and non-Aboriginal peoples based on recognition of the inherent rights of Aboriginal people. However, the extent to which this new set of rules facilitates this new relationship will be dependent on the way these rules are approached. I now investigate agreement-making under native title from the

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26 Daryl Williams, 'Native Title and Reconciliation', paper presented to Native Title in the New Millennium, Native Title Representative Bodies Legal Conference, 16-20 April 2000. Conference CD Rom.
27 Marjorie Thorpe, 'Reconciliation, Good Governance and Native title', paper presented to Native Title in the New Millennium, Native Title Representative Bodies Legal Conference, 16-20 April 2000. Conference CD Rom.
29 Noted by Patrick Sullivan, op cit, p.2.
30 Patricia Lane and Tony McRae, 'Sustainable Partnerships', in Meyers, (ed.), In the Wake of Wik, p.412.
perspective of both process and philosophy. The potential for the recognition of native title to transform relations between Aboriginal and non-Aboriginal peoples will be limited by the extent to which the agreement-making process is driven by a philosophy which seeks to limit and constrain Aboriginal rights in and on land, rather than seek a broad recognition of rights such as self-government.

II. The agreement-making process

Even given the broad scope of ILUAs negotiated under the NTAA thus far, two general points can be made. Firstly, the vast majority of agreements have been made to facilitate 'future acts', that is, any activity (but particularly mining or prospecting) on lands that may be subject to a native title claim.31 Secondly, and related to this first feature, is the fact that agreements thus far have not primarily sought to address broad political issues of Aboriginal self-government and jurisdiction. This trend is reflective of a situation where it has been private industry rather than governments that have thus far been the biggest users of the negotiation process provided under the NTA.

The role of government and industry

Opposition to the Mabo decision was both loud and long.\textsuperscript{32} Chief among those who reacted negatively to the belated recognition of Aboriginal rights to land were those who perceived their interests to be directly threatened, such as mining and resource industries. Yet within just a few years of the High Court's decision, a new pragmatism emerged amongst industry heavyweights which recognised the reality of having to deal with Aboriginal peoples in order to maintain development. Whether they liked it or not, industry generally came to recognise the fact that they would have to negotiate with Aboriginal peoples not according to their own good will, but on the basis that their inherent rights had been recognised by the common law.

A number of commentators have noted what one member of the NNTT described as a 'paradigm shift' in the attitude and practice of industry.\textsuperscript{33} Hal Wooten contrasted the unwillingness of government to get involved with the openness of mining companies who were willing to treat the 'technical absence of native title as the irrelevance it should be' and proceed to negotiations. He went as far as to suggest that if government had been as positive as mining companies, the NTA may have yielded more tangible results.\textsuperscript{34} In obtaining benefits from negotiated agreements with mining companies, a number of myths have been laid to rest. Chief among these have been the one dimensional, stereotypical views the parties may have previously had of one another. Miners and others have come to see that Aboriginal peoples are not always opposed to mining on principle, and often seek the economic empowerment that


\textsuperscript{33} Sean Flood, 'Native Title: The Right to negotiate – Common law right or right conferred by statute?', in Meyers (ed.), \textit{Implementing the Native Title Act}, p.85.

\textsuperscript{34} Hal Wooten, 'Some thoughts on native title and doing business', in Gary Meyers (ed.), \textit{Implementing the Native Title Act}, p.47.
comes from development, particularly when they have a degree of control over what happens on their traditional lands. On the other hand, as private industry has provided employment, education and other benefits as part of agreements, Aboriginal people have been forced to reassess a view of industry as simply out for profit. The process of negotiating ILUAs, even those primarily concerned with relatively localised economic projects, have thus contributed to improved relationships through increased dialogue.

This pragmatic willingness of industry to negotiate agreements can be contrasted with a relative lack of interest by governments. In general, neither state nor federal governments have taken a prominent role in facilitating the negotiation of land use agreements by Aboriginal and other peoples.35 One reason for government intransigence may be that, as Wooten suggested, relevant to the central issue of the recognition of native title, it often boils down to a question of whether claimants can convince government their claim would succeed in court.36 In a situation with a number of similarities to the BC treaty process, governments may be preferring a ‘reactive’ rather than proactive role, believing a legal process Aboriginal people find onerous, protracted and expensive is not much of a stick to get them to the negotiating table. Interestingly, in speculating as to the future of the Australian native title process, the late Aboriginal activist Rob Riley used exactly the same phrase Gursten Dacks had used to describe the BC process – a ‘war of attrition’.37 Just as Dacks suggested Canadian governments made a strategic decision post-Delgamuukw to maintain their intransigence, so too may Australian governments see little immediate need to avoid the courts and negotiate

35 Notwithstanding the apparent shift towards a more ‘comprehensive’ approach via statewide negotiations. See note 6. Having said that, the South Australian government still fights native title claims in the courts. See De Rose v State of South Australia [2002] FCA 1342 (1 November 2002).
prior to judicial recognition of title post-Mabo. There remains some doubt as to just how much 'leverage' the recognition of native title affords Indigenous peoples, particularly in the face of continued state attempts to constrain such rights even as they are recognised. Peter Yu, formerly of the Kimberley Land Council, suggested the absence of a state government policy and administrative framework for negotiated agreements is the major obstacle to their advancement in Western Australia, both regionally and locally. 38

Even if governments have not made a calculated decision to remain largely outside the native title agreements process, the fact that it has been industry rather than government driving the process has a number of implications. While important material benefits are provided by companies, there are certain forms of recognition that can only be provided by governments. As President of the Minerals Council of Australia, Jerry Ellis suggested, agreements that envisage some form of governance by Aboriginal people are 'matters for the Federal, State and Territory governments'. Self-determination and self-government 'is not something that mining companies can confer. This is a matter for governments and the general population.' 39 However, even in the process of recognising native title and negotiating competing interests in land, governments have not taken up the matter, but have preferred a narrower interpretation of the potential of ILUAs. Illustrative is the position of Peter Conran, then secretary to the Chief Minister of the Northern Territory. He suggested any agreement that included the element of 'political autonomy' was 'most unlikely' to succeed. He felt that 'rather than trying to address all the social and economic aspects of an area, we have found a focus on

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...I can't see any other objective scenario than a protracted, stubborn, unscrupulous 'war on attrition'." [sic] p.311.
commercial opportunities' to produce the best result. But for Aboriginal people attempting to obtain state recognition of their economic and political rights in land, it must be asked for whom this result is best?

Ciaran O’Fairchellaigh has noted the concentration on the commercial (and, I would add, the contractual) at the expense of the political in contemporary Australian agreement-making. In even stronger terms, Patrick Sullivan suggested:

One dimension of Aboriginal rights that commonly goes astray when we discuss land rights or native title rights is the political right of self-governance that is, or should be, bound up with concepts of land rights...the political dimension has been stripped from current theories of Aboriginal land use and ownership.

