



## Native Title and Agreement Making: a Comparative Study

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The failure in Australia to perceive native title and land rights as the basis on which to address Indigenous economic and social development has been evident at the legal, policy and administrative levels. Legally, the increasingly narrow interpretation of native title by the High Court has, as Noel Pearson has pointed out, stripped native title of much economic meaning or benefit.<sup>1</sup> Pearson has characterised the conceptualisation of native title by the Australian courts as discriminatory, and has noted the stark contrast to the decision of the Supreme Court of Canada in *Delgamuukw*<sup>2</sup> 'which affirms that communal native title involves the right to possession, of the surface and the subsurface'.<sup>3</sup>

As discussed in Chapter 3 the policy position at federal Government level has been to apply and reinforce this increasingly narrow judicial interpretation of native title, including opposing in the courts, recognition of native title (for example sea rights) and subjecting agreements recognising native title to critical scrutiny even where such agreements are based on consent.<sup>4</sup> It was also discussed in Chapter 3 how many state Governments are conducting native title negotiations within this narrow legal framework by focusing primarily on the settlement of native title claims rather than the economic and social development of the traditional owner group.

The restrictive and legalistic approach to agreement-making in respect of native title and land rights, as well as sitting awkwardly with initiatives such as the Council of Australian Governments' (COAG) 'whole of government' approach to service delivery, contrasts unfavourably with more holistic and constructive approaches being developed overseas.

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1 N Pearson, *Where we've come from and where we're at with the opportunity that is Koiki Mabo's legacy to Australia*, Mabo Lecture, Alice Springs Native Title Conference, 3 June 2003, available at <[www.capeyorkpartnerships.com](http://www.capeyorkpartnerships.com)> accessed 19 November 2003.

2 *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

3 Pearson, *op.cit.*, p10.

4 See for example the discussion in Chapter 3 about the Commonwealth government's delay in giving its consent to the in-principle native title agreement between the Wotjobaluk people and the Victorian Government concerning land in western Victoria.



This chapter raises the question of how native title, land rights, and agreement-making with Indigenous peoples are being handled both at juridical and policy levels in other comparable common law countries. The lens through which these international comparisons are viewed is that of the human right to development and the international discourse on sustainable development outlined in Chapter 1. By analysing other approaches to Indigenous rights and economic development the situation in Australia is illuminated so that lessons can be learned from similar experiences.

In pursuing such international comparisons, it should be noted that there is a tendency in Australia to discount the experience of other countries as not being sufficiently relevant, and to resent international comparisons or attention.<sup>5</sup> Indeed, Justice Kirby has cast doubt on the relevance of the findings of other courts in respect of native title matters. In the course of the *Fejo* case he noted:

..care must be exercised in the use of judicial authorities of other former colonies and territories because of the peculiarities which exist in each of them arising out of historical and constitutional developments, the organization of the indigenous peoples concerned and applicable geographical or social considerations.<sup>6</sup>

While the differences highlighted by Justice Kirby must be fully taken into account before implications are drawn from international comparisons, there are dangers in taking an unduly parochial view. The Chief Justice of New South Wales, James Spigelman, in noting that within a decade British and Canadian decisions in many areas of law may become 'incomprehensible' to Australian lawyers, warned that the "Australian common law tradition is threatened with a degree of intellectual isolation that many would find disturbing."<sup>7</sup> Similarly barrister Stephen Churches, who argued the *Teoh*<sup>8</sup> case, has noted that the challenge for Australian common law is to accept the restraint of universal values and standards. He notes that:

The alternative is to leave Australia increasingly in the position of a minority, operating under a private code, when every dictate of common sense requires that, in an interlocked and shrinking world, we be involved in fashioning international standards and showing the way in applying them.<sup>9</sup>

This chapter is developed on the basis that it is useful to examine the experience of comparable countries, especially in the context of the ongoing failure to significantly reduce Indigenous disadvantage in Australia. The two international examples considered here are Canada and the USA, given that there are a number of relevant similarities in the history, legal context and constitutional arrangements between Australia, the USA and Canada. The federal nature of the three countries, and their shared common law traditions, are sufficient to

5 See G Marks "Avoiding the International Spotlight: Australia, Indigenous Rights and the United Nations Treaty Bodies" (2002) 2(1) *Human Rights Law Review* 19.

6 *Fejo v Northern Territory* [1998] HCA 58, at [101].

7 Quoted in G Williams, "At law, spectre of the dinosaur", *Sydney Morning Herald*, 2/07/2000.

8 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

9 S Churches, "Treaties and their Impact on the Practitioner", unpublished paper presented to the Conference on *The Impact of International Law: Recent Developments and Challenges*, University of Sydney, November 1997, p10.



ensure that comparisons can validly be drawn, and that such comparisons have the potential to provide perspectives on developments in respect of native title and agreement-making in Australia.

## Canada

The situation in Canada with respect to Aboriginal rights, self-governance and agreement-making, while differing in important respects from the Australian situation, nevertheless provides useful and relevant comparisons.

### The legal and constitutional context

The early history of colonial relations in North America revolved around various alliances and treaties between the Imperial power and Indigenous peoples. Specific recognition of Indigenous peoples and their rights to their lands and territories was provided by the Royal Proclamation of 1763, which prohibited the private sale of Indigenous lands and required that Aboriginal lands could only be acquired by the Crown, and only with the consent of the Aboriginal peoples concerned (the Proclamation did not cover all of modern Canada, for example, it did not include British Columbia). The Proclamation enshrined the basic position in what was to become the nation of Canada that the settlement of native title issues would be on the basis of entering into treaties and agreements. This has remained a defining characteristic of the Canadian situation. An extensive reserve system was established with the purpose of furthering the protective policy of the Royal Proclamation (and enabling the Christianisation of Indigenous peoples).<sup>10</sup> The reserves were carved out of traditional territories, and have remained an important feature of Indigenous life in Canada, providing a secure land base for many tribes.

In contrast to Australia where the federal and state governments have concurrent jurisdiction in respect of Indigenous peoples, with confederation the federal government of Canada became responsible for 'Indian Affairs', with existing laws consolidated in the 1876 *Indian Act*,<sup>11</sup> the principal legislation affecting Indigenous people. The Indian Act provided *inter alia* that Indigenous land had to be surrendered before it could be disposed of, was exempt from tax and that Indigenous peoples could exercise a limited degree of local self-government. Under the Act, wide discretionary powers are held by the Minister for Indian Affairs and Northern Development over Indigenous lands, assets and moneys, band elections and council by-laws. The federal agency responsible for Indian Affairs is the Department of Indian and Northern Affairs (INAC). This department has the responsibility for the funding of delivery of services to Aboriginal and Inuit communities, and broad responsibility for the Northwest Territories and the Yukon.

10 S Dorsett and L Godden, *A Guide to Overseas Precedents of Relevance to Native Title*, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Canberra, 1998, p16.

11 S91(24) of the *Constitution Act* 1867.



The *Indian Act* has had few amendments since it became law in 1876 and is widely recognised as being out of date and failing to meet the needs of contemporary relations between the First Nations and the Canadian Government. The provisions of this Act were not designed to allow for First Nations communities to be fully participating partners in Canada. Given the broad consensus that thorough change is required, legislation has been developed on the basis of widespread consultations. The legislation is known as the *First Nations Governance Act*.<sup>12</sup> The Bill is currently before Parliament. This new Act would provide bands operating under the *Indian Act* with more effective tools of governance until the negotiation and implementation of self-government arrangements.

The provision in the *Indian Act* (s.18(1)) that reserves shall be held by the Crown for the use and benefit of the respective Indian bands has formed one basis of the Supreme Court of Canada's determination that the federal government owes a fiduciary obligation to the Indigenous peoples (see below).

### *Treaties*

The process of reaching agreements with the Indigenous peoples in Canada about the surrender of lands to make way for mining, agriculture etc, and the concomitant reservation of lands for Indigenous groups, were effected by agreements and in particular by treaties, including a series of treaties known as the "numbered treaties" going through to Treaty No. 11 in 1921. The basic terms of the treaties were similar, in that they provided for:

- Reserves and the full beneficial interest in the land and resources therein;
- The right to hunt, trap and fish throughout the tract of land surrendered until occupied; and
- Promises of social and economic development aid.<sup>13</sup>

These treaties, in contrast to those in the US (see below), are not seen as being encompassed by international law, nor as being between sovereign States. While they can override provincial laws, they do not prevail over federal laws. They have been characterised by the Supreme Court as *sui generis* in nature. However, they do create enforceable obligations and they recognise pre-existing rights.

### *Constitutional protection*

In marked contrast to Australia, the rights of Canada's Indigenous people are protected in the Canadian Constitution. In particular, this protection is afforded through s35 of the *Constitution Act, 1982* which was inserted at the time of patriation of the Constitution in 1982. Section 35 recognises and confirms existing Aboriginal and treaty rights. (Note, the term "Aboriginal" includes the Indian, Inuit and Métis peoples). This protection includes rights that exist or may be acquired by way of land claim agreements. In addition, section 25 of the

<sup>12</sup> *First Nations Governance*, Bill C-7, 2002.

<sup>13</sup> R Bartlett, "Canada: Indigenous Land Claims and Settlements" in B Keon-Cohen, ed. *Native Title in the New Millennium*, AIATSIS, Canberra, 2001, p356.



Constitution guarantees that rights and freedoms provided for by the *Canadian Charter of Rights and Freedoms* cannot be construed to abrogate or derogate from any Aboriginal treaty or other rights.

As a result of s35, Aboriginal rights can no longer be extinguished without consent, and legislation may only infringe on Aboriginal rights if it passes stringent criteria of justification laid down by the Supreme Court in the *Sparrow* decision.<sup>14</sup> The justification test specifically refers to “the unique contemporary relationship, grounded in history and policy, between the Crown and Canada’s Aboriginal peoples”.<sup>15</sup> Section 35 provides strong constitutional protection of the rights of Indigenous peoples in Canada.

### *Native Title*

Notwithstanding the influence of Canadian and Australian jurisprudence on each other in relation to native title, there are significant differences in the approaches taken by the respective courts. These differences have become more marked as the Australian courts have tended over recent years to take less cognizance of the decisions of other common law jurisdictions. As Canadian lawyer Stuart Rush has pointed out:

There has been a strong tradition between the Australian and Canadian appeal courts to apply each other’s decisions in cases involving Aboriginal law. Since *Mabo* there has been a steady drift, however, of the Australian High Court away from reliance on Canadian decisions. This trend is at odds with the common historical and judicial roots between the two nations.<sup>16</sup>

Canadian law distinguishes between “Aboriginal rights” and “Aboriginal title”. The concept of Aboriginal title was set out in the *Calder case*<sup>17</sup> of 1973 which found that Aboriginal title is part of Canadian law. Aboriginal title is a legal right to occupy and possess certain lands, the ultimate title to which is with the Crown. It is inalienable and upon surrender it gives rise to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. Apart from the issue of fiduciary obligation, this is a similar doctrine to native title in Australia, although, perhaps significantly, the Canadian courts emphasise “use and occupation” as the basis of Aboriginal title, differing somewhat from the Australian High Court’s basis of native title as “custom and tradition”.

