

Negotiating Settlements: Indigenous peoples, settler states and the significance of treaties and agreements: Overview of the Series

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Introduction

The aim of this seminar series is to contribute to the national debate about agreement making and the potential for a treaty between Indigenous people and settler Australia. It is designed to provide an arena for legal, historical and sociological examinations of treaties, negotiated settlements and agreements between Indigenous peoples and settler states, drawing out the significance of agreement-making for present-day Australian circumstances. It is intended that it will inform the debate on the negotiated settlement of disputes over resource use, service delivery and other citizenship entitlements in the Australian context.

Agreement making with Indigenous people has been a feature of the Australian policy landscape for over twenty years. There has been a proliferation of agreements between Australian Indigenous people and resource extraction companies, railway, pipeline and other major infrastructure project proponents, local governments, state governments, farming and grazing representative bodies, universities, publishers, arts organisations and many other institutions and agencies. Some are registered under the terms of the Native Title Act. Others are simple contractual agreements that set out the framework for future developments. Strelein (see Williams, 2001:14) noted that the accelerating process of agreement making in Australia necessitates “a national framework and protection for those agreements”. Scholz (2001) observes that in native title and agreement making negotiations the government is increasingly pushed by fiscal concerns to negotiate, but once government representative embark on the process of negotiation this creates its own momentum and communities of interest which become invested in the process of negotiation.

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The outcomes of the reconciliation process pursued in the last ten years necessitate an audit of agreement making with Aboriginal people in recent times. There has been some work in the native title field (Edmunds 1998) and in the governance field (Meyers et al 1999; Ivison et al 2000). However, there is a notable absence of a well-developed body of literature in Australia on treaty and agreement making with Indigenous peoples, either in academic or popular forms, covering broader issues and thus a lack of information on models, processes of negotiation, and forms of entrenchment through statutory or constitutional means. Neither is there an adequate international survey that draws relevance for Australian circumstances, although there has been some work in this field (Meyers 1996; Stephenson 1997; Ivanitz 1997; Dorsett and Godden 1998).

This seminar series forms an important component of the Australian Research Council Linkage project, 'Agreements, Treaties and Negotiated Settlements with Indigenous Peoples in Settler States: their role and relevance for Indigenous and other Australians'. This project involves ATSIC and researchers from both The University of Melbourne and The University of Technology Sydney and commenced in January 2001. This project aims to examine treaty and agreement making with Indigenous Australians and the nature of the cultural, social and legal rights encompassed by past, present and potential agreements and treaties. It will include an examination of the legal history and foundations of agreements and treaties, an audit of current agreements, including an agreements database, their purposes, status and outcomes, and will include international comparative research on treaty and agreement-making. While many of the agreements we examine will be related to land, our research will also examine non-land based agreements such as those agreements made in the areas of health, education and research.

The themes of this Seminar Series will include: treaties and their historical significance; race and racialising discourses in the encounters between indigenous peoples and state formations; legal issues and ramifications of agreement-making in a range of jurisdictions; native title; mining agreements; national parks; framework agreements; Indigenous Land Use Agreements under the Native Title Act; service delivery agreements; publishing and copyright issues; customary legal systems and their implications; and Canadian, United States, New Zealand and South African settlements

and agreements. As such, the seminar series will provide a forum for the examination of agreements from a variety of locations where innovative and lasting agreements have been made, and will draw on examples of different types of agreements and modes of Indigenous organisation/mobilization. Throughout the series we will critically explore a range of issues including the role of constitutional and/or legal contexts in the agreement process; the ways in which social rights and economic development are being addressed; patterns, themes, and parties emerging in the agreement-making process; and assess some historical and internationally comparative examples of agreement-making and their relevance for Australian circumstances.

In this introductory paper we want to give some attention to this idea of agreement making as the principal form of engagement between Indigenous peoples and the state as to resource use, including land, seas and waters, and the resources of the natural world.