Assisted by the limited role of government, the political dimension has also, I would argue, been stripped from the current agreement-making process in Australia. Or, perhaps more accurately, given the embryonic nature of the process, it has yet to be included. The continued lack of political recognition afforded Aboriginal people through the agreement process means their status with respect to other Australians is largely unchanged. The potential remains for them to continue to be at the mercy of 'an ever expanding labyrinth of state legislation with respect to native title'. Thus, despite the catchcry for 'certainty' in land dealings (again,

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43 But compare Langton and Palmer who argue the trend toward agreement-making represents the establishment of ‘new legal and political relationships’ between Indigenous peoples and governments, with ‘de facto’ recognition of Indigenous sovereignty. op cit, pp.30-31.
mirroring the BC treaty process), it appears the Land Use agreement process as it currently operates under native title legislation favours some certainty over others. Piecemeal – and often confidential – commercial agreements do not allow for Aboriginal people to maximise the potential for political and cultural control.\(^{45}\) Non-Aboriginal interests are guaranteed certainty by the fact that once an agreement is registered, all native title claimants are bound by the agreement, as if by contract. Kee notes that, at this stage, the much-vaunted ‘flexibility’ of the process is at its lowest ebb in respect of Indigenous concerns, but at its greatest in respect of certainty for future land management – so desired by non-Aboriginal interests.\(^{46}\) Also with respect to ‘certainty’, it remains to be seen whether ‘third parties’ (economic interests that may buy into a mining concern, for example) will themselves be bound by undertakings given by previous developers. Aboriginal peoples may then find themselves bereft of both their land, as well as the benefits ‘guaranteed’ by a departing developer.

In his study of agreements concluded between mineral companies and Aboriginal communities, O’Faircheallaigh addressed this issue of Aboriginal reliance on the word of companies. He found Aboriginal communities were able to maximise their benefits where mining companies were obliged by legislation (such as the \textit{Land Rights Act (Northern Territory)}\(^{47}\)) to gain Aboriginal consent before proceeding with exploration. He concluded that:

\begin{displayquote}
Legislative recognition of indigenous land rights in a form which provides indigenous Australians with some form of statutory control over mineral development is crucial in allowing them to achieve substantial benefits from mining. Reliance on the cooperation and goodwill of companies, or governments, does not offer an adequate alternative.\(^{47}\)
\end{displayquote}

\(^{45}\) Kee, \textit{op cit}, p.351.
\(^{46}\) ibid, p.349.
Even in the agreement process then, Aboriginal people continue to rely on the limited protection afforded them by state legislation. Wooten suggested that the ‘moral weight’ of native title may come to have ‘important political effects’. But, as we have seen, non-Aboriginal people in power have only rarely acted under a moral imperative, and often grudgingly under a legal one. Thus, under the current regime the consideration of native title – and the exercising of jurisdiction on those lands – is to be considered as part of the ‘mainstream management of land in Australia’. And, as the Attorney General Daryl Williams reminds us, ‘the primary responsibility for land management has always rested with the states and Territories’. These jurisdictions have, at best, a chequered history in terms of recognising and protecting Aboriginal rights. Justice French described the limited basis of the ‘rights’ even when they are conferred by regimes such as the LRA(NT), South Australian land rights legislation, and even the 1967 referendum. He argued,

being effected by statute and referendum respectively, they had the stamp of democratic legitimacy about them. They represent, however, not so much the recognition of rights as their creation and their creation as a kind of grace and favour act by government.

In this context, questions arise with respect to two key issues. With native title acting as the key leverage Aboriginal people can use to get government to the negotiating table, its conception is critical. Can the statutory regime by which both native title and ILUAs are negotiated allow Aboriginal people to maximise their say on traditional lands? And related to this issue, once Aboriginal people make it to the negotiating table, are they negotiating on anything like an equal basis?

49 Daryl Williams, ‘Native Title and Reconciliation’, Native Title in the New Millennium, Conference CD Rom.
50 This includes the Aboriginal Land Trusts Act (SA) 1966, the Pitjantjatjara Land Rights Act (SA) 1981, and the Maralinga Tjarutja Land Rights Act (SA) 1984.
Negotiations, identities, interests

There is no getting away from the immense complexity of intercultural negotiations involving different identities bound up in land. As such, any process of trying to reconcile Indigenous and non-Indigenous interests is to expect difficulty. A number of authors have commented on the theoretical and practical difficulties of conducting negotiations in this context. Yet it has been agreed by all parties that negotiation is to be favoured over litigation in resolving disputes between Aboriginal and non-Aboriginal peoples. The High Court suggested:

If it be practicable to resolve an application for determination of native title by negotiation and agreement rather than by judicial determination of complex issues, the court and the likely parties to the litigation are saved a great deal of time and resources. Perhaps more importantly, if the persons interested in the determination of those issues negotiate and reach an agreement, they are enabled thereby to establish an amicable relationship between future neighbouring interests.

I am most sympathetic to the approach suggested by the Court. What I wish to focus on here is the extent to which the current land use negotiation process can facilitate the appropriate recognition of Aboriginal status, and therefore the truly ‘amicable relationship’ that I have argued is necessary in the long term.

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The process of negotiation employed by the NNTT is that of 'principled negotiation'. Under this approach, the 'rights' of each party are to be put aside, with the focus placed on interests – both their own, and those of the other party. As Justice French suggested in the introductory noted for the historic first mediation conference at the Wellington (NSW) Town Hall on 14 May, 1994:

We try to separate the people from the problem. The problem is to reconcile, as far as possible, the various interests that you all have in an agreed outcome.54

In one sense, the recognition of Aboriginal peoples as having a legitimate interest in land is a great step forward. It has only been possible since the Mabo decision to view Aboriginal peoples in this light – that of holding a legitimate legal interest in land. Yet, as I have argued throughout, Aboriginal peoples have consistently sought recognition of a status that goes beyond that of merely another interest. Principled negotiation potentially works against the recognition of rights such as to self-government. Mary Edmunds suggested this model of mediation which reduces Aboriginal interests to the same as any other group ‘reduces the special character of native title’ in terms of both the High Court and NTA definitions.55 I would argue that ‘special character’ refers to the strength of the Aboriginal relationship with land that goes beyond a mere interest toward a sense of (collective and individual) self. This suggests the mediation process surrounding native title needs to explicitly recognise itself as an ‘identity oriented process’ not just an interest based one.56 For many Aboriginal people, Kado Muir suggested:

Native title is not about land access, not about process. Native title is about people, the Indigenous people of Australia. It is about our right to be a people, to have an identity, to practice our beliefs and to create our future.57

At a pragmatic level, any process of negotiation which fails to even attempt recognition of the unique nature of the Aboriginal interest retains the potential for enforcing the acceptance of lesser rights and benefits than the Aboriginal parties are due.58 There is no doubt Aboriginal people are aware of this potential. Monica Morgan of the Yorta Yorta people pointed to the limitations of a process which views Aboriginal peoples only as ‘just another interest’. She said:

We are participating on management boards, but we believe these operate at an unsatisfactory tokenistic level. We seek negotiations with the Government to correct these problems. We are not being seen or heard as the Indigenous people; Government see us as just another group in the community. So the recognition we seek relates to participating in the management of our country.59

Furthermore, a number of differences can be identified between a ‘mainstream’ dispute resolution model, and an alternative Aboriginal dispute resolution process.60 Indigenous negotiator Parry Agius suggested the former concentrated on processes such as adjudication, arbitration, mediation, independent expert appraisal, early neutral evaluation and issues identification. These are all present in the NNTT approach. On the other hand, the ‘Aboriginal’ process included elements such as the social matrix system, personal relationships, community dynamics, local Aboriginal history, Aboriginal social structures, current Aboriginal political issues and peak Aboriginal bodies and other Aboriginal players.61