The policy response to *Calder* was for the Canadian Government to enter into a process for comprehensive land claims negotiations and settlements, thereby minimising litigation (see below). The nature of Aboriginal title was explored more fully in the *Delgamuukw*<sup>18</sup> case. Before considering that case, it is necessary to distinguish the doctrine of Aboriginal rights from that of Aboriginal title.

14 *R v Sparrow* (1990) 70 D.L.R. (4th) 385.

15 *ibid*, at 900.

16 S Rush, “Aboriginal Title and the State’s Fiduciary Obligations”, paper presented at the *Conference on Land and Freedom*, Newcastle, Australia, July 1999, p36. Available at <[www.newcastle.edu.au/centre/cispr/conferences/land/](http://www.newcastle.edu.au/centre/cispr/conferences/land/)> last visited 17 November 2003.

17 *Calder v Attorney-General of British Columbia* (1973) 34 D.L.R. (3d) 145.

18 *Delgamuukw v British Columbia* [1997] 3 SCR 1010.



## Aboriginal rights

Canadian law recognises a distinction between Aboriginal rights and Aboriginal title. Aboriginal rights are activities integral to the distinctive cultures of Indigenous Canadians – such rights are not necessarily linked to title, nor do they need to be proved back to sovereignty, as is the case with title. That is, Aboriginal rights may exist independently of a claim of Aboriginal title. In Australia, no difference is made between a right to land and other analogous rights. The Canadian approach is set out in the decision in *Van der Peet*:

Aboriginal rights arise from prior occupation of land, but they also arise from the prior social organization and distinctive cultures of Aboriginal peoples on that land... Courts must not focus so entirely on the relationship of Aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of Aboriginal rights.<sup>19</sup>

Such an approach encompasses a distinct Indigenous polity and society. It may provide for greater flexibility in approach than in Australia, recognising that Aboriginal rights are to be perceived widely and as arising from a prior and distinctive society. Under such a doctrine, Aboriginal rights may even survive a grant to non-Indigenous interests of a fee simple title as they are not tied exclusively to land ownership. The Canadian courts have been highly protective of Aboriginal rights, and have resisted attempts to extinguish such rights. Further, following the constitutional protections of 1982, it is not possible to extinguish Aboriginal rights that still existed in 1982. As Canadian lawyer Louise Mandell has pointed out:

no extinguishment argument has prevailed in Canada although some of the same arguments have succeeded in Australia, notwithstanding that British common law is applicable in both jurisdictions.<sup>20</sup>

Extinguishment of course is at the heart of the discrimination against native title found in the doctrine of native title. As Mandell points out:

The colonization doctrines are promoted through extinguishment arguments. There can be no co-existence, or reconciliation if extinguishment is a precondition. To extinguish means to terminate – to bring to an end – to wipe out – to destroy.<sup>21</sup>

The discriminatory doctrine that native title can be extinguished unilaterally by government is shared by the common law of the US, Australia and Canada. However, the Canadian courts place a high onus on the Crown to justify extinguishment. They have been stringent in assessing “clear and plain” intent. The onus is high to take into account the far reaching consequences of extinguishment for the Indigenous groups. This appears to be in marked contrast with recent examples of extinguishment in cases before the High Court of Australia.

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19 *R v Van der Peet* [1996] 2 SCR 507 at [74].

20 L Mandell, “Is White Might Right?” Paper presented to *Land and Freedom Conference* July 1999. Available at <[www.newcastle.edu.au/centre/cispr/conferences/land/](http://www.newcastle.edu.au/centre/cispr/conferences/land/)> last visited 17 November 2003, p10.

21 *ibid*, p4.



### *Delgamuukw and Aboriginal title*

The Supreme Court in *Delgamuukw* identified the basic legal characteristics of Aboriginal title. These characteristics include:

- Aboriginal title is a right to the land itself. It is not limited to the right to carry on traditional practices or activities. Rather, Aboriginal title is a broad right to the exclusive use and occupation of land.
- being more than the right to engage in specific activities, Aboriginal title confers the right to use land for a variety of purposes, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of Aboriginal societies (with the limitation that the activities cannot be inimical to the attachment to the land).
- the title includes the resources on the land, such as oil, gas and timber etc.
- Aboriginal title arises from prior occupation – Aboriginal rights are not dependent on any legislative or executive instrument for their existence.
- Aboriginal title is a collective right held by all members of an Aboriginal nation, suggesting that Aboriginal peoples, as distinct and organised societies, must have decision-making processes that are integral to the exercise of self-government (although this issue was not conclusively decided in *Delgamuukw*).
- Aboriginal title is a proprietary title that can compete on an equal footing with other proprietary titles.

Besides developing a title which is broader, more robust and of greater utility for the holders of the title than the Australian version, *Delgamuukw* also places stringent conditions on interference with Aboriginal title, including the need to justify any interference in terms of the Crown's fiduciary obligations.

Noel Pearson has criticised the trend of the Australian courts to ignore the *Delgamuukw* decision:

A search of cases in *Ward* and *Yorta Yorta* reveals that hardly any cases are canvassed in support of the court's conclusions on the state of Australian law. There is absolutely no reference in either of these Australian cases to what is the seminal Canadian decision on native title, and in my view the most important decision on the subject since the High Court's decision in *Mabo*, namely the decision of the Supreme Court of Canada in *Delgamuukw*. Given that *Delgamuukw* dealt with the very issues that were at issue in *Ward* and *Yorta Yorta*, it is startling to consider that no reference is made to it in Australian law.<sup>22</sup>

### *Implications*

The significantly stronger doctrine of Aboriginal rights and title developed in Canada, the constitutional protection of Aboriginal rights, the stringent tests in respect of interference with such rights and the Crown's fiduciary obligations,

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22 N Pearson, "Land is Susceptible to Ownership", paper presented at the *High Court Centenary Conference*, October 2003. Available at <[www.capeyorkpartnerships.com](http://www.capeyorkpartnerships.com)> accessed 17 December 2003.



along with a policy position of negotiating rather than litigating native title settlements, places the Indigenous peoples of Canada in a strong position in respect of developing agreements, in particular comprehensive settlements of native title claims.

### **The Comprehensive Land Claims Settlements Process: General outline**

The policy response to the recognition of Aboriginal title in the *Calder* decision of 1973 was contained in the federal government's *Statement on Aboriginal Claims*, August 1973.<sup>23</sup> Comprehensive land claims negotiations are based on the assertion of continuing Aboriginal title to lands and natural resources. The federal policy stipulates that land claims may be negotiated with Aboriginal groups in areas where claims to Aboriginal title have not been addressed by treaty or through other legal means.

The thrust of the 1973 Comprehensive Claims Policy, which was reaffirmed in 1981, was to exchange claims to undefined Aboriginal rights for a clearly defined package of rights and benefits set out in a settlement agreement. Section 35 of the *Constitution Act, 1982* recognises and affirms Aboriginal and treaty rights that now exist *or that may be acquired* by way of land claim agreements.

Significant amendments to the Comprehensive Claims Policy were announced in December 1986, following an extensive period of consultation with Aboriginal and other groups. The revised policy improved the negotiation process, allowed for greater flexibility in land tenure, and provided a clearer definition of the topics for negotiation. These changes have contributed to the achievement of settlements in recent years. The 1986 Policy allows for the retention of Aboriginal rights on land which Aboriginal people will hold following the conclusion of a claim settlement, to the extent that such rights are not inconsistent with the settlement agreement. Since 1995, Canada has explored new approaches to achieving certainty with regard to lands and resources as an alternative to the traditional approach based on exchange and surrender of Aboriginal land rights. From 1995 self-government arrangements (see below) can be negotiated simultaneously with land and resources as part of a comprehensive land settlement. Importantly, such self-government rights can be constitutionally protected under s.35 of the *Constitution Act*. In 1998 the federal government affirmed that treaties, historic and modern, will continue to be the foundation of the relationship between the Aboriginal people and the Crown.

#### ***Objectives***

The primary goal of the Canadian government in the Comprehensive Claims settlement process is to negotiate modern treaties which will provide a clear, certain and long-lasting definition of rights to lands and resources for all Canadians; thus equitably reconciling the protection of Aboriginal and non-Aboriginal interests through the negotiation process by:

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23 See R Bartlett, *Canada: Indigenous Land Claims and Settlements*, in B Keon-Cohen, *op.cit.*, pp356-362.





- providing economic opportunities for Aboriginal groups, building new relationships with government, promoting partnerships between Aboriginal groups and their neighbours in managing lands and resources;
- ensuring that comprehensive land claims respect the fundamental rights and freedoms of all Canadians, Aboriginal and non-Aboriginal; and
- ensuring that the interests of the general public and existing legal interests are respected under these agreements and, if affected, are dealt with fairly.

### *Results*

Initially the Provinces were reluctant to participate in such negotiations, but the federal government was able to proceed in respect of the territories of the Yukon and the Northwest. In respect of the Inuit people of the western Arctic a series of negotiations and agreements led to a final umbrella agreement in 1993. This umbrella agreement became the basis for the negotiation of claims, settlements and self-government agreements with individual Yukon First Nations, with settlements and agreements now having been reached with the majority of the fourteen First Nations of the area.

Negotiations began in 1980 with the Inuit of Central and Eastern Arctic, leading to a final agreement in 1993 covering an area of two million square kilometres and nineteen thousand Inuit. The new territory of Nunavut came into being in 1999. While a final agreement was initialled in 1990 concerning the Denes and Métis of the Northwest Territories in 1990, it was not ratified because of concerns by the Dene-Métis about the “complete extinguishment” clause in the agreement.

In Quebec, which had no history of treaties or agreements before 1975, an agreement was signed with the Cree and Inuit of northern Quebec providing for the surrender of native title, the return of approximately one per cent of traditional lands to the Cree and Inuit, and significant financial compensation. Fishing and hunting rights to some of the land surrendered were guaranteed. Further agreements have been made with other groups in Quebec in subsequent years. In British Columbia a Treaty Commission was established (see below) and a number of agreements have been made, including with the Nisga’a.

These comprehensive land claim settlements provide for grants of freehold with rights to minerals (generally a percentage of traditional lands) or in some cases freehold title excluding minerals. Traditional rights are maintained *throughout* the traditional lands, although the form of such rights in fishing and hunting varies between agreements. For example, in some agreements this might be a preference or priority to Indigenous hunting, in others a guaranteed quota.



## The Nunavut Comprehensive Land Claim Settlement<sup>24</sup>

Nunavut is the result of the largest land claim settlement in Canada's history, and follows years of negotiation between the Government of Canada and the Tungavik Federation of Nunavut (TFN), which represented Inuit of the eastern Arctic.

From the beginning, Inuit negotiators sought the creation of the Nunavut territory, and their own territorial government, as part of their claim. In 1993, the Parliament of Canada passed legislation to enact the settlement. The *Nunavut Land Claim Agreement Act* gave Inuit control of more than 350,000 square kilometres of land, of which 36,000 square kilometres includes mineral rights. It also provides Inuit with more than \$1 billion over 14 years.