The significance of agreement making

In 1992 the High Court of Australia overturned traditional views on Aboriginal rights in land in its famous decision in *Mabo (No. 2)* and recognised native title as a form of customary title arising from traditions and customs. The common law recognition of native title by the High Court established that customary rights to land had pre-existed and, under certain conditions, survived British sovereignty. Native title survives in a range of circumstances where it was not extinguished by valid acts by the Crown, not only extinguishing acts such as valid grants of title but also extinguishment acts such as the Native Title amendments that limit the recognition of native title. The codification of native title in the *Native Title Act* of 1994 (NTA) aimed, among other things, to resolve the retrospective effects of an underlying title which had the potential to invalidate land titles, including pastoral leases issued since annexation.

The National Native Title Tribunal and procedures of the NTA have the purposes of enabling determination or negotiation of native title and non-claimant applications with respect to dealings in land that might be subject to native title. The Act establishes a 'right to negotiate' procedures, which following amendments to the NTA, are conceded only to registered native title bodies corporate and registered native title claimants in relation to certain

kinds of future acts (Australian Government Solicitor 1998: 37). Especially important in this context are the sections of the NTA which provide for agreement making, such as consent determinations and Indigenous Land Use Agreements.

Corporations, such as Comalco, signatory to the Western Cape York Communities Co-existence Agreement, are readily prepared to treat with Aboriginal nations, noting in their agreements their ancient identities, the Wik, the Thaayorre, the Alngith, and many others. Corporations acknowledge that pre-existing Aboriginal polities exist as a profound reality in our political and economic landscape. Such agreements are evidence of a willingness among some present day private corporations to do what the colonial governments were by and large unable to countenance, that is, to acknowledge that another group of people were the owners and custodians of the lands and waters of Australia and their descendents have a right to possess, use and enjoy those lands and waters and, within the limits of Australian law, to govern their use and access by others, and to reap any benefits arising from that use and access by others as would any other group of people in rightful possession of a place.

Agreement making emerges in our historical analysis as an instrument of governance within and between the nation state and indigenous nations, or as we refer to them, aboriginal polities. Agreement making has developed as a surrogate instrument of engagement and governance in a context of legal pluralism that has denied rights of self-government. That is, in a settler nation state that coincides with a number of aboriginal polities having their own customary law regimes, agreement-making has evolved among these diverse entities as a means of engaging rationally in dealings in land access and use and resource distribution and governance. However, the Australian Constitution provides no recognition of the existence of aboriginal polities, and it is only in legislation, such as the Native Title Act and to some extent land rights statutes, such as the Pitjantjatjara Act, that lower level of recognition of these polities occurs in order to provide statutory regimes for dealings between resource extractors and the Aboriginal landowning corporations or entities.

The evolving nature of these agreements has raised a number of highly contentious legal, political and constitutional issues.

The right to negotiate, a limited and prescribed statutory right under the Native Title Act, serves as the trigger for a series of governance procedures that, in sum, are an inferior substitute for rights of self-government that are found in the Canadian and United States jurisdictions with respect to first nations.

Legal and constitutional pluralism: recognition of indigenous polities and customary law regimes and their relevance to treaties and agreement-making

The Australian Law Reform Commission (n.d.), in its Reports on the Recognition of Aboriginal Customary Law, discussed the wide variation in a number of overseas jurisdictions of the incorporation of customary law into the legal regimes of nation states. It described, on the one hand, the apartheid era situation in South Africa as a 'coercive form of legal pluralism' with not only separate laws but a separate court structure for the Blacks. Of South Africa's diverse legal history, the Report observed that its legal system had its origins in Roman Dutch law (from the Netherlands) but with a strong infusion of English common and statute law. At the same time, South African law provided for the recognition of the customary law of the Bantu (or Blacks). The recognition of indigenous customary law was 'a vehicle for avoiding the recognition of the equality of all South Africans'. It was accompanied by rules maintaining the superiority of the 'white' legal system and its rules. [335]

In contrast, the Report noted that 'many other African countries have, since independence, opted for integrated legal systems, partly in response to the demands of 'nation-building', partly as a reaction against pluralism as a form of 'separate development':'

Some of the states in Nigeria have for example abolished customary courts, preferring instead that customary law be applied in the ordinary courts. Tanzania, Uganda, Zimbabwe and Kenya have also opted for integrated court systems. [336] The Northern States of Nigeria, on the other hand, have retained customary courts and worked on improving them. [337] Other African countries have excluded customary law completely or modified its recognition to meet their new situation. [338]