60 See also Behrendt, Aboriginal Dispute Resolution, op cit.
61 Parry Agius, ‘Dispute Resolution prior to application: the role of representative bodies’, in Paul Burke (ed.), The skills of native title practice; proceedings of a workshop conducted by the NTRU, AIATSIS, the Native Title
Pointing out Agius’ identification of alternative systems is not meant to suggest any irreconcilable gulf exists between two mutually exclusive ways of being. In any case, members of the NNTT have shied away from any suggestion that their model represents some universal ideal, instead recognising the cultural specificity of mediation, as well as suggesting Europeans may never come to fully understand the Aboriginal relationship to land. It is likely to ultimately improve communication when such cultural considerations are being brought out, rendered explicit and explored. However, despite rejecting an approach which blandly assumes the existence of neutral universals, doubt remains as to the possibility of moving towards real recognition through a system which fails to capture the sui generis nature of native title. Such a system leads to outcomes which misrecognise Aboriginal ‘interests’ in land as akin to European interests, such as in the process of offering financial compensation for the loss of land Aboriginal people may value primarily in other ways.

An alternative to interest-based negotiations would be ones which recognised the mediation process as explicitly identity-oriented. These would place as much emphasis on who is negotiating, as what they are negotiating about. In this vein, reminiscent of the Canadian approach, Patrick Sullivan has argued that Aboriginal people should enter into negotiations with Commonwealth, state and local governments as a fourth tier. This suggests a radically different entry point into negotiations where the focus is on rights rather than interests – the

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Section of ATSIC and the Native Title representative bodies, Australian National University, Canberra. 1995, pp.28-31.


64 Sullivan, ‘Regional Agreements in Australia’, p.6.
rights of peoples. Along similar lines, seasoned negotiator Rick Farley appears to recognise the negotiation process must be an identity-oriented process. In speaking of his own experience of the issues that motivate Indigenous negotiators, he noted Indigenous peoples will want to tell their story as part of the mediation process. It is vital that they are able to do so, if the agreement process is to facilitate any sort of transformation through exposure to alternative viewpoints. As Greg Egert of the Quandamooka Land Council suggests, ‘no-one else can bring our values and principles to the table’. Far from being peripheral, this element of ‘story telling’ is ‘an integral part of developing a relationship through which negotiation can proceed and lasting agreements can be reached’. It has been suggested that stories are not just a description of evidence: they are the evidence itself.

Facilitating rather than preventing Aboriginal peoples from bringing their values and stories to negotiation will have two effects. Firstly, it will assist in reducing the danger of miscommunication recognised by the Social Justice Commissioner. He suggested this goes beyond mere language, to ‘the general cultural gap that exists between claimants and others participating in the native title system’. Seaman suggested the point is not to ask Aboriginal people if they understand the process, rather, ‘the ultimate test of comprehension is to ask the other person to repeat in their own words [and, I would add, in their own way] what it is they understand to be the proposition at hand’. This approach also retains the potential for the process to be a truly transformative one, where positions are altered and identities reassessed.

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67 Farley, ‘Practical considerations…’, op cit.
70 ibid, p.399.
Mary Edmunds described the transformations brought about in the course of one native title stakeholders meeting, after Aboriginal demonstrations of strong attachments to country via ‘alternative’ storytelling such as singing and dancing. Even opponents to native title began statements acknowledging Aboriginal attachments to land, and others broke ranks with a state government position and entered negotiation.71

This is not to suggest generations of indifference will be overturned by direct exposure to Aboriginal cultural ways. The point is that if the rigidity of the native title regime tends to prevent the agreement-process creating the space for Indigenous people to express themselves in their own way, potential benefits are lost to both Aboriginal and non-Aboriginal parties. A decade on from Mabo, there is little evidence to suggest the creation of a bicultural process where both peoples feel equally at home. Rather, the agreement process leaves us in no doubt, as Farley suggests, that native title law is whitefella law.72 Native title processes then, tend to be whitefella processes. After observing a native title trial in the Kimberley – apparently an ‘Aboriginal domain’ – Alex Reily nevertheless described a scene where

[t]he common law moves in with its language, symbols and procedures. Aboriginal people must make out their claims within a foreign framework, sometimes breaking their own Law to do so. This new meeting of black and white has...disturbing similarities with early colonial practices.73

The most disturbing similarity, I would suggest, is in failing to create the space for Aboriginal expression of the meaning of title (and identity), thereby also preventing the possibility of transforming relations with non-indigenous people. Rather than emerging as a vehicle for self-expression and transformation, the potential of native title has been constrained by interests-

71 Mary Edmunds, ‘A Comparison of “internal” dispute resolution by representative bodies with mediation by the NNTT’, in Paul Burke, *The Skills of Native Title Practice*, p.40
72 Farley, ‘Native Title: Two laws, Many cultures’, p.116.
73 Alex Reilly, *op cit*, p.209.

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based negotiations usually focussed on small scale commercial matters. The limited role accorded native title here is as a 'lever' used to manoeuvre non-Aboriginal groups towards the negotiating table, where issues of Aboriginal autonomy are, by and large, off the agenda. Changes to the NTA’s right to negotiate provisions weakened the force of this lever. But beyond this, there are deeper problems that emerge when native title is conceived only in this way.

*Conceptualising native title as leverage*

It would be wrong to suggest that conceptions of native title under the agreement process are devoid of the political. However, as suggested above, the 'politics of native title' has not yet expanded to include discussion of Aboriginal jurisdiction. Rather, the politics of native title under the agreement process is such that title is conceived as an instrument of leverage used to bring other parties to the negotiating table. Jon Altman suggested to Indigenous people that 'it is important that native title is recognised for what it is: a lever to bargain for concessions with resource developers'.

While he acknowledged native title leverage is weaker than that built into Northern Territory land rights legislation, the 'up side of native title, however, is that the process does provide some leverage, which is better than nothing'.

It is certainly true that native title has emerged as a useful bargaining tool for Aboriginal peoples. In this sense, the common law recognition of native title has altered relationships between Aboriginal people and others. There may also have been some informal shift in the

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75 ibid.
status of Aboriginal people, who have become ‘people of account’, those who must be addressed. As in Canada and elsewhere, the potential legal existence of native title has produced a degree of uncertainty for those who wish to gain some form of title for commercial activity. In terms of the (short term) strategy of native title claims, it has also been suggested as legitimate that Aboriginal people actively foster this uncertainty as a means of getting governments and others to the negotiating table. For a chronically poorly resourced group, with few political weapons, it is understandable that they would utilise all those available to them.