The *Nunavut Act*, the legislative framework for creating Nunavut, is an extension of the land claim settlement. The territory encompasses 2 million square kilometres, or one fifth of Canada's land mass. Nunavut Tunngavik Inc (NTI) administers the claim settlement benefits on behalf of Inuit. NTI has established several regional development corporations that are involved in activities ranging from shrimp fishing to tourism. It is also encouraging mining exploration on Inuit lands. Inuit hold mineral rights in areas that show good prospects for future royalty payments. These efforts will strengthen the Nunavut economy and reinforce the territorial government's drive to make the territory self-sufficient.

In recognition that Inuit make up about 85 percent of the territory's total population of 25,000, the settlement includes preference for Inuit-owned businesses bidding on government contracts in Nunavut. At present, 270 businesses are eligible for contract preference. Inuit in Nunavut who earn their living as hunters have also benefited from the claim settlement. Over the past three years, the Nunavut Hunters Support Program has invested \$6 million in improvements to subsistence hunting. More than 1,400 Inuit Elders over the age of 55 will benefit from the Elders Benefit Program, which will provide an income supplement to improve their quality of life.

The Nunavut land claim settlement also provides for the establishment of the Inuit Heritage Trust to regulate the activities of archaeologists in Nunavut. Archaeological excavations pose a serious concern for Inuit who have seen ancestors' artefacts, and even their bones, removed to museums throughout the world. The trust is also working to conserve Inuit oral history, part of which includes finding Inuit place names throughout Nunavut.

Culturally, politically, economically and socially, the Nunavut land claim settlement helps Inuit in the territory realize their potential by enabling them to make their own choices.

### Process

Negotiation of land claim settlements in the Northwest Territories usually involves three parties: the Government of Canada, the Territorial Government, and the Aboriginal group making a claim. The goal of negotiators is to balance the range of concerns and needs expressed by all those involved. Each negotiation is unique, and reflects the needs, desires, and processes of those at the table. However, most negotiations proceed through several distinct stages:

24 The source of the following material is a fact sheet *The Nunavut Comprehensive Land Claim Settlement* provided by the Department of Indian and Northern Affairs Canada on its website at <[www.ainc-inac.gc.ca/nu/nunavut/index1\\_e.html](http://www.ainc-inac.gc.ca/nu/nunavut/index1_e.html)> accessed 11 December 2003.



**Submission of claim:** The Aboriginal group prepares a description of its claim that identifies the general geographic area of its traditional territory.

**Acceptance of claim:** The Government of Canada reviews the claim and advises the Aboriginal group whether Canada is prepared to open negotiations. If the answer is no, reasons are provided in writing. If the answer is yes, the claim is accepted, and the process proceeds to the next step.

**Framework Agreement:** At the first stage of negotiation, the groups involved agree on issues to be discussed, how they will be discussed, and on deadlines for reaching an Agreement-in-Principle.

**Agreement-in-Principle:** This is the stage at which the parties negotiate the issues set out in the Framework Agreement. Reaching an Agreement-in-Principle (commonly called an 'AIP') often takes longer than any other stage in the negotiation process. The AIP should contain all the major elements of the eventual Final Agreement.

As with treaty negotiations (for example in British Columbia) significant financial resources are provided by the Canadian Government to assist the Indigenous participation in the negotiations. Such expenditure is justified by the government on the basis that it is important for the national good that land issues be settled by agreement, and because negotiation will overall prove to be less costly than litigation.

### **Comprehensive Agreements – issues and contemporary developments**

One major issue of concern in some agreements has been the extinguishment of Aboriginal title by surrender. For example, in accordance with then federal policy, with Federal/Provincial Agreements and with the legislation establishing the British Columbia Treaty Commission, Indigenous peoples in British Columbia were required to extinguish approximately 95% of their traditional territory as a necessary condition of treaty-making. Writing in 1999, Mandell commented:

The governments still demand a surrender as a basis for treaty made in 1999. The very word surrender [as used in earlier treaties] has been replaced by the word "certainty" but it is surrender nevertheless. Surrender implies passivity, loss of objectivity and loss of control. It is another form of assimilation.<sup>25</sup>

However, recent agreements have seen a move towards outcomes that do not require surrender or extinguishment of title, but rather an undertaking not to exercise rights other than those agreed (see the Dogrib example below). This development may have important implications for native title agreements in Australia, where extinguishment has been central to some agreements.<sup>26</sup>

25 Mandell, *op.cit.*, p22.

26 eg the Dughutti agreement concerning Crescent Head NSW, and the Wotjobaluk in-principle agreement in Victoria involving extinguishment of native title on most of the area of the claim.



## Treaty-making in British Columbia – an incremental approach

Although the objective of comprehensive agreements is to achieve certainty by reaching a final settlement of land claims in an area or region, experience in British Columbia has led to the adoption of an incremental approach to agreement-making, rather than attempting in the one negotiation process to settle all matters conclusively. The lessons learned in British Columbia, and the incremental approach now being developed there, have clear implications for the process of negotiating agreements with native title claimants in Australia.

### British Columbia Treaty Commission

The modern process of negotiating treaties in British Columbia began in the 1990's. In 1993, the federal and provincial governments and the First Nations Summit launched the British Columbia treaty process and established the British Columbia Treaty Commission (BCTC). The BCTC coordinates the start of negotiations, monitors progress, keeps negotiations on track, provides information to the public and allocates funds to support First Nations' participation. The Commission proposed that the basis for treaty making between First Nations, Canada and British Columbia should be a new relationship based on mutual trust, respect and understanding, through political negotiations. This approach was expected to lead to earlier opportunities for agreements or treaties. However, the experience of the intervening years has shown that building new relationships is a more complex and time-consuming undertaking than was initially recognised.

### *Problems*

A major review of the treaty process by the Treaty Commission has revealed that urgent action is necessary to make the treaty process more effective. As a result of its review, the Treaty Commission suggests that treaties are best built over time rather than moving directly to one-off final settlements. In this way, when a final treaty is signed, the new relationships necessary for success will largely be in place. The current negotiating process is expensive and it takes a long time to achieve results. In the meantime, it does not provide stability on the ground for First Nations, governments or third parties. Nor does it necessarily improve social and economic conditions for First Nations and other British Columbians. This leads to growing frustration and reduces support for treaty-making.

### *Solutions – an incremental approach<sup>27</sup>*

A working group looked at what could be achieved in the short term as the parties progress towards comprehensive agreements. The focus is now on process efficiencies and, in particular, options to build treaties incrementally. The central recommendation in the Treaties Commission Review was that First Nations, Canada and British Columbia shift their emphasis in treaty-making to building treaties incrementally over time so that when a final treaty is signed, the new relationships necessary for success will largely be in place.

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27 In Chapter 1, I discuss how an incremental approach allows the group to learn from prior experiences thus contributing to capacity development within the group.



What does building treaties incrementally mean? While there is not yet clarity on what incremental treaty-making means in practical terms, the working group noted that it is a process for building treaties by negotiating over time a series of arrangements or agreements. These can be linked to treaties which can be implemented prior to a final treaty. This concept is in its early formulation and requires further elaboration.

It should be noted that an incremental approach to treaty-making is not a move away from comprehensive treaties. It is not about maintaining the status quo by only negotiating arrangements that are currently available under existing policy, programs and legislation. Instead, it reflects a commitment by all parties to be innovative and to strive for results on the ground. This should create a more stable social and economic environment sooner, which in turn contributes to building a new relationship between the parties.

The British Columbia experience has shown the fundamental necessity of building relationships on an incremental basis and of linking social and economic development to settlement of land claims or native title issues. It is through this process that viable relationships and partnerships can lay the basis for economic and social development. As the BC Claims Task Force Report noted, “Early implementation of sub-agreements may provide the parties with an opportunity to demonstrate good faith, build trust and establish a constructive relationship”.<sup>28</sup>

Thus, interim measures and other agreements that bring the parties closer to a new relationship and that serve as the building blocks of comprehensive treaties are a key means by which the parties can build treaties incrementally.

It is recognised that the success of incremental treaty building will, in large measure, depend on the parties having a clear and shared vision of where they are going in treaty negotiations. If the parties are negotiating a series of arrangements and agreements that will ultimately form a comprehensive treaty through an incremental approach, they need to have a plan or vision of how those components will all come together. Most of the subjects that eventually form part of the treaty may be appropriate for an incremental arrangement or agreement. These could include:

- Land and resource protection
- Land and resource acquisition
- First Nation access to land and resources
- First Nation involvement in land and resource management and planning
- Governance arrangements
- Cultural resources and activities
- Fiscal arrangements
- Economic development initiatives

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28 The First Nations of British Columbia, the Government of British Columbia and the Government of Canada *The Report of the British Columbia Claims Task Force Part 2: Scope – What the Negotiations Should Include*, June 28, 1991.



## *Conclusion*

It can be seen that an incremental approach does not mean a limited or restricted approach, or that only minor issues should be dealt with initially. The difficulties of developing final settlements, including recognition of the capacity limitations of Indigenous groups, and the fact that other priorities might at times intrude into the process, can be accommodated in an incremental approach. Indeed the development of governance structures and effectiveness and capacity building can form part of the process of developing agreements. In this respect the potential unfairness of groups having to conclude final agreements when they may not yet have the capacity to do so can be avoided. Support for capacity building can indeed be part of the process of incremental agreement making and the establishment of appropriate relationships that build self-government of native title claimants.

## *Self-government*

Aboriginal peoples in Canada have long expressed their aspiration to be self-governing, to chart the future of their communities, and to make their own decisions about matters related to the preservation and development of their distinctive cultures. Aboriginal peoples also maintain that they have an inherent right of Aboriginal self-government, a right which should be recognised by all Canadians. The trend in Canada is to bring land claim settlements and agreements about self-government together in an integrated process.

## *Status of Self-government*

The government of Canada recognises the inherent right of self-government as an existing right within section 35 of the *Constitution Act, 1982*. It has developed an approach to implementation that focuses on reaching practical and workable agreements on how self-government will be exercised, rather than trying to define it in abstract terms. Acknowledging that the inherent right of self-government may be enforceable through the courts and that there are different views about the nature, scope and content of the inherent right, the government takes the position that litigation over the inherent right would be lengthy, costly and would tend to foster conflict. The government's policy position is that negotiations between governments and Aboriginal peoples are clearly preferable as the most practical and effective way to implement the inherent right of self-government.

The Canadian position is that the inherent right of self-government does not include a right of sovereignty in the international law sense, and will not result in sovereign independent Aboriginal nation states. In this sense the legal underpinnings of self-government differs from the US doctrine of inherent, if limited, sovereignty (see below). Implementation of self-government is intended to enhance the participation of Aboriginal peoples in the Canadian federation, and ensure that Aboriginal peoples and their governments do not exist in isolation, separate and apart from the rest of Canadian society. However, not all Indigenous groups accept this unqualified incorporation into the Canadian nation state. For example, the Six Nations Confederacy, also known as the Iroquois, have consistently asserted their independence and sovereignty, and continue to do so. The Iroquois state:



We are the proper subjects of international law, not Canadian law. We seek only the rightful recognition of our historic, current and future rights as one of the original confederations of nations of North America.<sup>29</sup>

The fact that self-government is acknowledged to be an inherent right, and the fact that it can fall within the scope of the comprehensive settlements process and receive Constitutional protection means that self-government, while falling short of sovereignty, is an entrenched right in Canada, and evidences a significant application of the right of self-determination to the Indigenous peoples of Canada.