Assessing the shortcomings and difficulties confronting courts and other bodies in overseas jurisdictions, the Commission found a number of trends that also have become apparent in our study of agreement making in native title contexts in Australia;

- the diversity of experience in different countries, each dependent to a very large degree on its own experience and history;
- the difficulty of classifying many of the 'justice mechanisms' as 'traditional' or indigenous, given that many operate as an extension of the criminal justice system;
- the difficulty, in particular, of limiting 'justice mechanisms' to problems which can be regarded as 'traditional';
- the frequent difficulties encountered (especially in the United States) with jurisdictional and due process requirements;
- the tendency of tribal courts to become more legalistic over time, often as a response to the way the general legal system operates;
- the relatively trivial or limited range of matters dealt with, especially in the criminal law field; and
- the continual encroachments and pressures on the laws, customs, practices and traditions of indigenous people, even in countries where they are in the majority.

The Report emphasizes that, with respect to these various examples of legal pluralism, the level of acceptance by the indigenous people subject to them is a crucial consideration in assessing their validity and success.

The long tradition of legal pluralism in common law jurisdictions is an important foundation for considering the questions of both legal and constitutional pluralism that have arisen in recent Australian literature on the question of a settlement or treaty with Indigenous Australians and the native title agreement making environment that has emerged since the High Court decision in *Mabo No. 2*.

Recent literature on federalism draws attention to how diversity is accommodated in constitutional and political arrangements in various state formations. Thomas Fleiner (2001) of the Institute of Federalism at Frieberg University has proposed in a paper, "Constitutions & Diverse Communities in the 21st Century", that, in Europe at least, a number of different solutions have evolved in European nation-building, particularly expressed in European Constitutions with regard to their diversities. While the German

constitution constructs the *volk*, or one-people, as the equivalent of the nation (conceived as a unity of people, territory, language and polity), Belgium, made up of three Communities, the French Community, the Flemish Community, and the German-speaking Community, recognises this diversity in its Constitution. In the Serbian Constitution, it is stated that “Persons belonging to a national minority shall have special rights which they exercise individually or in community with others.” The Bosnian Constitution asserts that it is the will of its various communities in the following: “Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows”. This rich diversity of communities of people caught up in several modern nation state formations in Europe contrasts with the settler state situation in Australia where unitary principles of nation-building have been, and remain, dominant in constitutional affairs.

Aboriginal people have continued to argue for the survival not only of customary property rights in land but also ancient jurisdictions, on the grounds that, just as British sovereignty did not wipe away Aboriginal title, neither did it wipe away Aboriginal jurisdiction. Aboriginal governance under the full body of Aboriginal customary laws must, by the same logic as the discovery of native title at common law, survive annexation of Australia by the Crown, even if in some qualified way.

Because of the Native Title Act administrative regime, governments are being forced to treat with Aboriginal people in a variety of ways. We thus find that by default Aboriginal people are, through the cumulative effect of native title determinations both by the Tribunal and by the Federal Court, being treated as peoples. The aboriginal polity has emerged from the factors at work in the environment of dealing with native title holders in relation to economic and land use issues and resource distribution.

The international literature of relevance to this project shows that in the United States of America, Canada and New Zealand, and perhaps elsewhere, negotiated agreements have replaced treaties as the modern arrangement for engagement with Indigenous peoples with respect to resource use (Bartlett 2001, Dorsett & Godden. 1998, Ivanitz 1997, Langton 2001).

Webber (2001) Dean of Law at the University of Sydney, speaking last year in the AIATSIS Seminar Series “The Limits and Possibilities of a Treaty Process in Australia’, observed that, in Canada at least, treaties and agreements function to handle the interface between Indigenous and non-Indigenous governments long into the future. They manage the just apportionment of resources and create institutions which govern territory, rather than ruling on specific proprietary interests.