However, in the longer term, the conceptualisation of native title in this way does little to move the native title process closer to Indigenous understandings, or increase their autonomy on land. And it may be that the best way to gain recognition of distinct Aboriginal rights, such as to self-government, is to be explicit about the link between title and jurisdiction/autonomy. If title is conceived primarily as a ‘bargaining chip’ in order to bring about negotiation, its broader parameters are likely to remain safely (for the status-quo) unexplored. In the process of describing not only the content but the implications of native title, Aboriginal peoples gain a rare opportunity to broaden and deepen understandings of their society. The potential of native title must not be exhausted as a lever to prise open the door to negotiations. If it is, we

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77 In the context of native title, this has been particularly evident with Native Title Representative Bodies, which assist Aboriginal people with claims and agreement-making. The first key finding of ATSIC’s 1999 *Review of Native Title Representative Bodies* (the ‘Love-Rashid Report’) was that ‘workloads of NTRBs are significantly higher than allowed for by present funding.’ (p.1). It went as far as to suggest “The consultancy is of the view that NTRBs will not be capable of professionally discharging their functions under the new regime within the current funding framework.’ (p.43). Since 1999 those workloads have increased, while there has been no significant increase in funding.
will be unlikely to ever see the assertion of what John Bern described as a 'radical political title to the territory by Aboriginal people' 78

Another feature of this tendency to view native title as a 'lever' is that it seems to imply a process of competition rather than relationship building. It suggests an agreement process whereby one side 'wins' and the other side 'loses'. Jon Altman went as far as to suggest 'it is important that intermediaries negotiate on behalf of native title interests, because hard-edged negotiation often requires an adversarial approach'.79

The use of native title only as a bargaining tool of 'hard-edged negotiation', rather than as a concept capable of much deeper consideration prevents the possibility of transformation. It fails to facilitate a process where each side is allowed to tell their story in their own terms, thereby encouraging mutual recognition. This is reminiscent of corporate, commercial negotiation, rather than the development of a relationship between peoples. Any negotiation process taking place between different peoples must move beyond being merely adversarial if it wishes to build sustainable new relationships. It will be recalled that the potential of the ILUA process to move beyond the adversarial has been seen as one of its most beneficial elements. As Muir suggests,

the process of agreement-making is about establishing relationships. The important consideration is how that relationship is formed, is it on a basis of mutual respect, truth/trust and a genuine desire to bring about change? If so, ILUAs have the potential to...create a future for Indigenous Australians.80

78 John Bern, cited in ‘Discussion 1’, in Jim Fingleton and Julie Finlayson, (eds.), Anthropology in the Native title era. Proceedings of a Workshop, AIATSIS, Canberra, 1995. (emphasis in original). Bern suggested ‘...what we are talking about here is fundamentally political.’ (p.22.)

79 Altman, op cit.

80 Muir, op cit.
However, the fact that the negotiating process relies on using native title as a ‘big stick’ limits the potential for ILUAs to contribute to that process. That Aboriginal people must rely on native title in this way points to the continued disparity in resources available to them – before, during and after negotiation. In recent times, this has been seen particularly in the case of Native Title Representative Bodies (NTRBs) which are assuming an increasingly prominent role in the native title and agreement-making process, yet remain chronically under-funded. While it may be relatively simple to remedy these ‘procedural’ matters, proponents of self-determination through the agreement process may be facing more entrenched difficulties.

III. Managing native title – the philosophy of agreement-making

As the former President of the NNTT, Justice Robert French noted, there are no agreed rules for managing the relationship between native title, public law and private rights. While the recognition of native title did create a level of uncertainty about issues such as land tenure, it also opened the possibility of creative new approaches in a range of areas. An agreement process offers just such a chance to develop ‘systematic and coherent approaches to issues such as native title rooted not in the strict letter of the law, nor concessions made under an imperial approach to land management but in the recognition of substantial justice’.

The philosophy of governments was always going to be a vital factor in determining the extent to which native title and the resultant agreement process could transform relations in this

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81 See note 76.
country. Governments may have chosen attempts to maximise the potential of native title for both Aboriginal and non-Aboriginal peoples, but instead we saw the resort to familiar rules of contract, as well as a miscellany of state and Commonwealth laws in an effort to constrain native title.

Ten years after Mabo, it can be argued that governments have generally taken a narrow and defensive approach to the management of native title, and the conclusion of land use agreements. Wooten notes they have not responded to Mabo by saying they will not rely on past wrongs in further dispossessing Aboriginal people. Or that they will not use technical and brief extinguishment to deny native title, even where recognition would not prejudice the position of other citizens. Rather, he suggests that governments 'have responded legalistically and bureaucratically, ignoring Aboriginal claims to land and combing their archives to discover long forgotten extinguishing events'. This is despite the limitations placed on native title, particularly the guiding principle that in clashes between native and other titles, it is the native title that must yield. Governments have responded to native title claims as if they are an attack to be repelled, and in the old familiar terms of a problem to be overcome.

Even in this supposed age of decolonisation, O'Faircheallaigh notes we have witnessed in Australia not just a failure to engage with Aboriginal political processes on any level of equality, but in fact a failure to acknowledge they even exist. This would align with Nettheim's suggestion that while the myth of terra nullius (land of no people) is dead, the

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85 Hal Wooten, 'Some thoughts on native title and doing business', p.48.
86 ibid.
attitudes that supported it (people of no politics) remain potent. While the *terra nullius* fiction cannot be revived, he argues it remains deeply embedded in the psyche of State and Territory politicians and bureaucrats. Its place has been taken by conceptualising any moves to recognise the relationship of Indigenous Australians to their land and waters as running counter to the prerogative and imperatives of ‘land management’.88

There has been very little challenge, he argues, to the economic view of land. The alternative (Aboriginal?) view of land ‘remains beyond the imagination’. Aboriginal political systems cannot be accommodated in negotiated agreements because they remain literally ‘unimaginable’ to the administrative mind constrained by the old ways of thinking.

In common with previous policies devised by, and for the interests of, the dominant society, the agreement process continues to be hampered by a failure to engage with Aboriginal people on their own terms. Difference (such as an Aboriginal concept of agreement-making) is not addressed with an eye to the creative possibilities of intercultural dialogue, but is avoided in favour of the familiar (such as the European idea of contract). With strong similarities to the ‘Indigenous’ view suggested by Alfred in Canada,89 Australian Aboriginal people have often stressed a preference for ‘openness’ in agreements. For example, at one of the first conferences to discuss the concept of regional agreements, Gordon Pablo and Tony Flinders of the Wuthati Nation suggested:

> Regional agreement has no beginning and no ending to us as traditional owners. These things need to be flexible as things are always changing.90

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88 Garth Nettheim, ‘Native Title, Fictions and Convenient Falsehoods’, *In the Wake of Terra Nullius. Law, Text, Culture*, vol. 4, no. 1, Autumn 1998, p.79. Daryl Williams stated recently: ‘The Commonwealth firmly believes that native title issues need to be considered as part of the mainstream management of land in Australia.’ Williams, *op cit.*

89 See chapter 7 note 64 and following text.

This contrasts sharply with the view of Peter Conran, of the Northern Territory Chief Minister’s office. He felt:

Any agreement must provide for certainty of outcome so that outstanding issues and claims are brought to an end. It is no use if the end result is renegotiation of an agreement 5 or 10 years down the track.91

For the Aboriginal party to a potential agreement, the ability to adjust to an unknown future is important, suggesting the possibility of an ongoing relationship. Yet for Conran, locked into the bureaucratic and legalistic mindset described above, renegotiation is ruled out as both ‘commercially unworkable’ and ‘politically untenable’ for a government that must seek certainty ‘in the public interest’.92

As with the BC treaty process, it appears that the Australian agreement process has tended to favour (economic, primarily non-Indigenous) ‘certainty’ over the development of a new basis for relations between peoples. This has been achieved by a process which continues to regard Indigenous ‘interests’ as a threat, and thus something to be contained and reduced, rather than a legitimate new part of land management whose creative potential should be maximised for the benefit of Australia’s most disadvantage group, as well as all Australians. Despite the Social Justice Commissioner’s argument that arbitral bodies such as the NNTT should approach future land use in the context of the broader aspirations of Indigenous people,93 those broader aspirations – particularly in the realm of political autonomy – remain largely ignored.