### *Negotiating Self-government*

Given the different circumstances of Aboriginal peoples throughout Canada, implementation of the inherent right is not uniform across the country nor does it result in a “one-size-fits-all” form of self-government. The Canadian Government proposes to negotiate self-government arrangements that are tailored to meet the unique needs of Aboriginal groups and are responsive to their particular political, economic, legal, historical, cultural and social circumstances. The government enters into negotiations with duly mandated representatives of Aboriginal groups and the provinces concerned, in order to establish mutually acceptable processes at the local, regional, treaty or provincial level. It is the government’s view that tripartite processes are the most practical, effective and efficient way of negotiating workable and harmonious intergovernmental arrangements.

It is considered essential that the individuals negotiating on behalf of Aboriginal peoples be duly mandated by the group they are representing, and that support be maintained throughout the negotiation process. The onus to resolve any disputes regarding representation within or among Aboriginal groups rests with the Aboriginal groups concerned.

The approach to self-government differs between the various Indigenous peoples of Canada. Many First Nations (Indian tribes) have expressed a strong desire to control their own affairs and communities, and deliver programs and services better tailored to their own values and cultures. They want to replace the outdated provisions of the *Indian Act* with a modern partnership which preserves their special historic relationship with the federal government. All First Nations want other governments to recognise their legitimacy and authority.

On the other hand Inuit groups in various parts of Canada have expressed a desire to address their self-government aspirations within the context of larger public government arrangements, even though they have, or will receive, their own separate land base as part of a comprehensive land claim settlement. The creation of the new territory of Nunavut is one example of such an arrangement on a large scale.

Métis and Indian groups living off a land base have long professed their desire for a self-government process that will enable them to fulfill their aspirations to

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29 See D M Johnston, “The Quest of the Six Nations Confederacy for Self-Determination” in S J Anaya (ed) *International Law and Indigenous Peoples*, the Library of Essays in International Law, Ashgate, Dartmouth, 2003, p107.



control and influence the important decisions that affect their lives. The federal government is prepared to enter into negotiations with the Provinces and Métis and Indian groups residing off a land base. Negotiation processes may be initiated by the Aboriginal groups themselves and will be tailored to reflect their particular circumstances and objectives.

### *Scope of Negotiations*

Under the federal approach, the central objective of negotiations is to reach agreement on self-government. Aboriginal governments and institutions require the jurisdiction or authority to act in a number of areas in order to give practical effect to the inherent right of self-government. Broadly stated, the government views the scope of Aboriginal jurisdiction or authority as likely extending to matters that are internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as an Aboriginal government or institution. Under this approach, the range of matters that the federal government sees as subjects for negotiation could include all, some, or parts of the following:

- establishment of governing structures, internal constitutions, elections, leadership selection processes
- membership
- marriage
- adoption and child welfare
- Aboriginal language, culture and religion
- education
- health
- social services
- administration/enforcement of Aboriginal laws, including the establishment of Aboriginal courts or tribunals and the creation of offences of the type normally created by local or regional governments for contravention of their laws
- policing
- property rights, including succession and estates
- land management, including zoning, service fees, land tenure and access, and expropriation of Aboriginal land by Aboriginal governments for their own public purposes
- natural resources management
- agriculture
- hunting, fishing and trapping on Aboriginal lands
- taxation in respect of direct taxes and property taxes of members
- transfer and management of monies and group assets
- management of public works and infrastructure
- housing
- local transportation
- licensing, regulation and operation of businesses located on Aboriginal lands

There are a number of other areas that may go beyond matters that are integral to Aboriginal culture or that are strictly internal to an Aboriginal group. To the extent that the federal government has jurisdiction in these areas, it is prepared





to negotiate some measure of Aboriginal jurisdiction or authority. In these areas, laws and regulations tend to have impacts that go beyond individual communities. Therefore, primary law-making authority remains with the federal or provincial governments, as the case may be, and their laws would prevail in the event of a conflict with Aboriginal laws. Subject matters in this category include:

- divorce
- labour/training
- administration of justice issues, including matters related to the administration and enforcement of laws of other jurisdictions which might include certain criminal laws
- penitentiaries and parole
- environmental protection, assessment and pollution prevention
- fisheries co-management
- migratory birds co-management
- gaming
- emergency preparedness

The particular situation of Métis and Indians living off a land base in terms of self-government arrangements is relevant to a number of situations in Australia where Indigenous people may have limited, if any, land rights or native title. Although not having a land base or only a limited land base, such Aboriginal communities remain a distinctive society and indeed may represent a significant proportion of the total population in a region. In such situations a clear desire for a greater degree of autonomy and self-government, with increased participation and control in respect of programs and services, is evident (the Western Division of NSW may be a case in point). In Canada, the government recognises the need for flexibility in developing self-government arrangements. As such, negotiations may consider a variety of approaches to self-government off a land base including:

- forms of public government;
- devolution of programs and services;
- the development of institutions providing services; and
- arrangements in those subject matters where it is feasible to exercise authority in the absence of a land base.

Importantly, the government is prepared, with agreement from the Provinces, to protect rights in such agreements, even though they are not necessarily tied to a land base as constitutionally-protected section 35 treaty rights.

#### *Mechanisms for Implementation*

The Government anticipates that agreements on self-government will be given effect through a variety of mechanisms including treaties, legislation, contracts and non-binding memoranda of understanding. Implementation of the inherent right of self-government with constitutional protection would be a continuation of the historic relationship between Aboriginal peoples and the Crown. Self-government rights could be protected under section 35:



- in new treaties;
- as part of comprehensive land claim agreements; or
- as additions to existing treaties.

### *Financial Arrangements*

The federal government's position is that financing self-government is a shared responsibility among federal, provincial and territorial governments, and Aboriginal governments and institutions. Specific financing arrangements will be negotiated among governments and the Aboriginal groups concerned. The Government will normally require that an agreement on cost-sharing between the federal government and the relevant provincial or territorial government be secured prior to the commencement of substantive negotiations.

### *Responsibility for Negotiations within the Federal Government*

Within the federal government, the Minister of Indian Affairs and Northern Development has a mandate to enter into negotiations with First Nations, the Inuit, and Métis groups north of the sixtieth parallel. The Federal Interlocutor for Métis and Non-Status Indians has a mandate to enter into negotiations with Métis south of the sixtieth parallel and Indian people who reside off a land base. In addition, Ministers of other federal government departments have mandates to enter into sectoral negotiations in their respective areas of responsibility. A Federal Steering Committee co-ordinates implementation of the inherent right of self-government within the federal government and maintains an overview of all self-government activities across the federal government. The Committee ensures the participation in negotiations, as required, of all federal departments and agencies.

### *Relationship to Other Processes, in particular Comprehensive Land Claim Settlements*

The federal government is prepared, where the other parties agree, to deal with implementation of the inherent self-government right in combination with other processes, particularly the negotiation of Comprehensive Land Claim Settlements. The government is also prepared to enter into negotiation processes building on the relationship already established through existing treaties. Finally, wherever feasible and appropriate, existing tripartite arrangements, such as the British Columbia treaty negotiation process will be used to facilitate the negotiation process.

### *Approval of Negotiated Agreements*

Within the federal government, Cabinet approval will be sought for Agreements-in-Principle and Final Agreements, and Parliamentary approval sought for self-government treaties and any implementing legislation that may be required. This is indicative of the importance attached to Indigenous self-government in Canada.

The Government will require evidence that negotiated agreements have been ratified by the Aboriginal group concerned in a way that demonstrates clearly the group's consent. While the specific ratification mechanism can be negotiated, it will have to ensure that all members have an opportunity to participate, that



they have all relevant information available, and that the procedures for ratification are transparent and recognised as binding.

The Canadian situation is characterised by a dynamic participatory environment, based on acknowledgement of rights and negotiation between equals. The progress in settlement of land claims, the development of self-government, and the integration of land, governance and social and economic programs, are exemplified by the recent Tlicho (Dogrib) agreement.

### **“Dogribs dealt a new deal”**

In September 2003 the newspaper *Indian Country Today* ran a story headed “Dogribs dealt a new deal” about the signing of a treaty by the Tlicho (previously known as Dogrib) Indian nation with the Canadian Government.<sup>30</sup> The treaty signing was a historic moment not just for the Tlicho people, but also for the development of integrated land claims and self-government agreements.

The Indian Affairs Minister Robert Nault noted that the settlement did not extinguish any Aboriginal rights. It also allowed for further revisions in the future if required. He said that Canada leads the world as far as Aboriginal and treaty rights are concerned.

At the signing of the Treaty he was reported as saying:

“This is unique to Canada. No where else in the world is anyone attempting to combine three levels of government, federal, territorial and Aboriginal. In Canada, we believe in treaty and Aboriginal rights, that there is another level of government that is constitutionally protected”.<sup>31</sup>

Representatives of the Dogrib Treaty 11 Council, the Government of the Northwest Territories, and the Government of Canada signed the Tlicho Agreement on 25 August 2003. The Prime Minister of Canada, Jean Chrétien, attended the ceremony. He observed:

This agreement will serve as a model for other indigenous communities in Canada and in other countries: a model for implementing self-government. The agreement defines rights and shows the world how diversity creates strengths and how partnership builds success.<sup>32</sup>

The Tlicho Agreement is the first combined land claim and self-government agreement of its kind in the Northwest Territories. The Agreement will create the largest single block of First Nation owned land in Canada, and provide new systems of self-government for the Tlicho First Nation. The Tlicho will gain more effective tools and new law-making powers to protect and promote the Tlicho culture and way of life, and enhance the economic growth and well-being of their communities.

30 “Dogribs dealt a new deal”, *Indian Country Today*, 8 September 2003. Available at <[www.indiancountry.com](http://www.indiancountry.com)>. Last visited 18 November 2003.

31 “Tlicho Agreement ‘represents what is best about Canada’” *NWT Plain Talk* Fall 2003 p1 at <[www.ainc-inac.gc.ca/nt/pt/pdf/fal03\\_e.pdf](http://www.ainc-inac.gc.ca/nt/pt/pdf/fal03_e.pdf)> accessed 11 December 2003.

32 *ibid.*



## Details of the Agreement:

### *Land and resources*

- The Tlicho agree not to exercise or assert any Aboriginal right, other than any rights set out in the Agreement, or any Treaty 11 right, other than certain specified rights.
- All laws of general application will continue to apply to Tlicho Citizens and the Tlicho Government.
- The Agreement is not intended to affect any Aboriginal or treaty rights of any other Aboriginal peoples.
- Subject to existing rights, the Tlicho Government will own a single block of approximately 39,000 square kilometres of land, including the subsurface resources, adjacent to or surrounding the four Tlicho communities.
- The Tlicho Government will receive approximately \$100 million, which will be paid over a period of years. As well, it will receive a share of resource royalties received by government annually from the Mackenzie Valley.