In the same series, Patton (2001: 16), of the Department of Philosophy at the University of Sydney, pointed out the ‘inconsistency in recognizing native title on the one hand, and refusing to recognize any form of sovereignty on the other’. In responding to this paradox of the proliferation of agreements with indigenous people governing resource use and the illegitimacy of Aboriginal customary governance of resources, Patton argued that ‘Resolving that inconsistency, that paradox, is what needs to be done in order to restore legitimacy’ (2001:16). His substantive argument relied on overseas examples of sharing sovereignty and the earlier considerations by a Senate Standing Committee of the Makarrata proposal for a treaty or compact with indigenous Australians. He asks ‘whether the present constitutional arrangements do not amount to an illusory and indefensible form of unity, achieved without the consent of and without consultation with the Indigenous people of this country – this is how the present Constitution was achieved’ (2001:8). He raises ‘the possibility that the Constitution might be altered in ways that could accommodate some form of ongoing residual Indigenous sovereignty,’ (2001:8) such as has been raised in Canada where the Canadian Royal Commission into Aboriginal Peoples has proposed the idea of shared sovereignty: Aboriginal inhabitants of Canada could be regarded ‘as partners in the sovereignty of the nation on a par with the federal and provincial governments – that they should be considered a third tier of sovereign government’ (2001:8).

He also reminds us of the deliberations of the 1983 Senate Standing Committee on Constitutional and Legal Affairs which argued in its Report that little was to be gained by relying too heavily on the precedent of treaty-making in North America and elsewhere for at least two reasons: ‘the term ‘treaty’ did not have, in the 18th and 19th centuries, the precise meaning that it has today in international law. . .’ and ‘those treaties signed in

earlier periods generally have no status as instruments of international law today' (2001:8).

The committee recommended that the government give consideration to the implementation of a compact by amending the Constitution to provide a broad enabling power to the Commonwealth to enter into an agreement with representatives of the Aboriginal people.

In particular, the committee recommended a constitutional amendment along the lines of s.105A, which was inserted into the Constitution in 1929 in order to give the Commonwealth power to enter into financial agreements with the states. This section provides, in particularly strong form, for the protection of all such agreements against other laws, both state and federal, and all other sections of the Constitution. A provision of this kind, giving the Commonwealth power to make agreements with Indigenous peoples, would provide similarly strong protection for the rights laid down in any future agreements. (Patton 2001: 9)

Mick Dodson (2001) has outlined the case law in Australia and the way in which the Australian Constitution might be changed to accommodate Australian circumstances. He agreed with the proposition to amend **Section 105 of the Constitution which would provide an enabling power** to enter into a range of agreements with Indigenous people. It is suggested by advocates of this approach that this Section 105 of the Constitution could then underwrite a series of regional agreements and be supplemented by a preamble. The Canadian Constitutional entrenchment of treaties and agreements provides a model which might be used by Aboriginal people in our circumstances, especially in relation to this proposition to amend Section 105. There is no evidence that there has been any detriment caused either to Canadian sovereignty or to the Canadian polity by these arrangements. That many recent agreements have been affirmed by the Canadian Constitution is evidence that there are alternatives to the limited framework of the legal cannon in Australia.

In 2001, Rowse argued that a Treaty or national framework agreement would be an effective check on states, more so than the political will of the Commonwealth government in relation to standards of social justice, land tenures and service delivery.

These approaches to questions of self-determination, sovereignty and indigenous self-government were also raised by George Williams (2001:15) in the AIATSIS seminar

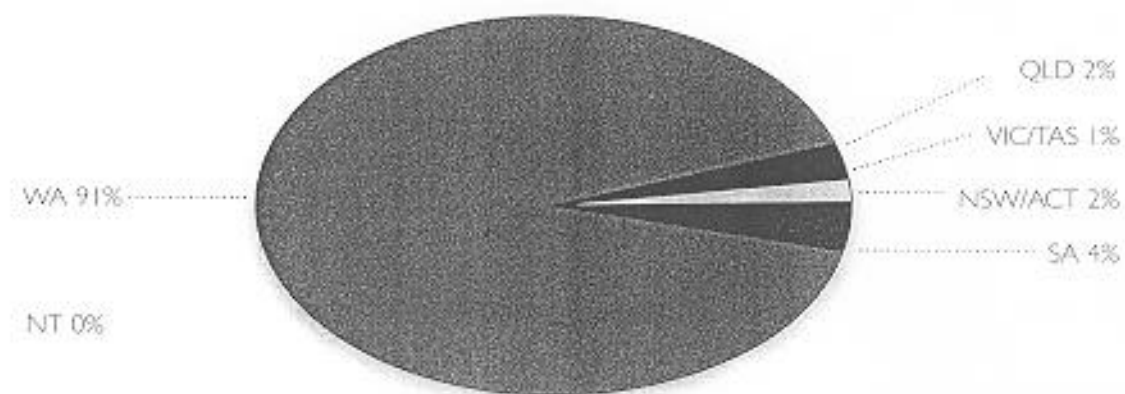
series. Williams observed that ‘. . . what we need. . . is to develop a more sophisticated sense of what we understand by sovereignty. . . because of Mabo it is possible to have a legal system that has sovereign laws emerging from different social and historical contexts.’