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92 ibid, p.156.
It may well be correct with reference to the resource industry to suggest the emergence of a ‘new psychology’ surrounding commercial negotiations with Aboriginal peoples in the post Mabo era. Given the animosity that often characterised relations between Aboriginal peoples and miners and other developers, this is no small achievement. It may well point the way for Aboriginal peoples toward a future of economic self-sufficiency rather than welfare colonialism. However, in terms of political relations between peoples, there is little evidence of this ‘new psychology’.

Here, Patrick Sullivan points to what may be referred to as a ‘neo-colonial’ mindset, which is able to perceive the implications of inherent Aboriginal rights, but falls back on old familiar ways to restrain their impact. Sullivan suggests that, generally speaking, national governments are able to conceive of the implications of native title. They are, in fact, ‘keenly aware’ of the collective rights to self-government bound up in rights to land and sea. The popular approach has then been ‘to head off any deep consideration of this issue by recognising land rights and in the same process regulating, circumscribing and taking control of them.’ This process has been apparent in Australia where recognition in certain areas goes hand in hand with the denial of rights in others, with the result being maintenance rather than transformation of existing power relations. Sullivan suggests:

the mechanism of control is by the absorption of those elements of Aboriginal culture that can be readily translated into mainstream administrative forms such that Aboriginals continue to be treated as a problem within the Australian polity, rather than one that occurs between it and a separate group. The Land Rights Act 1976, the ATSIC Act 1989 and the Native Title Act 1993 are all successful examples of this.

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95 Patrick Sullivan, ‘From Land Rights to the Rights of the People’, p.111.
96 ibid.
All those acts, like the agreement process under the native title regime, have produced substantial benefits for Aboriginal people, but at a price – ‘the price of autonomy’.  

_A culture of negotiation?_

It is true that Australia is developing its own ‘culture of negotiation’ with respect to Indigenous-state relationships. Yet real doubts remain as to the transformed nature of such a culture. It is apparent that the law is being used to constrain ILUAs rather than these agreements being used as a mechanism to push the limits of law. Agreements under the native title process remain bound by the ‘labyrinth’ of regulation discussed above. In this sense, agreements display continuity with, rather than a departure from, previous regimes of control, critically compromising their ability to be a vehicle for self-determination. In determining the scope, or at least the management of native title, the state maintains the primacy of its own ways of being and doing, such as the corporate, contractual model of managing Aboriginal interests in land. Paul Hayes suggested that the requirement that native title be managed through the creation of a Prescribed Body Corporate is simply a ‘legislative quid pro quo’ for the recognition of title.

The increased prominence of corporate bodies in the emerging native title landscape is taken for granted, given the complex regulatory regime created by Australian parliaments. Yet, despite their ubiquity, it is still possible to question their suitability as the vehicle for new

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98 See Langton and Palmer, _op cit._
agreements. Sullivan suggested were the Aboriginal corporation not such a feature of the Aboriginal landscape, ‘such an approach to the provision of a legally recognised entity reflecting community governance would be stunning in its inappropriateness, cultural arrogance, crudeness, institutionalism of outside control, and sheer unworkability.’\textsuperscript{100} An approach that is governed by such limitations, particularly in the eyes of Aboriginal claimants, must not seem like much of a departure from previous regimes, despite the new emphasis on ‘negotiation’ rather than ‘consultation’.

With the recent trend towards negotiated agreements, a good deal of the old ambiguity is retained for Aboriginal peoples. It appears that formal guarantees, such as the right to negotiate, are currently the best hope for increasing Aboriginal autonomy. Once again, Aboriginal people must rely on the limited benefits bestowed by a ‘foreign’ system of laws. Yet this is the same legislative regime that has withheld recognition of Aboriginal status for more than two centuries. As Dolman suggests, this regime is itself a product of the lack of Indigenous power in Australian society.\textsuperscript{101} It is apparently still the state that determines the rules of the game, despite the undoubted strategic advantages the recognition of title has bestowed upon Aboriginal people. The state not only creates the basic legal framework within which agreements take place, it also plays a ‘crucial’ role in determining the negotiating power of Indigenous people, their capacity to harness that power, and both whether and how negotiations will take place.\textsuperscript{102} O’Faircheallaigh suggests then, the challenge for Aboriginal people will always be twofold – to maximise their negotiating position within any given set of

\textsuperscript{100} Patrick Sullivan, 'From Land Rights to the Rights of the People', p.112.
parameters, and over the longer term, to modify those parameters by bringing about favourable changes in state policy.\textsuperscript{103}

The implication of this assessment is that, despite the fact that a decade ago the High Court recognised the inherent right of Aboriginal people to their land, they are still reliant on changes in state policy for effective enjoyment of this inherent right. Even where Aboriginal claimants play by the state rules and negotiate an agreement under the native title regime, the vast majority are not having an effective say about political, social and cultural development on their traditional lands.\textsuperscript{104} This criteria – Aboriginal autonomy – is suggested by Dolman and Burke as the critical one in evaluating the NTA.\textsuperscript{105} If it is also the way to evaluate the new agreements such as ILUAs, it suggests this process has not yet facilitated recognition of the legitimate status of Aboriginal people as equal partners in a new relationship, but retains much of the colonial mentality.

\textbf{IV. Conclusion}

Kevin Dolman pointed to the ambiguity of the agreement-making process in Australia. He suggested the emergence of negotiated agreements between Aboriginal peoples and others represents ‘a marked change in the relationship’ between Indigenous peoples, government and industry, yet ultimately, they ‘do not deliver Indigenous rights to self-determination’.\textsuperscript{106} The agreement-making process under the NTA has had to deal with what has variously been

\textsuperscript{103} O’Faircheallaigh, ‘Negotiating with Resource Companies...’, p.200.
\textsuperscript{104} Dolman, \textit{op cit}, p.9.
\textsuperscript{106} Dolman, \textit{ibid}, p.9.
described as the traditional ‘deafness of power’ to Aboriginal people,107 or the maintenance of a ‘colonial mindset’ by non-Indigenous stakeholders.108 Part of the legacy of this mindset is that it still seems to be ‘impossible’ to convince governments that native title might replace states rights to manage vacant crown land.109 Lisa Strelein noted, ‘the process of determination and negotiation of ILUAs sets Indigenous people as one of hundreds of interest holders and, in it current form, does not adequately recognise the status of native title holding groups as political, legal and social entities.’110