### *Governance*

- On the effective date, the Dogrib Treaty 11 Council, the Dogrib Rae Band, and the Wha Ti First Nation, Gameti First Nation and Dechi Laot'i First Nation bands will cease to exist and will be succeeded by the Tlicho Government.
- The Tlicho Government will have a wide range of law-making powers on Tlicho lands and over Tlicho Citizens off Tlicho lands. There will be certain types of laws the Tlicho Government cannot enact.
- The Tlicho Government generally will be tax exempt regarding its government activities, like other governments in Canada.
- Tlicho laws will not displace federal or territorial laws – Tlicho laws will be concurrent. In the case of conflict with a federal law, the federal law will prevail, to the extent of the conflict. In most instances, a Tlicho law will prevail over a territorial law, to the extent of the conflict.
- An intergovernmental services agreement between the Tlicho, the Government of the Northwest Territories and Canada will provide a single delivery system for health, education, child and family and other social programs and services to Tlicho Citizens and other persons in Tlicho communities. The first intergovernmental services agreement will be in effect for 10 years.

The agreement also contains extensive provisions about public government in the Tlicho communities, mineral resources, water rights and licences, wildlife harvesting and heritage protection. In these areas the agreement provides that the Tlicho have significant rights and responsibilities.

Tlicho is seen as just the start. When the agreement-making process is complete – perhaps within five years – virtually the entire Northwest Territory will live under



some form of Aboriginal government. The Dogrib model will not be copied exactly across the North, but regardless of the structure, each government will probably want powers similar to those of the Dogrib. That means changes for the territorial government in the capital, Yellowknife. While Aboriginal governments will have control over local services such as education and health, they will contract with the territorial government to actually deliver them.

### **Implications from Canadian Law and Practice for the Australian Situation**

There have been a number of positive developments in Canada over recent years in terms of integrating the social and economic development of Indigenous people with the recognition of Aboriginal rights through the development of comprehensive land claim settlements.

Given the on-going social disadvantage and distress of Indigenous communities in Australia, the continuing string of judgments negative to native title rights in the Australian courts, and the at times hostile and obstructionist behaviour of federal and some state governments, the argument to take close note of Canadian developments is compelling. The opportunity that native title can present to governments endeavoring to break the cycle of poverty that pervades Indigenous communities is evidenced by Canadian responses to land claims which integrate economic and social development into the cultural values of the group. This is the type of development envisaged in the preamble to the Declaration on the Right to Development as a comprehensive economic, social, cultural and political process.

The scope and creativity of Canadian responses to land claims, self-government and social and economic development has not been imagined in Australia to date. A number of comparisons have been made throughout the text above, but the following points appear of particular relevance:

#### *Jurisprudence*

Canadian jurisprudence should be carefully considered at both legal and policy levels for its potential application to the Australian situation. This is not to say that Canadian practice should necessarily be followed in Australia, but where Canadian decisions give a more expansive interpretation of Aboriginal rights and a higher level of protection, there is a responsibility on Australian authorities, as a fellow common law jurisdiction, to give close consideration to applying the higher standards in Australia. Such an approach is an obligation, at least moral and political, arising from the settlement, without the consent of the Indigenous peoples, of Australia and the consequent dispossession and distress. Australia, as a good international citizen, should meet standards of law and practice in respect of its Indigenous peoples no lower than those applied in comparable nations such as Canada and the United States.

Stuart Rush, noting the drift of Australian courts away from taking cognisance of relevant Canadian decisions, has commented that:

It may now be time for the High Court to return to those traditions of judicial comity established between the appellate courts of our two countries. It would seem reasonable to urge the Australian High Court to adopt fiduciary principles established in Canadian law, most recently in



### *Constitutional entrenchment*

It is incongruous that of the three federations, Australia, the US and Canada, it is only in Australia that the Constitution fails to provide protection to the nation's Indigenous peoples.

### *Self-governance*

There have been major developments in Canada in respect of governance and self-government, which has represented a major policy area for the Canadian Government. A number of self-government agreements have been put in place, with the current trend being to negotiate land claim settlements and self-governance as part of the one major comprehensive settlement. Given the somewhat hesitant steps in Australia in respect of regional agreements, whole-of-government service delivery and regional planning arrangements, there are clear lessons about the need for a clear framework and defined objectives, adequate resources and consultation, and coordination between Aboriginal groups and state and federal governments. Canada would appear to be leading the way in terms of imaginative, well-resourced and practical agreement-making as a basis for economic and social development.

### *Land claims*

The basic Canadian response to the recognition of on-going Aboriginal rights and title in Canada has to been to avoid litigation and instead move down the path of comprehensive land claim agreements. Where necessary, major political changes have also been achieved, for example establishing the territory of Nunavut. While the comprehensive agreements were originally based on surrender of native title rights in return for certainty of defined rights, freehold and compensation, recent developments have shown that surrender or extinguishment of title is not necessarily a part of such agreements.

Bartlett has concluded that the Canadian approach is positive and has worked better than the Australian approach. He states that:

The policy and practice in Canada is dramatically different from that in Australia. The Canadian policy of reaching settlements by agreement has worked and is working.... The objectives of securing a bridge between traditional and contemporary approaches to development, and providing certainty and clarity for land and resource management, are being achieved. Moreover, such objectives are being achieved without the gross denial of equality, or the ludicrously wasteful expenditure of the processes of the NTA [*Native Title Act*].<sup>34</sup>

Perhaps it is time for Australia to consider pursuing its own comprehensive settlements process which would incorporate land rights and customary rights, governance through self-government models with significant powers, multi-level government arrangements and social and economic development programs.

33 Rush, *op.cit.*, p36.

34 Bartlett (2001), *op.cit.*, p362.



## Resources

However, unless ownership and management of the resources that go with the land – timber, water, minerals and wildlife, are vested in the traditional owners, there is little to build agreements or governance models on. One thing that Canadian (and US) experience suggests, perhaps above all else, is a radical re-thinking in Australia of the scope of native title so that it has real content and utility. The current trend in Australia to reduce the scope and content of native title over much of the country (in those parts where it has not been extinguished) to something akin to a usufructuary right is leading Australia into a moral and political dead end. Legitimate Indigenous interests and rights in land as a basis to build (or re-build) society presently have little scope for expression or development.

## The United States of America

### The legal context – Indians as sovereign nations

While the basis for the colonisation of what is now the United States and the dealings with the Native American, or Indian,<sup>35</sup> tribes and nations is a complex history of treaty negotiations, alliances, warfare, massacre and dispossession, the fundamental relationship between the USA and Native Americans was declared in a trilogy of Supreme Court cases under Chief Justice Marshall in the early nineteenth century.<sup>36</sup> These cases identified the legal basis for Native American sovereignty and self-government. In *Cherokee Nation v Georgia*, the Supreme Court characterised the Cherokee as ‘...a distinct political society...capable of managing its own affairs and governing itself’.<sup>37</sup> Marshall CJ defined a tribe as a “domestic dependent nation” and noted that:

..[Indians] are in a state of pupillage; their relation to the United States resembles that of a ward to his guardian. They look to our government for protection.<sup>38</sup>

In *Worcester v Georgia*, Chief Justice Marshall reiterated his analysis, describing the tribal nations as “independent, political communities, retaining their original

35 According to the US Code devoted to Indians (Title 25) which consolidates all federal laws in respect of Indians and Indian lands, the term “Indians” refers to Eskimos, Aleuts and native North Americans (inhabitants of North America prior to European discovery). An Indian tribe is defined as a body of Indians of the same or similar race united in a community under one leadership or government, and inhabiting a particular territory. The term “tribe” is not always used with this meaning. It is sometimes used interchangeably with “nation” or “subtribe.” The terms also vary from statute to statute. See <[www.law.cornell.edu/uscode/](http://www.law.cornell.edu/uscode/)>. Accessed 4 November 2003.

36 *Johnson v McIntosh*, 21 US (8 Wheat) 543 (1823); *Cherokee Nation v Georgia* 30 US 1 (1831); *Worcester v Georgia* 6 Pet 515 (1832).

37 *Cherokee Nation case* at 16.

38 *ibid*, at 17.



natural rights”.<sup>39</sup> He explained that the relationship of the United States and the tribes, *vis a vis* the sovereign authority of the state governments, involved the protection of tribes as nations. The concept of guardianship however did not destroy the recognition of inherent sovereignty. As Marshall CJ put it, “protection does not imply destruction of the protected”, and he stated that:

a weaker state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.<sup>40</sup>

Through these decisions, “tribes were brought within the framework of American jurisprudence as sovereigns.”<sup>41</sup> The decisions effected an historic compromise. The Indians were recognised as the “rightful occupants of the soil” but the Crown had an “absolute title...to extinguish that right”. The Chief Justice did not delude himself that this rule was just. In his oft quoted words in *Johnson v McIntosh*:

We will not enter into the controversy, whether agriculturalists, merchants, and manufacturers have a right, on abstract principle, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny.<sup>42</sup>

These foundational cases have been relied upon in Canada, Australia and New Zealand. They are the basis of the doctrine of native title as developed in these jurisdictions. Accordingly, “Aboriginal title is the right of people in the new world to occupy and use their native area”.<sup>43</sup>

Marshall CJ noted the importance of treaties with Indian tribes, and the place of treaties in American constitutional arrangements whereby treaties are part of the supreme law of the land. Thus treaties form another inter-locking base of the American recognition of Native American sovereignty. Despite treaties not being fully honoured in some instances, a number of treaties are still in effect today. Although not all tribes are covered by treaties, the principles of sovereignty upon which treaties are concluded and implemented can be extended to all tribes on the basis of the “equal footing” doctrine.<sup>44</sup> The third leg of Native American sovereignty lies in the United States *Constitution* itself, in particular the Commerce Clause providing Congress with the power to “regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes”.<sup>45</sup> Indians are thereby given explicit and separate recognition in the *Constitution*.

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39 *Worcester case* at 559.

40 *ibid.*, at 552.

41 C Tebben, “An American Trifederalism Based upon the Constitutional Status of Tribal Nations” *University of Pennsylvania Journal of Constitutional Law*, (2003) 5(3) 318-356.

42 *Johnson v McIntosh*, 21 US (8 Wheat) 543 (1823) at 573, *cf* *Coe v Commonwealth* (1979) 24 ALR 118.

43 *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v Voight* 700 F.2d 341 (1983).

44 The equal footing doctrine was a policy applying to new states as they were admitted to the Union. Unlike earlier colonisation policies, that viewed new colonies as inferior to the founding state, the equal footing doctrine allowed new states equal rights with the original states in all respects.