As Patton (2001) has pointed out what we need in Australia is a revision of Eurocentric judgements about political organisation in Indigenous societies that enable the Constitutional recognition of Indigenous civil polities and customary law.

Trends in agreement-making

While many of these same shortcomings and difficulties confront courts, Indigenous groups and others negotiating the recognition of Indigenous rights in the Australian jurisdictions, of itself the emerging culture of agreement-making in Australia is progressing a process of orderly negotiation based on recognition of civil polity, in particular the setting out of principles and rules for managing the relationship between native title, public laws and private rights. As the National Native Title Tribunal Member, Fred Chaney (2001) suggests, by achieving native title agreements you carry things forward; native title act procedures may in fact come to recognise and flesh out the substance of native title rights.

In September 1998 an audit conducted by the National Native Title Tribunal found that there were at the time 1349 agreements struck by native title parties nationwide (See Figure 1). According to the Tribunal this outcome was indicative of a developing culture of mediation and negotiation (NNTT 1999: 15). Of these agreements, 257 related to



Source: National Native Title Tribunal 1999:15.

Figure 1. Agreements by State and Territory, 1994-1998 (future act agreements included)

native title determination applications while a further 1092 were future act related agreements (See Figure 2). These native title determination applications ranged from consent determinations of native title to intra-indigenous agreements over boundaries of native title applications (See Figure 3). The audit data establishes that the number of agreements reached rose significantly each year and according to the Tribunal this is a result of the parties developing an understanding of the native title and agreement making process, building relationships of trust and appreciating the importance of progressing in mediation as opposed to litigating an outcome (NNTT 1999: 17).

The President of the National Native Title Tribunal, Graham Neate (2001), in his latest publication refers to a growing confidence in the process of agreement-making with Indigenous people. One type of agreements increasing in prevalence are Indigenous Land Use Agreements (ILUAs) which can be made both under the terms of the NTA and outside of its terms. The ILUA provisions replace the agreement-making process in Section 21 of the 1993 Act (which lacked proper protection for agreements once they were made) and provide for legally binding negotiated agreements made voluntarily