Mabo recognised Aboriginal peoples as having their own viable and continuing systems of law which gave rise to their inherent rights, such as to land. Yet the legislative process that grew up in order to recognise those rights has been more concerned with circumscribing and limiting them in the name of ‘certainty’. Aboriginal peoples did not contribute much to this regime, let alone on any equal basis. The fact that a change of government meant even less input into a more restrictive regime indicates that despite the increasing emphasis on negotiation, Aboriginal peoples still remain largely prisoners to what in some sense can be viewed as a ‘foreign’ system of laws. Aboriginal identity cannot be sufficiently recognised by – let alone within – a system in which Aboriginal cultural ways continue, albeit in a more ‘sophisticated’ fashion, to be subordinated by those of the dominant society. The fact that Aboriginal people cannot see themselves and their culture adequately represented by the agreement process means non-Aboriginal people are required to undertake only a limited degree of self-analysis. Ultimately, while the relationship is certainly being altered on the

periphery, its core remains largely unchanged by the current agreement process as it is managed via the native title regime. The argument for a treaty process in Australia is as relevant today as at any time in our history, as we continue to aspire to a relationship based on the equality of peoples.
Chapter 12

Conclusion

When I began this project, I was unsure of its final shape. On completion, I feel I have taken on some of the ambivalence which I tried to show is part and parcel of the whole question of Indigenous-state relations, the Indigenous *problematique*. I firmly believe that the establishment of a treaty relationship is the most appropriate way – perhaps the *only* way – for Australia to move away from its colonial past. A just relationship requires a process of negotiations in which Aboriginal people are recognised as equals in the unfinished project of ‘state-building’.

The ambivalence arises because at the beginning of 2003, the prospect of such a relationship seems as far, or even further away than when I began this exercise.

That agitation for a treaty has not received widespread support is no surprise. This issue continues the historic marginalisation of those who argue for Aboriginal rights – a status felt most painfully and directly, but not exclusively, by Aboriginal people. Those who advocate treaty in this country currently find themselves belittled by those in power for pursuing a ‘rights’ agenda which, the argument goes, actually harms Aboriginal people by failing to address their chronic position as a seemingly permanent underclass in Australia.
Michael Dodson suggested that 'in a policy area like Indigenous affairs, matters of philosophy are central'. But philosophy has never been a feature of Aboriginal affairs in Australia. Slogans – like segregation, protection, assimilation, integration, self-management, reconciliation – have been the order of the day. Perceiving this need to examine Indigenous-state relations in greater depth, I attempted to 'lift' consideration of the Indigenous problematique beyond its 'normal' level by investigating the approaches of three political philosophers. Young and Kymlicka's analyses were found to be limited by commitments to a politics of difference, and the liberal tradition, respectively. Tully, on the other hand, took a deeply historical approach, allowing the Indigenous problematique to be considered on its own merits. While all differed as to their justification for specific Indigenous rights, all recognised the existence of such distinct rights.

In Australia, such thinking, and the creative possibilities it opens up, has effectively been limited by a dominant ideology which wrongly equates 'equality' with 'sameness'. Latterly, in policy terms, this 'philosophy' has assumed the guise of 'practical reconciliation'. This is a code word for what some Aboriginal commentators suggest is assimilation; at best it represents a kind of forced integration. It continues rather than departs from paternalistic approaches to the Indigenous problematique that have effectively driven policy in this country since contact, ensuring the further domestication of Indigenous status. It is the expression in policy of the basic underlying belief that whites know what is best for blacks; and that what is best is for them is to become as much like us as their tainted, flawed, even tragic background will allow.

Such thinking is, of course, far from new. It has been around, in one form or another, for as long as Europeans journeyed to the lands of others, and became desirous of them. Just as

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kings, captains and colonists found ways to physically facilitate the imperial enterprise, so too did theorists, philosophers and jurists develop the arguments that sought to provide the intellectual legitimacy of the project. The point was not simply that law, politics and other disciplines aided the course of colonialism, but that these canons of Western thought actually emerged as part of the imperial project. That legal and political justifications of the status-quo prevail into the twenty-first century may be the ultimate accolade for the agents of Empire who developed them. Or perhaps the fact that they still endure says as much about the desperate need to believe such arguments, and the utility of believing them.

The reality of this continuity is perhaps my most alarming finding. To a large extent, the discourses of domination continue to underpin efforts to contain what is still effectively viewed as ‘the Aboriginal problem’. There was, though it is rarely remembered, a period in Australian history when recognition of Aboriginal status, and their right to make treaties, was discussed at the highest levels. However, the possibility of pluralism soon gave way to a more pragmatic politics which evoked legal, cultural, and later biological justifications for denial, which ushered in a ‘great Australian silence’ about the inherent political rights of Aboriginal people. Even in the supposedly ‘enlightened’ period following the 1960s, this continued. The ambiguity of the last three decades is evident in the fact that despite being popularly regarded as a period of ‘progress’ in Aboriginal affairs, it both began and ended with demands for a treaty relationship. Faced with an increasingly assertive Aboriginal political identity, and then the judicial recognition of native title in *Mabo*, the state resorted to methods of denial which appear sophisticated when viewed against the simple dichotomies used in previous times. Yet these denials, up to and including the *Native Title Amendment Act* (1998), were seen to share much in common with the discourses of domination.
What this suggests is that the denial of Aboriginal status flows not from considered engagement with their claim, but from a deeper source – a particular mindset, developed over centuries, which actually prevents this consideration. This reflects the unavoidable fact that such consideration directly challenges key assumptions of the state and its majority people. For underlying the brand of liberal individualism that appears to have won the ultimate ideological battle in Australia as elsewhere,\(^2\) is the unshakeable, unspoken belief in the sanctity of ‘progress’. We are supposed, always, to be becoming more free, not less; we are ever closer, not further away, from enlightenment. Yet, even the most cursory glance at exactly who ‘we’ are gives the lie to this assertion. If ‘we’ are the Aboriginal people of Australia, we are demonstrably less free than we were a little over two centuries ago; we have less, not more right to live according to our traditional philosophies, within our own polities than our ancestors had. And this reality – the fact that Aboriginal people continue to exist, and continue to agitate for recognition of their distinct rights – represents a profound and fundamental challenge to the very idea of Australia, of ‘one people’, ‘one nation’. It is not just that we, as a state, don’t listen to the claims of Aboriginal peoples – a claim that should fundamentally resonate with our core liberal beliefs as a claim to be treated equally, a claim to the equality of peoples. It is more unconscious than that. We are unable to hear the Aboriginal claim because we hear it only in terms of this challenge to our very being. We (the individual, the state) still fear Aboriginality, or at least any Aboriginality we cannot control.

This contemporary position is exemplified by the current Prime Minister. John Howard represents the embodiment of concerns about the fragmenting possibilities apparently residing within Aboriginal identity. While he is (effectively) head of state, the assertions he instinctively, defensively deploys to deny a distinct – and political – Aboriginal status

\(^2\) Francis Fukuyama famously suggested following the fall of the Soviet empire and the Berlin Wall that the apparent triumph of liberalism represented ‘the end of history’. See Fukuyama, *The End of History and the*
show him to also occupy the symbolic position of ‘individual as the state.’ Howard’s elevation at the end of the twentieth century suggests an Australia committed only to the closed circularity of the domination-resistance paradigm.