45 U.S. *Constitution*, art.1, para 8, cl 3.





At the legal, constitutional and policy levels, the United States has recognised and continues to recognise an on-going, if impaired or diminished, sovereignty and a right to self-government inhering in Native American tribes. This relationship has been characterised as a part of US federalism:

tribes have a federal relationship with the national government, based on treaties, constitutional provisions and Supreme Court precedent.<sup>46</sup>

### **Sovereignty today**

While the ability of Native American nations to exercise this sovereignty has waxed and waned over time, depending in part on the prevailing policies and attitudes of Congress (particularly Congress's doctrine of plenary power over Indian Tribes which provides *inter alia* the power to unilaterally abrogate Indian treaties). Despite too, inconsistent decisions by the courts, the sovereign status of Native Americans has persisted. This is reflected in a number of facets of contemporary constitutional arrangements for Indian affairs in the USA, and approaches to policy, programs and agreements. In effect, the federal system of government in the US is based on three sovereign entities, the federal government, the states and the Indian Tribes, and US federalism reflects the ordered sharing of power between these distinct sovereign entities.

On April 29, 1994, at a meeting with the heads of tribal governments, President Clinton reaffirmed the United States' "unique legal relationship with Native American tribal governments", and issued a directive to all executive departments and agencies of the federal government that they should implement activities affecting Native American tribal rights or trust resources in a knowledgeable, sensitive manner respectful of tribal sovereignty.<sup>47</sup> This policy is also reflected in the US Department of Justice's *Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes* (1999), which declares that "our Constitution recognises Indian sovereignty by classing Indian treaties among the 'supreme law of the land'. It reiterates that trust responsibility 'includes the protection of the sovereignty of each tribal government'.<sup>48</sup>

The Department of Justice summarises the US legal and constitutional position of Indian Tribes thus:

- 1) the Constitution vests Congress with plenary power over Indian affairs;
- 2) Indian tribes retain important sovereign powers over their members and their territory, subject to the plenary power of Congress; and
- 3) the United States has a trust responsibility to Indian tribes, which guides and limits the Federal Government in dealings with Indian tribes. Thus, federal and tribal law generally have primacy over Indian affairs in Indian country, except where Congress has provided otherwise.<sup>49</sup>

This recognition of Indian sovereignty has major policy and program implications and practical effects for the implementation of policies. These include areas

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46 View of Richard Monette, discussed in Tebben, *op.cit.* p330.

47 See <[www.usdoj.gov/otj/sovtrb.htm](http://www.usdoj.gov/otj/sovtrb.htm)>, accessed 4 November 2003.

48 *ibid.*

49 *ibid.*



such as child welfare, gaming, and tribal jurisdiction in respect of law enforcement and courts. The Supreme Court has identified “traditional notions” of the extent of tribal sovereignty, including the power to:

- make substantive laws to regulate internal affairs
- create tribal court systems, set criminal penalties for tribal members
- tax oil and gas extraction on reserves
- tax non-Indian leasehold interests on reserves

Title 25 of the United States Code consolidates all federal laws in respect of Indians and Indian lands. At the state level, voluntary agreements or compacts between tribal authorities and state governments cover a wide range of key social and economic issues including environmental protection, criminal jurisdiction, traffic and safety, child protection and education. These are explicitly based on respect for the sovereign rights of Indian Tribes. This provides a basis of equality, mutual respect and co-existence which has barely begun to emerge in Australia.

### **International law, US Indian law and the *Mabo* decision**

US law in respect of Indians is both based on and reflects international law. Although the *Mabo* decision<sup>50</sup> was influenced by contemporary international human rights instruments and standards, especially in respect of the norm of non-discrimination,<sup>51</sup> and by the jurisprudence of the International Court of Justice in respect of the doctrine of *terra nullius*,<sup>52</sup> it is the interweaving of international law and United States law (especially the Marshall US Supreme Court decisions in respect of Indigenous rights) that is more deeply embedded in the *Mabo* decision.

This is significant, especially given the present tendency of Australian courts to pay limited attention to overseas developments in the recognition of Indigenous rights. In *Mabo*, Brennan J noted (with Mason CJ and McHugh concurring), the effect on the development of the common law of Australia’s accession to the Optional Protocol to the *International Covenant on Civil and Political Rights*:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.<sup>53</sup>

The somewhat ambivalent expressions of the Australian courts have tended to see international law as a *source* of Australian common law, rather than as *part* of it. In contrast, as Felix Cohen has shown, US law in respect of Indians *reflects* international law.<sup>54</sup>

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50 *Mabo v Qld (No 2)* (1992) 175 CLR 1.

51 *ibid* at 42.

52 *ibid* at 40-41 (citing the *Western Sahara case* (1975) ICJ 12. See also Toohey J’s judgment at 181-182.

53 *ibid* at 42.

54 F Cohen, “The Spanish Origins of Indian Rights in the Law of the United States”, (1942) 31 *Georgetown Law Journal* 1.



As Cohen demonstrated, US Indian law cannot be adequately comprehended without an appreciation of its international law nature. The basic concepts of Indian law are based on a long tradition of recognition of Indigenous rights in international law. Cohen showed that US Court opinions going back to Marshall owed much to international jurists such as Grotius and Vattel, who in turn called upon a legal tradition going back to the Spanish jurist Francisco de Vitoria. Indeed, Vitoria is generally seen as responsible for identifying guardianship as part of the relationship between coloniser and Indigenous group. Guardianship, or fiduciary obligation, is a key element of US Indian law.<sup>55</sup> Cohen saw the doctrine of domestic dependent nations as reflecting the twin international legal traditions of attribution of sovereignty to Indigenous peoples and the guardianship principle.

While guardianship may seem a somewhat dated concept, in the form of the doctrine of fiduciary obligation it demonstrates a willingness to protect the interests of Indigenous peoples as a necessary concomitant of the acquisition of their territory. Guardianship, or fiduciary obligation, have provided invaluable protections in the US and Canada to native interests, protections which have been unavailable in Australia, thus leaving Indigenous people and their resources open to discrimination and exploitation. The extinguishment of native title in the Torres Strait Islands where the Crown has undertaken capital works is a recent example – the Islanders had assumed that the state would protect Indigenous peoples' rights and interests, and not seek their extinguishment.<sup>56</sup>

### **Native title rights**

Because of the importance of Indian rights reserved under treaty in the US, the distinction needs to be drawn between such treaty rights, which are known as *recognised* title, and Aboriginal, or Indian, title known as *unrecognised title*. It is the latter unrecognised or Aboriginal title that most closely corresponds with native title in Australia, but with some important differences.

This Indian title, emerging from the Marshall decisions and considered by the courts over the years, is a right of occupancy extinguishable only by the US federal government (without compensation). To be protected by the government, this right need not be “based upon a treaty, statute or other formal government action”.<sup>57</sup> In the US, the states cannot extinguish native title, whilst in Australia native title can be extinguished by state or federal governments (absent any protection provided by the *Native Title Act*).

In the US, Indian title must be exclusive. This not necessarily the case in Australia, given the “bundle of rights” approach. Whilst this may appear to be advantageous to Indigenous Australians, the exclusive nature of Indian rights does take this doctrine closer to a property right, and Indian groups continue to press for common law rights in resources such as timber on their lands. There has been some success in this regard. In the *Shoshone* case, the Supreme

55 As well, international law considerations entered US Indian law through the application of the law of the previous sovereign in parts of the USA (principally Spanish law).

56 *Erubam Le (Darnley Islanders) 1 v State of Queensland* (2003) FCAFC 227.

57 *United States v Santa Fe Pacific Rail Co.* 314 US 347 (1941).



Court held that the tribe's Aboriginal title was as 'sacred as the fee',<sup>58</sup> that minerals and timber constitute elements of the land itself, and that for all practical purposes the tribe owned the land and is entitled to compensation for the timber and minerals. Such an outcome would be difficult to achieve in Australia, as it would be necessary to prove the customary use of minerals and timber at the time of sovereignty.

On the matter of establishing the point in time from which evidence of occupation must be shown, the American courts do not require evidence of occupation from the date of sovereignty, but rather evidence of exclusive and continuous occupation 'for a long time'. This allows for the effect of historical circumstances after the somewhat arbitrary dates of sovereignty. As Lee and Godden observe:

The date of establishment is a fundamental point of distinction between Aboriginal title in the United States and the doctrine of native title laid down in *Mabo v Queensland (No 2)*.<sup>59</sup>

### Policy history and framework<sup>60</sup>

The early days of colonisation in North America saw many treaties negotiated by the British and Spanish with Indian tribes. The British Government's *Royal Proclamation of 1763* gave the Crown the sole right to purchase Indian lands. After independence, the US, under the federal treaty making power, continued to make treaties with Indian tribes. It was during these early years of American independence that the US Supreme Court developed its doctrine of "domestic dependent nations". During this period US Indian policy revolved around the apparently contradictory policies of non-interference of Indian nations and forced removals.

Many treaties during the removal period were concerned with the transfer of land. The practice of removal continued until 1861 when the expansion of settlement beyond state boundaries into Indian country led to a change in policy from one of removals to reservations. Treaties were signed to reserve land for permanent Indian occupation. Indian conflict with the US army in the late 19<sup>th</sup> century often revolved around attempts to force Indians onto these reserves. It should be noted that in reserving lands for Indians, other rights were seen to be reserved as well, including hunting and fishing rights, and rights to water. The Supreme Court affirmed that rights in addition to occupancy were reserved to tribes in treaties with the US government, noting that:

the treaty was not a grant of rights to Indians, but a grant of rights from them – a reservation of those not granted – and the right[s were] intended to be continuing against the United States as well as against the States and its grantees.<sup>61</sup>

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58 *United States v Shoshone Tribe of Indians* 304 US 111 (1968), as discussed in Dorsett and Godden, *op.cit.*, p62.

59 *ibid.*

60 This section draws in part on the historical overview provided by Dorsett and Godden, *op.cit.*, pp2-6.

61 *United States v Winans* 198 US 371, 381-82 (1905).



Treaty-making ceased in 1871. Between 1871 and 1928 policy moved from one of 'measured separatism' to one of assimilation which was promoted through breaking up reservations by way of allotments to individual Indians and with 'surplus' land being sold to white settlers.<sup>62</sup> The end result was that Indian tribal lands which were estimated at 138 million acres in 1887 were reduced to 52 million acres by 1934. Many reservations now represent a 'Swiss cheese' picture of Indian and non-Indian holdings. The allotment policy provides a cautionary tale in respect of proposals to individualise native title and land rights holdings in Australia.

By 1928 allotment was recognised to have been a disaster which led to increased poverty. Congress moved to protect remaining tribal lands by the *Indian Reorganisation Act* 1934. However, from 1945 policy and consequent legislation sought to reverse tribal self-government and to end the trust relationship between the federal government and tribes. Criminal and civil jurisdiction over Indian country was passed to a number of States by federal legislation. By the mid-1960's, this 'termination' philosophy was in decline as failed policy and Congress began to include Indian tribes in legislation designed to rebuild the social infrastructure of the nation and provide economic opportunities for economically-depressed areas.

### Self-determination era

Commencing in 1961 and continuing to the present, US Indian policy has been firmly based on the principle of self-determination, with recognition of the powers and status of tribal self-government, and with the passage of important legislation enhancing and protecting Indian rights and interests.