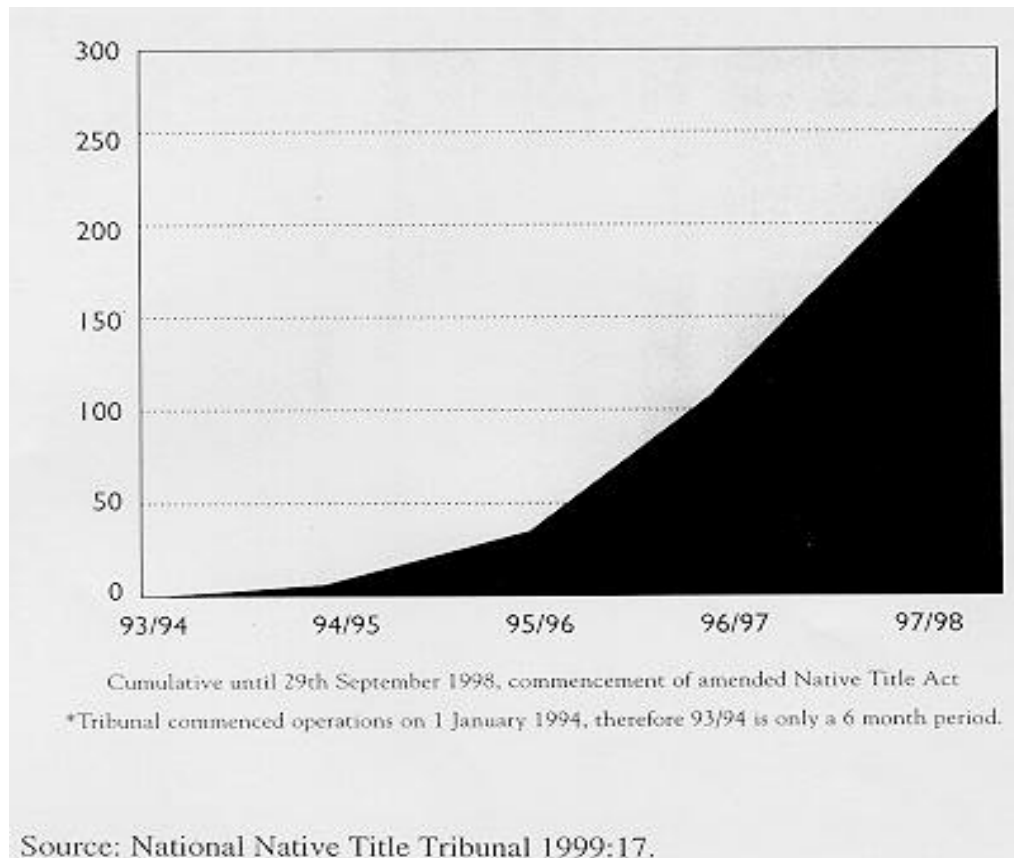


Figure 2. Cumulative number of Native Title related agreements by year (excluding future act) 1994-1998.

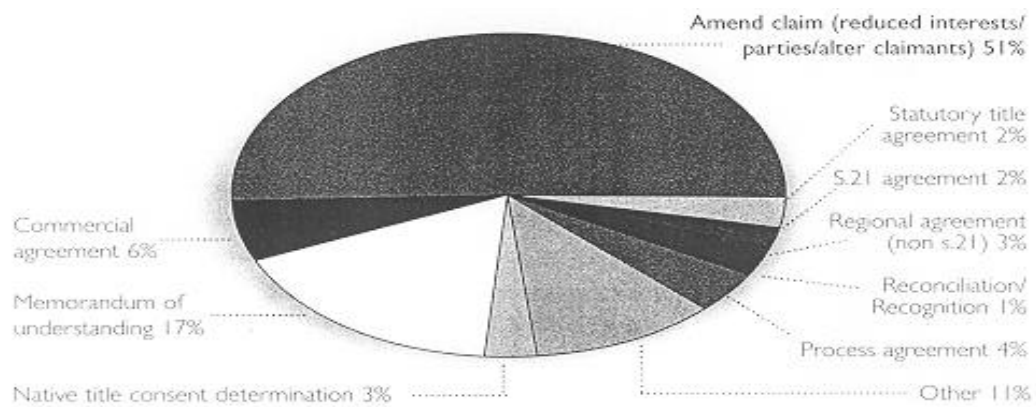


Figure 3. Major components of native title agreements (non future act) 1994-1998.

between people who hold, or claim to hold native title in an area and other people who have, or wish to gain an interest in that area (Wade 2001). Once successfully negotiated, and after procedural hurdles stipulated under the Act have been satisfied, an ILUA is registered as a statutory agreement under the NTA and takes the form of a contract between parties. Also of significance is that Native Title holders, irrespective of being party to the agreement, are contractually bound and can be sued for any breach.

ILUAs are particularly important and useful when

- There is adequate time to negotiate
- There will be a long term relationship between parties
- Where compensation is likely to be an issue (Wade 2001:3).