There are, however, alternative futures available to Australia. Residing alongside, or beneath, or at times even ‘within’ the discourses of domination, the voices of contest have always been present. By really listening to these voices, such as that of Patrick Dodson, we may be led not along the path of division and disintegration, but mutual recognition and coexistence. The profound contribution Dodson makes to Indigenous-state dialogue is to illustrate the falseness of arguments which suggest an ‘Aboriginality or citizenship’ dichotomy. Dodson’s central claim is that Aboriginal people have always sought recognition of citizenship rights, as well as the distinct rights that make up their Aboriginality. Just as these two different sets of rights can be exercised by one person, so too can the different sets of rights coexist within the one state. In what may be seen either as a realistic acceptance of state power, or a generous act of recognition, Dodson explicitly acknowledges the exercise of Aboriginal rights will indeed take place within the state. What this position implies is that the relationship between different sets of rights – between different peoples – will not be determined only according to the brutal, limited logic of power, as in the colonial relationship, but according to norms of mutual respect and coexistence, through negotiation.

This, of course, is where the notion of a treaty comes in. Despite efforts in Australia (as elsewhere) to close off discussion before it begins, treaty is a mechanism whose very characteristics must be determined as part of a dialogue. The lack of a precise, good-for-all-situations definition of treaty should not be seen to prohibit its investigation in Australia. So long as its openness and flexibility is embraced, treaty is ideally suited to the

complex project of reordering Indigenous-state relationships. The essence of the treaty process is dialogue. Guided by the principles of consent and continuity, the treating parties meet across the table and work out together the ideas, structures and processes that will govern the relationship between them. Following Tully, the norms of mutual recognition, coexistence, self-government, and the equality of peoples should be integral to the new relationship. This relationship is strengthened as misunderstandings are avoided in the very practical processes of mutually identifying issues, discussing ways to resolve them, implementing solutions, living with them, and re-addressing them in the light of lived experience. As Tully described treaty, it is profoundly about the process – it assumes an ongoing relationship which requires mediation, rather than positioning the problématique as a problem or crisis which needs an immediate, ‘one-off’ solution.

Investigating the British Columbian treaty process puts paid to any suggestion of treaty being viewed as the solution to any or all problems. Treaty is not imbued with magical powers, and it cannot reinvent the wheel. What it can do is to provide a new lens through which to approach current problems, and recontextualise already-existing relationships. This potential was evident in the conception of the BC treaty process. In shifting from a position of denial to one which sought to fundamentally re-order relationships, it was essential that both peoples were actively – and equally – represented at the outset of the new process. As Australia similarly seeks to move from denial to real negotiation, the BC Claims Task Force remains a model worthy of consideration.

The difficulty arises, of course, when the potential of political theory clashes with the intransigence of political reality. The ‘progress’ of the BC treaty process illustrates the profound difficulty of altering entrenched relationships. In line with a major theme of this thesis, BC shows, perhaps above all else, the importance of transforming the underlying
perceptions which determine relationships between peoples. Despite the treaty process' optimistic beginnings, the ascension of the Campbell government in BC represents the consolidation of previous paternalistic thinking, and a move away from a true people-to-people relationship.

In a similar sense, it is questionable, despite the elevated hopes of the last three decades, whether Aboriginal people in Australia are any closer to achieving a position of authority and recognition in Australia. The trend towards negotiated settlements that followed the recognition of native title in 1992 is certainly a positive one, with the potential to radically realign relationships in this country. Yet the cautious, restrictive, legalistic approach generally taken by governments calls into question suggestions that we have turned the corner, that we are currently engaged in a de facto treaty process. On the contrary, after a detailed investigation of agreement-making under the primary legislative mechanism for recognising Aboriginal title, I believe the need for a new process of genuine negotiation between Aboriginal people and the state is as great as ever.

What I have sought to do is not so much suggest immediate solutions for such a disturbing situation, but develop a perspective from which contemporary developments, such as the native title regime, can be viewed as part of historical and international processes of colonisation. I have suggested that we need to understand the bases of Australian thought before it can be used as a tool of decolonisation. That is why it is essential we look back at the way previous thinkers have sought to explain (and justify) relations between peoples, and how these discourses have been adopted and adapted in the Australian context. This showed, I believe, that we do have our own brand of political thought in this country, even if it is firmly in line with a fairly 'classical' brand of liberalism. Examining the claims of Indigenous people – particularly that central claim to be regarded as a people – enabled an
Australian form of denial to emerge that may be unique in its totality. What Strelein referred to as 'an ignominious originality', Reynolds described as 'the distinctive and unenviable contribution of Australian jurisprudence to the history of relations between Europeans and the Indigenous people of the non-European world'. Currently, with Australia as the last Commonwealth country to recognise Aboriginal peoples inherent rights to land, we are in danger of establishing another 'ignominious originality' – that of constructing so-called 'agreement processes' which consolidate rather than transform our colonial beginnings.

We have arrived in this country at a classic Catch-22 situation. The process of discussing, implementing, and living a treaty relationship is uniquely capable of transforming Indigenous-state relationships beyond the boundaries of what I have termed 'the colonial mentality'. However, in order to begin such a process, in order to establish a treaty relationship, Australians must free themselves of the conceptual shackles of the past which have prevented them from viewing Aboriginal people as legitimate rights holders – as a legitimate people. A treaty process will assist the recognition of a legitimate Aboriginal status. However, to begin a treaty process, Aboriginal peoples' status must be viewed as legitimate. We are at a stalemate, and it seems currently we will remain so while the status-quo continues to favour those who hold power rather than those that seeks its re-organisation.

The triumph of 'realpolitik' is not inevitable.

Despite the consolidation of the discourses of domination in Australia in recent years, I remain optimistic about the establishment of a treaty relationship, at least in the long term.

Critical is my conclusion that the period of time before Australia signs a comprehensive national treaty is likely to be measured in decades, not years. As an academic observer, I have the luxury of being able to take the long view. Aboriginal people who continue to suffer disadvantage at a greater rate than the rest of Australian society, including the ultimate differential – dying, on average, twenty years younger than white Australians – do not always have such an advantage. In this context, it is difficult for anybody, let alone a white academic, to criticise Aboriginal people for taking the best deal they can get, even when this involves trading inherent rights for kidney dialysis machines.5

Where, in this picture, is there room for optimism? I believe the first task in transforming relationships of domination is to understand them, particularly in terms of their underlying causes, not just their all too obvious effects. I have attempted to lay bare the historical, philosophical and theoretical bases for the current relationship, as well as the manner in which they are manifested in current arrangements. If the first step on the road to recovery is to admit things are not right, I have promoted that step by showing the deep-seated nature of ‘the European problem’. The extent of denial of Indigenous status can be viewed as a kind of state psychosis – a type of ‘mass non-hysteria’ which comfortably accepts the status-quo without reflection, despite (or because of) the injustice at its core. But beyond simply understanding the scope of the problem, grounds for optimism lie in two areas: one internal to Australia, the other external.