In particular, the policy of self-determination was mandated by the *Indian Self-Determination and Educational Assistance Act* of 1975,<sup>63</sup> by which Congress committed:

to the maintenance of the federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct and administration of those programs and services.<sup>64</sup>

The US Department of Justice notes that President Clinton's important executive memorandum of 1994 built on the firmly established federal policy of self-determination for Indian tribes. Working together with Congress, previous Presidents had affirmed the fundamental policy of federal respect for tribal self-government.

62 The *General Allotment Act* 1887, known as the *Dawes Act*.

63 Public Law 93-638.

64 Quoted in Christine Zuni Cruz, "Human Rights and Nationhood in the International Context: Self-Determination and Indigenous Nations in the United States: International Human Right, Federal Policy, and Indigenous Nationhood", paper presented at the *Native Title Conference Native Title on the Ground* Alice Springs June, 2003, p2 found at <[www.aiatsis.gov.au/rsrch/ntru/conf2003/papers/zunicruz.pdf](http://www.aiatsis.gov.au/rsrch/ntru/conf2003/papers/zunicruz.pdf)> accessed 11 November 2003.



## Administration

The principal federal agency in respect of the administration and implementation of Indigenous policy and programs is the Bureau of Indian Affairs (BIA). The BIA describes its mission as fulfilling its trust responsibilities and promoting self-determination on behalf of Tribal Governments, American Indians and Alaska Natives.<sup>65</sup> It has responsibility for the administration and management of 55.7 million acres of land held in trust by the United States. Developing forestlands, leasing assets on these lands, directing agricultural programs, protecting water and land rights, developing and maintaining infrastructure, providing for health and human services, and economic development are BIA responsibility, in cooperation with the American Indians and Alaska Natives.

As federal policy has evolved away from subjugation into one of partnership and service, so has the BIA's mission changed, culminating in the passage of landmark legislation such as the *Indian Self-Determination and Education Assistance Act* of 1975 and the *Tribal Self-Governance Act* of 1994 which have fundamentally changed how the BIA and its constituency do business with each other. However, the relationship between the Indian tribes and the BIA has often been fraught. In particular, there has been controversy concerning the BIA's administration of trust funds collected for the use of tribal allotment lands, as well as the general problems arising from imposed grant-driven programs that do not adequately reflect the priorities of Indigenous communities nor contribute to long term capacity building. As one commentator has described the situation:

The tribes' relationship with the bureau is often described as a love/hate relationship. On the one hand, the bureau is the symbol of the tribes' special relationship with the federal government. On the other hand, tribes have suffered from bureau mismanagement, paternalism, and neglect. It is the hope and objective of many tribal peoples and government officials that tribes can enter into a more equal relationship with the bureau and that the bureau can truly function in an advisory capacity as opposed to dictating policy to tribes.<sup>66</sup>

Another key US agency in respect of Indian affairs, the Justice Department, affirms that it is committed to strengthening and assisting Indian tribal governments in their development and in promoting Indian self-governance. Consistent with federal law and Departmental responsibilities, the Justice Department consults with tribal governments concerning law enforcement priorities in Indian country, supports duly recognised tribal governments, defends the lawful exercise of tribal governmental powers in coordination with the Department of the Interior and other federal agencies, investigates tribal government corruption when necessary, and supports and assists Indian tribes in the development of their law enforcement systems, tribal courts, and traditional justice systems.

65 See BIA website at <[www.doi.gov/orientation/bia2.cfm](http://www.doi.gov/orientation/bia2.cfm)> Accessed 6 November 2003.

66 CL Henson, *From War to Self-Determination – A History of the Bureau of Indian Affairs*, American Studies on Line, at <[www.americansc.org.uk/Online/indians.htm](http://www.americansc.org.uk/Online/indians.htm)>. Accessed 6 November 2003.



The Indian Health Service (IHS) within the Department of Health and Human Services (DHHS) is the other major Federal agency concerned with Indian affairs.

### *Self-Governance*

Self-Governance evolved from the vision of Tribal leaders historically seeking to reduce or eliminate the bureaucratic control of the United States government over the Tribes. Essential elements to achieve this objective include bringing decision-making authority and financial resources back to the Tribal level. The ability of Tribal governments to determine their own destiny and future creates a more meaningful government-to-government relationship between Tribes and the United States.

In the 1980s Congress launched the “Indian Self Governance” program because of concerns with the performance of the BIA and other agencies.<sup>67</sup> Congress decided that adequate federal agency reforms were not going to take place and the only answer was to circumvent the agencies by providing the funds directly to the tribes themselves. An Office of Self Governance was established within the Department of the Interior to oversee the transfer of responsibility and funds for federal programs to Tribal governments, including pooling funds into block grants.

Self-Governance legislation mandates Federal departments and agencies to transfer federally administered programs, services, functions, and activities, or portions thereof, to Self-Governance Tribes. Indian Tribes do not need Self-Governance in law simply to administer existing federal programs; pre-existing law allows Tribes to assume and operate federally-designed programs, services, functions, and activities. Rather, Self-Governance is designed to provide Tribes with the flexibility to re-design and re-prioritize federal programs and to reallocate federally-appropriated funds to programs that best meet Tribal priorities. The Self-Governance Project is characterized as “contracting and compacting”, whereby Indian nations take over the management and delivery of programs otherwise within the domain of the federal government.<sup>68</sup>

### *Planning, Negotiation and Implementation of Self-Governance*

Self-Governance provides maximum flexibility for Tribal governments to design programs and services, as well as to allocate funds to address Tribal priorities and concerns. In contrast, when the BIA and the Indian Health Service provide direct services or manage Self-Determination grants or contracts, the program design and funding level decisions are made by the Federal bureaucracy. Most BIA and HIS guidelines, policies and regulations are prepared for national application and are not tailored to a specific Tribe, reservation, or to local

67 Self-Governance was permanently authorized within the Department of Interior (DOI) under Title IV of Public Law 103-413, and within the Department of Health and Human Services (DHHS) – Indian Health Service (IHS) under Title V of PL. 106-260. Additionally, Title VI of PL. 106-260 authorized the Secretary of DHHS to conduct a study to determine the feasibility of a Tribal Self-Governance demonstration project for appropriate programs, services, functions, and activities (or portions thereof) of any agency or other organizational unit of HHS, other than the HIS.

68 eg under Public Law 93-638.



conditions. Over the years, the programs and organizational structures of Tribal government have evolved to correspond to these Federal programs and their funding mechanisms and regulations. Tribal structures, therefore, have mirrored the Federal bureaucracy.

Under Self-Governance, along with pre-existing Tribal responsibilities, Tribal governments become the primary policy-makers for the programs and services, funding allocations, and administrative structures on their reservations. Generally speaking, this requires a reorganization of Tribal governance structures, although some Tribal governments with Compacts of Self-Governance have maintained essentially the same administrative structures and programs that existed previously. Where Tribal reorganization for Self-Governance is undertaken, it needs to be determined by the particular needs and unique situation of each individual Tribe. The importance of education and communication with Tribal members is high. Tribal members need to clearly understand what Self-Governance means, how the trust and treaty relationship is protected, and how Self-Governance will change and benefit Tribal operations. Lack of information and misinformation among Tribal members has been the greatest threat to Self-Governance implementation.

### *Negotiating Self-Governance*

The Self-Governance negotiation process results in an agreement between Tribal and BIA/HIS representatives. For the federal government and the Tribes, negotiations are managed by either the Office of Self-Governance or the Office of Tribal Self-Governance staff. The resulting Compact of Self-Governance and Annual Funding Agreement will determine the future relationship between the Tribes and the BIA/HIS in terms of roles, responsibilities, programs retained by the BIA/HIS, and BIA/HIS programs, services, functions and activities assumed by the tribe.

Not all Tribes have joined the Self-Governance project, and during the initial “demonstration” phase a number of Tribes have stayed with the traditional BIA program delivery mechanisms. This situation has allowed for comparisons to be made of the results of moving to Self-Governance agreements and contracts.

Self-Governance has resulted in establishing a “new partnership” between Tribal governments and the federal government, a process similar to that used in earlier times to negotiate agreements, including treaties, between Indian Tribes and the United States. The benefits of the new relationship have been identified by an Indian leader before a Congress hearing. Melanie Benjamin, chief executive at Mille Lacs, spoke for many tribes in identifying five points of impact on program operations that get at the heart and soul of Self-Governance:

First, we can now design programs as we see fit. If we have a better way to provide chemical dependency treatment by using a sweat lodge, we can do it. Second, we can also reprogram funds as we see fit based on changing needs. For example, if we have an exceptionally dry season as we recently had, we can allocate more funds to fire protection. Third, the Mille Lacs Band can participate in rulemaking. Title IV [of the 1994 Indian Self-Determination and Educational Assistance Act, Title IV being short for the Tribal Self-Governance Act of 1994] was the first Indian law that required negotiated rulemaking and for the first time brought federal and





tribal officials together to develop the rules. Fourth, we are using our funds more efficiently. Our local needs determined by us dictate the use of our funds, not a federal official located in Minneapolis or Washington. Finally, our compacts with the federal government reflect a true government-to-government relationship that indicates we are not viewed as just another federal contractor.<sup>69</sup>

### *Implementation*

To implement Self-Governance, both the federal government and Tribes have developed internal Self-Governance structures. Self-Governance has both revitalized the historic relationship between Tribes and the United States and provided new responsibilities to each party. Both the Federal agencies and Tribal Governments have had to review their historic roles in the government-to-government relationship and, in many areas, each has developed plans to restructure, reorganize, or develop new internal procedures and/or governmental structures in order to implement Self-Governance.

### *Tribal Self-Governance Structures*

Actual Self-Governance implementation falls primarily on the Tribes. As a tribally-driven initiative, Tribal leaders need to maintain their leadership role in areas involving legislative, executive, and judicial activities. Self-Governance implementation depends extensively on the ability of Tribal Governments to carry out their responsibilities and obligations in an effective and efficient manner.

Under typical contracts, when Tribes encounter difficulties in carrying out contract functions, they can simply inform the BIA or HIS, who are obligated under statute and regulation to provide technical assistance to the contracting Tribe. Self-Governance Tribes, however, are expected to perform the responsibilities that they have agreed to. This is not to say however that Self-Governance Tribes cannot request assistance from Federal agencies for areas of legitimate policy and administrative concerns which are important to carrying out the Tribe's Compact responsibilities and obligations. However, under Self-Governance Tribes cannot turn difficult tasks and decisions over to Federal officials to decide on their behalf after that program has been transferred.

Governmental structures among Self-Governance Tribes vary greatly depending on the individual needs of each tribe, their constitutions, and their leaders and members. From the beginning of Self-Governance, Tribal leaders have taken the lead in generating discussions and forcing policy decisions from both tribal and federal governments. To assist in this leadership role and to implement Self-Governance, almost all participating Tribes have established their own Offices of Self-Governance. Tribal Governments have created positions of Self-Governance Coordinators who are responsible for monitoring Self-Governance activities for their Tribes. The Coordinator position is typically located in the executive offices of Tribal Governments so that timely information can be provided for policy, legal, and management decision-making.

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69 Quoted in "Self-governance tribes termed the "true trust reformers" *Indian Country Today*, October 20 2003. Available at <[www.indiancountry.com](http://www.indiancountry.com)> last visited 11 November 2003.