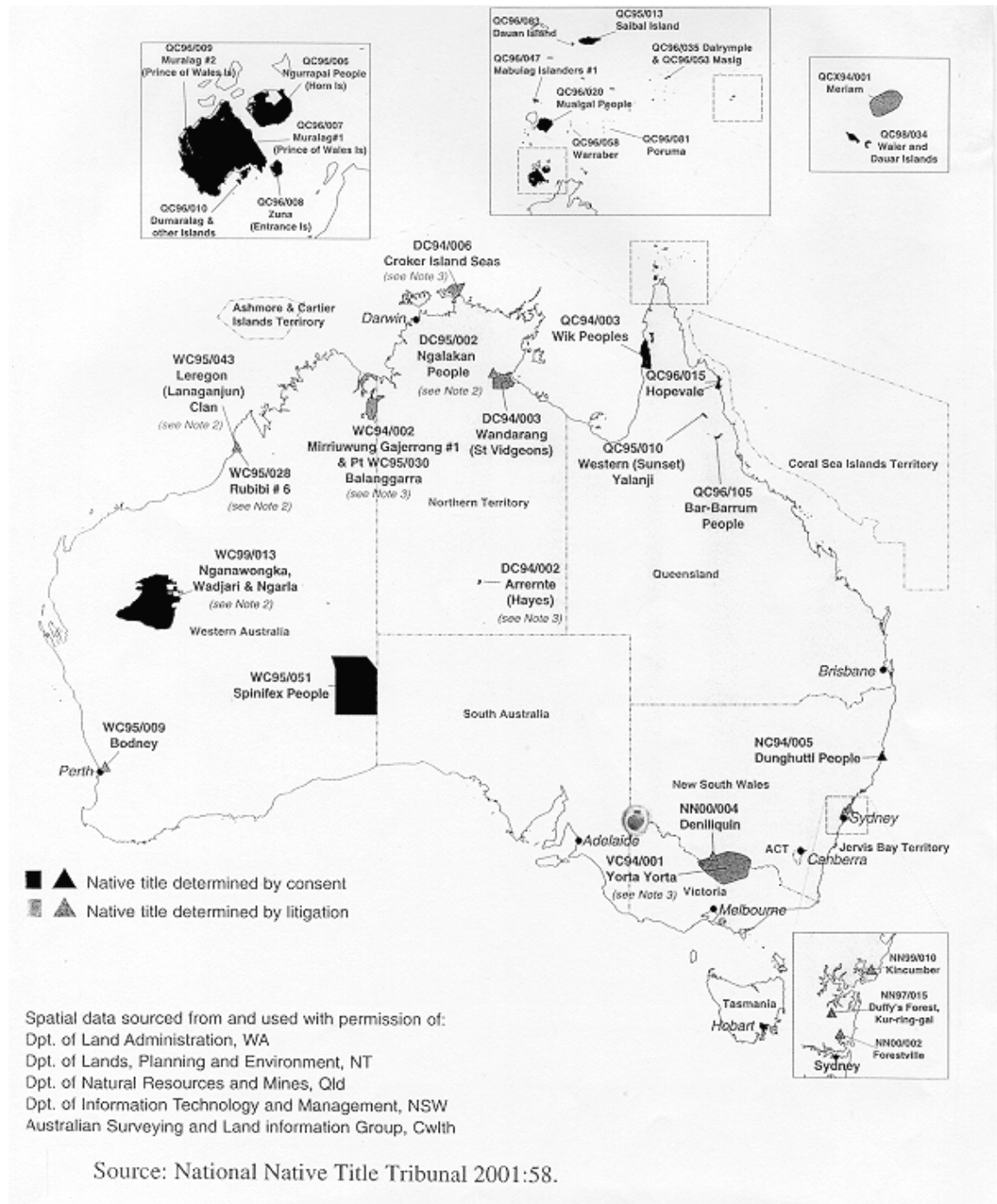
In 2001 the NNTT was in the process of assisting 110 separate ILUA negotiations. Many native title claims, especially in Queensland, are proceeding through mediation to consent determination coupled with the use of ILUAs, which in these instances form part of the package of documents which formalise the resolution of native title determination applications. Alternatively ILUAs may be 'stand alone' agreements which deal with native title issues independently of the native title determination process (Neate 2001). In South Australia, the Aboriginal Land Rights Movement (ALRM) and the State Government are involved in negotiations to progress a statewide ILUA. There are currently 3 pilot projects in SA which are being used to work out and discuss the statewide ILUA process. Parry Agius (2001) of the ALRM refers to these pilot projects as the 'Substantive Issues Development Phase'.