I am optimistic about the establishment of a treaty relationship because of the nature of Aboriginal demands. This refers primarily to two features. Firstly, their longevity: in the

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5 In 1998 the Jawoyn people gave up claims to land around Katherine, Northern territory, in return for four kidney dialysis machines, and an alcohol rehabilitation centre. See Chris Ryan and Janine MacDonald, ‘Aboriginal health-care ‘barter’ condemned’, *The Age*, Wednesday 21 October 1998. Following several months of negotiation, the Northern Territory Government advised that the four kidney dialysis machines would be made available in Katherine (by July 1999), without the need for Aboriginal people to trade their land rights.
face of uniquely stringent denials, Aboriginal claims for recognition of their distinct status have been remarkably consistent. Secondly, the inherent justness and reasonableness of such claims which emphasise a peaceful coexistence and not a violent separatism. Dodson’s Wentworth Lecture illustrated the argument of at least one prominent Aboriginal leader to be eminently reasonable, just and realistic. It put paid to the claims of conservative denialists that Aboriginal calls for recognition of their ‘peoplehood’ amount to calls for secession, and the creation of a Black state. This ‘fear’ reflects traditional European neuroses, which prevent an open, creative assessment of contemporary Indigenous polities and politics. It reveals the limited intellectual parameters of such thinkers, who can only view the Indigenous *problematique* through a thoroughly Western, statist lens. While such thinking remains powerful, its glory days are past.

Another reason for optimism is because of the trajectory of Indigenous-state relationships globally over at least the past three decades. At this point, I need to be clear about the claim I am making. I am not suggesting we are on a path to the inevitable emancipation of Aboriginal people. As suggested above, the course of ‘progress’ is nothing if not unpredictable. I am also not suggesting that international developments such as the BC treaty process represent a template for Australian action. In fact, my reading of that process would suggest that beyond its trilateral conceptualisation, the BC process may be useful as a model of what not to do, rather than an example to follow.

Having said that, taking the long view developed throughout the thesis, it is still possible to discern a definite shift in the position of states away from denial towards the recognition of the rights of Aboriginal people. One theme I have developed is that Australians must see themselves as part of these global processes of colonisation, rather than holding onto a view which blindly asserts the triumphal nature of our past. Australians will find it less and
less easy to sustain arguments which deny Aboriginal rights in the context of increasing international recognition of those rights.⁶

At home, it is possible to see at least the beginnings of these sorts of shifts taking place. I have shown that the culture of agreement-making in this country may be limited, it may be flawed, and it is certainly at a critical juncture. But it exists. For instance, approximately 10 per cent of local governments across Australia have some form of agreement or protocol with traditional Aboriginal owners.⁷ The significance lies not necessarily in the nature of the agreements themselves, but in the suggestion at least, of a meaningful phase of transition. There is a trend whereby the agreement process is being driven at a grass roots level by representatives of both peoples who are not necessarily motivated by the grand historical project of ‘state building’ (though they may well be engaging in such a process). Black and white Australians are pragmatically looking to ‘get on with the job’, and are thus building relationships in a way not seen before.⁸ If one stops for a moment to ponder the Aboriginal ‘failed protest’ about bauxite mining at Yirrkala in 1969 and the number of ‘successful protests’, or agreements, in the 33 years since, then, the change has been ‘monumental’.

This also brings to light an area which may be useful in transforming the mindset of political leaders who are following rather than leading the process, only viewing the Indigenous *problematique* in terms of rights *versus* socio-economic equality. While it was

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⁶ This trend was recently indicated by the establishment of the United Nations Permanent Forum on Indigenous Issues, which first met from 13-24 May 2002. See http://www.unhchr.ch/indigenous/forum_files/ind1.css


⁸ One recent example of what was described as evidence of ‘a new era of co-operation between indigenous and non-indigenous [cattle] producers’ in Cape York was the recent establishment of the Northern Cattlemen’s Alliance. Showing increasing awareness of coexistence and interdependence, vice president, John Fraser, suggested ‘Aboriginal cattlemen have got a lot to offer the industry and the facts are that they now own a significant amount of land. To see these places improve...has to be an advantage for the whole
not the focus of my work, an increasing amount of research is showing the correlation
between recognition of Aboriginal status – such as 'peoplehood' and sovereignty – and
economic development. To date, this has perhaps been most evidenced by the Harvard
Project in North America. After exhaustive study, it has found that not only is it possible
to link self-government (sovereignty), treaty, and development, but that the three are
dependent on each other. Cornell and Kalt suggested:

Among the most powerful arguments for tribal sovereignty is the simple fact that it
works. Nothing else has provided as promising a set of political conditions for
reservation economic development. Nothing else has produced the success stories
and broken the cycles of dependence of the federal system in the way that
sovereignty backed by capable tribal institutions has done... The lesson is that
sovereignty is one of the primary development resources any tribe can have...
Furthermore, tribal sovereignty works not only for Indians; it has benefits for non-
Indians as well. Around the country, economically successful Indian nations are
becoming major players in local and regional non-Indian economies... Economic
development on Indian reservations is first and foremost a political problem. At the
heart of it lie sovereignty and the governing institutions through which sovereignty
can be effectively exercised.

I have concentrated on arguing for treaty-making as an important process in legitimating
the place of both Aboriginal and non-Aboriginal Australians in this country. The argument
for such recognition should stand on its own, as a matter of justice. Yet such theory means
little if Aboriginal peoples lack the capacity – the experience, the training, the resources
and the institutions – to exercise these rights which recognise them as First Nations. Here,
what I have termed ‘state-building’ can be placed alongside what Cornell called
(Indigenous) ‘nation-building’, and is currently labelled locally as ‘capacity-building’.
Cornell suggests treaty may assist in this critical process:

Treaty making is potentially a nation-building exercise...this process could, not
will but could, dramatically improve the chances of economic development for
Indigenous nations. The critical issues are these: will the process lead to genuine
decision making power in the hands of Indigenous nations, and will it equip those
I conclude by briefly mentioning the issue of economic development because it has often been deployed to deny debate on the issue of treaty. The suggestion that talking about inherent rights, sovereignty and treaty inhibits Aboriginal development flows from the philosophy, much explored in this thesis, which fears increased recognition of diversity will fracture an assumed uniformity. However, the important work of the Harvard project suggests that the recognition of Aboriginal sovereignty, of their peoplehood, may actually facilitate integration into the national economy. In very similar terms to Dodson, Cornell argues that achieving this integration need not come at the expense of distinct, political, Indigenous identities. In order to succeed at the goal of Indigenous economic empowerment, these identities must be recognised, supported, and strengthened, rather than ignored, undermined, and destroyed, as has happened for centuries. Such exciting findings should have made treaty a strong focus of the national conversation on the Indigenous *problematique*. Those who argue for an economic focus on Indigenous issues have avoided thinking about the link with treaty, or self-determination. Their main aim may not be advancing Aboriginal interests, but maintaining a particular view of a uniform Australia in which Aboriginal people must resign themselves to the erosion of their inherent rights.

As Cornell suggests, there are no guarantees of success. What is certain is that if the state continues to pursue those strategies employed in previous centuries, if it continues to rely upon the discourses of domination, it will fail. While the strategies of denial continue to get more sophisticated, their ultimate success lies in Aboriginal people either disappearing, or ceasing to argue for recognition of their distinct status. One of the many lessons from a

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history of colonialism now half a millennium old, is that Aboriginal people simply won’t let this happen.

The process of establishing a treaty relationship has the potential to legitimate the status of white Australians – a status which must carry some uncertainty and ambiguity while it continues to be based on the denial and exclusion, rather than consent, of the original inhabitants. It has the potential to recognise Aboriginal status as First Peoples, and rebuild Indigenous nations, who seek not a separate state, but recognition of their distinct status within Australia. And in facilitating these outcomes, establishing a treaty relationship could, for the first time, achieve a just relationship between the different peoples destined to share this ancient land.