Another important area of agreement making under the provisions of the NTA is the increasing number of Native Title Consent Determinations. At the end of 2001 the NNTT recorded some twenty-two Native Title Consent Determinations (See Figure 4). These date from the first decision on the 7th of April 1997 to the most recent case in October of 2001. These determinations are resolved through the principle of good faith negotiations.

Another emerging area of significance in the agreement making arena is Environment Australia's Indigenous Protected Area Program. Through this program, Indigenous landowners are supported by Natural Heritage Trust Funding to manage their lands either as independent bodies or through co-management agreements. As of November 2001 there were 28 Indigenous Protected Areas, 15 officially declared, 11 co-management projects, while 3-4 have interim

funding.

Figure 4. Map showing external boundaries for areas over which native title has been determined as at 30 June 2001.



In response to the Convention on Biological Diversity 1992, ratified by Australia in 1993, the Australian Government produced the *National Strategy for the Conservation of Australia's Biological Diversity* (1996). This *National Strategy* recommends a framework in which governments, industry, community groups and individual land owners can work co-operatively to 'bridge the gap between current efforts and the effective identification, conservation and management of Australia's biological diversity' (1996:3). The Strategy also advocates the development and use of collaborative agreements that would recognise existing intellectual property rights and establish a royalty payments system in line with relevant international standards relating to traditional resource rights. This is an emerging form of agreement making that requires further development and research, and will be an important area of focus in our ARC research project.

In addition to these significant categories of agreements, we have devised a provisional list of categories of agreements for the database:

Categories of Agreements:

- Conservation Agreement
 - Joint-management
 - National Park
 - Conservation Reserve
 - Marine Park
 - Indigenous Land
 - Indigenous Protected Area
- Mining Agreement
 - Exploration
- Resource Agreement
 - Pastoral
 - Fisheries
- Recognition Agreement
- Service Delivery Agreement
 - Employment and training
 - Health

- Education
 - Housing
 - Infrastructure
 - Legal
- Art and Culture Agreement
 - Intellectual property
 - Art
 - Performance
- Heritage Agreement
 - Cultural Heritage
 - Sacred site protection
 - Rock Art
 - Sites of Significance
- Tourism Agreement
- Research Agreement
- Intra-Indigenous Agreement
- Other

Conclusion

New legal and political relationships between indigenous peoples and the Australian polity and its constituent parts is a dynamic and rapidly growing phenomenon. Research is needed to inform the debate about the possibility for alternative arrangements in post-frontier Australia.

There is concern about not simply the mechanism but rather the kinds of agreements that any Constitutional change would take into account and might confirm, and the range of issues that need to be looked at in pursuing that path.

There has been a number of propositions put on how to deal with this problem of legal and political pluralism and settler and customary land tenure systems. For instance national Native Title Tribunal Member Fred Chaney (2001) proposes as a resolution to these problems in the context of agreement making that in addition to the acknowledgement of native title there also needs to be a permanent state title which overlies and does not extinguish native title itself. He also states that Aboriginal people

need to be given the power to create tenures on their title for Aboriginal and non-Aboriginal people which do not extinguish native title and which would be commercial tenures.

A peculiarly Western Australian view has been proposed by Glen Shaw of the ATSIC Treaty Think Tank. He argues that in relation to Native Title there is a need to shift the focus from the Commonwealth and to negotiate with the States as well. Legislation involving land tenures lies with the States, therefore States by virtue of such legislation define the terms of extinguishments or impairment of Native Title.

In case law, it was the Delgamuuk'w finding that introduced to the developing body of native title law the idea of native identities as both ancient and adapting, based in traditional practices but with the flexibility to deal with the realities of late modernity. De Costa in his analysis of the British Columbia Treaty Commission process asks, Is the call for 'certainty' in the BC Treaty Process 'the recognition of Indigenous rights, or an indemnity against their assertion?' (2001:9) He also notes that modern agreements in British Columbia are 'living agreements' with the potential to evolve, rather than achieving final closure in negotiations (De Costa 2001).

What is needed are new ways of looking at the traditional notion of treaties between settler states and indigenous peoples along with research which will untangle these difficult historical problems.

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