## Significance of Self-Governance

Overall the introduction of Self-Governance is seen to have been positive, especially in terms of economic and social programs. However, some problems were identified in the Preliminary Findings of a Self-Governance Process Evaluation in 1995. This study noted that thirty three Indian governments had engaged in negotiations and concluded at least one and sometimes two Compacts of Self-Government with the United States between 1990 and 1995. The study also noted that the principles guiding the original negotiation of these compacts, as defined by Indian leaders in 1986 and 1987, emphasized the establishment of a government-to-government framework with the United States on a tribe-by-tribe basis. Emphasis was placed on the importance of these agreements being between each Indian government and the United States government as a whole instead of Indian governments dealing with individual agencies.

The Self-Governance Process Evaluation also noted two earlier studies. Both studies were positive about outcomes, including the creative and effective activities of Indian governments. The new study measured the increase or decrease of self-governing powers in Indian governments as a result of the Self-Governance Project. Two problems that showed up from these studies were firstly, that Compacts had not always resulted in each Indian government arranging a government-to-government framework with the United States. Rather Indian governments were engaged in negotiating Compacts on an agency-by-agency basis resulting in a pattern of relations similar to previous contracting. Secondly, Indian governments were emphasizing social and economic development at the expense of political development, suggesting the possibility of future weakening of the Indian governments and their becoming dependent on federal agencies.

Overall, Baseline Measures Reports from participatory Indian governments and the study conducted by the Department of the Interior (1995) confirmed that Indian governments had made major progress toward social and economic development as a direct result of the Self-Governance initiative. Dr Manley Begay Jr, of the Native Nations Institute for Leadership, Management and Policy (NNILMP)<sup>70</sup> has noted that the systematic evidence arising from the self-governance project makes it clear that 'contracting and compacting' has been successful in both promoting economic development and enhancing tribes' experience in the business of self-governance.<sup>71</sup>

Some of the research findings cited by Begay include significant improvements in productivity and better prices for the product from forestry programs which were shifted from Bureau of Indian Affairs-employed forestry workers to Aboriginal-employed workers; and positive results from tribal contracting and compacting for Aboriginal health services. In areas such as child foster care

70 The Institute is at the University of Arizona, Tucson, Arizona, USA.

71 M Begay Jr, "Corporate and Institutional Strengthening for Effective Indigenous Self-Governance on the Ground – Policy Lessons from American Indian Nations", paper presented at the *Indigenous Governance Conference*, Canberra, 3-5 April 2002. Available at <[www.reconciliationaustralia.org](http://www.reconciliationaustralia.org)>.



and wildlife management, Aboriginal programs have so out-performed state governments' that "non-Indigenous governments are now turning to the Indian nations for advice and counsel".<sup>72</sup>

Dr Begay points out the significance of the change in approach taken by the federal government to achieving successful long term outcomes for Indian communities. He observes that:

Federal economic initiatives in Indian country have long been dominated by a 'planning and projects' mentality. Sustained and systemic economic development, however, does not consist or arise from building a plant or funding a single project. Economic development is a process, not a program.<sup>73</sup>

Begay sees the improved performance under Self-Governance as being built around recognising and enhancing tribal sovereignty or self-rule, concepts that have come to be encompassed in the term 'governance'. He identifies the block funding available under Self-governance as critical, as it minimizes micromanaging the allocation of funds, and, importantly, it permits the allocation of activity and resources in accord with what he terms '*Aboriginal* priorities'.<sup>74</sup>

Governance, as demonstrated in results from the implementation of the Self-Governance policy, is thus seen as the principal driver and prerequisite for sustainable economic and social development for Indian tribes. These results have been closely studied by NNILMP's sister project, the Harvard Project on American Indian Economic Development. The Harvard Project set out to understand why some tribes had been able to break away from long term poverty and economic stagnation, with all the attendant social problems, while others had not. Stephen Cornell of the Harvard Project has observed that among the key research findings of the Project is the critical role of self-governance – "In the United States at least, genuine self-rule appears to be a necessary (but not sufficient) condition for economic success on indigenous lands".<sup>75</sup> Cornell and Taylor have observed that on the basis of twelve years' research:

The evidence is compelling that where tribes have taken advantage of the federal self-determination policy to gain control of their own resources and of economic and other activity within their borders, and have backed up that control with good governance, they have invigorated their economies and produced positive economic spillovers to states.<sup>76</sup>

However, in a discussion very relevant to Australian development, Cornell seeks to identify the meaning of self-government, noting that it is significantly different to mere administrative control. The key findings of the Harvard Research point to five factors as the key determinants of tribal economic success:

72 *ibid*, p5.

73 *ibid*.

74 *ibid* (emphasis in original).

75 S Cornell, "The Importance and Power of Indigenous Self-Governance: Evidence from the United States", paper presented at the *Indigenous Governance Conference*, Canberra 2002. Available at <[www.reconciliationaustralia.org](http://www.reconciliationaustralia.org)>.

76 S Cornell and J Taylor, *Sovereignty, Devolution and the Future of Tribal State Relations*, Malcolm Wiener Centre for Social Policy, June 2000, p6. Available at <[www.ksg.harvard.edu/hpaied/docs/PRS00-4.pdf](http://www.ksg.harvard.edu/hpaied/docs/PRS00-4.pdf)>.



## *Sovereignty*

In every case examined where there has been sustained economic performance, the major decisions about governance structures, resource allocations, development strategy and related matters are in the hands of the Indian nations concerned.

### *Governing institutions*

Self rule is not enough, it has to be exercised effectively, which means stability in the rules by which governance takes place, and keeping politics out of day-to-day business and program management. As well, there has to be fair, effective and non-politicized resolution of disputes, which in the US at least means strong and independent tribal courts. It is necessary to put in place capable tribal bureaucracies that are able to effectively deliver services and implement decisions.

### *Cultural match*

The Harvard Project has identified the need to develop tribal governing institutions that have credibility within Indian society, that “resonate with indigenous political culture”. As Cornell points out, historically outsiders, typically the US Government, have designed and imposed tribal governing institutions, and accordingly these institutions are ineffective in managing sovereign societies. However, the evidence is that there is no one model that applies across all Indian nations, and that the solution to “cultural match” has to be worked out according to the particular situation of each group and its response to the need to build institutions on an indigenous base.

### *Strategic thinking*

Despite the pressures to look for short term outcomes, the Project has noted the key importance of longer term strategic thinking and planning, including a systematic examination not only of assets and opportunities but also of priorities and concerns.

### *Leadership*

The Project noted the key role of leadership in terms of persons who envision a different future, recognise the need for foundational change, are willing to serve the tribal nation’s interests instead of their own, and can communicate their vision to other community members.

In summary, the Harvard Project, without diminishing the importance of “economic” factors (resources, distance to markets etc) found that the primary requirements for developmental success were political rather than economic, focusing around issues of governance, or more broadly speaking, “nation building” or “nation re-building”:

Nation-building refers to the effort to equip indigenous nations with the institutional foundations that will increase their capacity to effectively assert self-governing powers on behalf of their own economic, social and cultural objectives.<sup>77</sup>

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77 Cornell (2002), *op.cit.*, p8.



In summary, whilst the move towards tribal Self-Governance cannot be characterised as one of linear improvement, and there have been problems associated with it, there seems to be general agreement that it is a significant step forward. For those Tribes that are able to address their own governance issues the potential for economic and social progress and enhanced cultural well-being, including vitality of language and custom, is very high. There is also widespread support amongst Indigenous and Government parties for the expansion of the Self-Governance approach to other significant areas of Indian affairs, particularly in respect of health programs.

As the Harvard Project has shown, the possibilities for nation building, or rebuilding, are now present in a situation where Indigenous peoples can negotiate a new relationship with the federal government through the agency of Tribal Self-Governance.

### **Negotiated settlements**

In 1871 Congress decreed that no further treaties were to be entered into with Indian Tribes, although existing treaties were to be honoured. Nevertheless, Congressional practice thereafter was to seek consent in some form for actions affecting Indian lands or interests. Thus 'agreements' replaced treaties and the practice has been to use negotiated settlements to resolve complex issues. Such negotiated settlements have covered matters such as gaming on Indian reserves, child welfare, and in the case of Alaska, major Aboriginal title and land claim issues. Self-Governance Compacts are more recently seen as a step towards resuming full treaty-type relations.

The negotiated settlements are of relevance to the Australian situation. The best known US settlement in respect of land is the Alaska Native Claims Settlement of 1971. The *Alaska Native Title Claims Settlement Act 1971* (ANCSA) authorised Alaska Natives to select, and receive title to, 44 million acres of federally-owned public land in Alaska, and also to receive \$US962,000,000 in cash as settlement of their Aboriginal claim to land in the State of Alaska. Title to the land selected was not conveyed to native Alaskans nor tribal governments, but to native corporations. The Act established a system of village and regional native corporations to manage the lands and cash payments, with extensive provisions regarding the operations of the corporations.

These corporations bore little resemblance to Aboriginal organizations but were largely based on US corporations.<sup>78</sup> The Alaska Settlement has been described as a "very large real-estate deal," perhaps the largest in history. But there was nothing in the Act regarding native government, the institutions by which the natives could control their lands and their lives. Congress went out of its way in fact to reach a settlement without establishing any permanent racially-defined institutions.<sup>79</sup>

78 G Nettheim, G Meyers and D Craig, *Indigenous Peoples and Governance Structures*, Aboriginal Studies Press 2002, p64.

79 See *Berger Launches ANCSA Hearings*, *The Arctic Policy Review* June 1984. Available at <[www.alaskool.org/projects](http://www.alaskool.org/projects)> at 12 November 2003.



The immediate cause for the Settlement was the granting of statehood to Alaska in 1958. The new state had been given the right to select over 100 million acres of federal land for state ownership, but the native Alaskans claimed the same land as chosen by the state, a situation that was aggravated by the discovery of oil. The Settlement attempted to accommodate all interests, ie those of the State, the Natives, conservation concerns, and oil companies. The price that the Alaskan Natives paid for the grant of title to the 44 million acres and the cash settlement was extinguishment of native title over most of Alaska (365 million acres). As s 4(b) of the Act provides:

All Aboriginal titles, if any, and claims of Aboriginal land based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any Aboriginal hunting or fishing rights that may exist, are hereby extinguished.<sup>80</sup>

The objectives of the Act in respect of Alaskan natives were to foster self-determination and the economic development of their lands as the perceived answer to the poverty of the Indigenous people. The assumption appears to have been that the traditional culture and economy would decline.<sup>81</sup> The results of the Settlement have been far from perfect and the legislation has needed amendment a number of times to address Indigenous concerns. The extinguishment of native title hunting and fishing rights over such a vast area in a situation where subsistence activities are of major importance has itself been highly problematic, and has necessitated protection of hunting and fishing rights through various separate state and federal pieces of legislation – a situation which created administrative difficulty and uncertainty about the long term security of the rights.

The main problems with the Settlement revolved around the corporatisation of land holding arrangements. Designed to facilitate native interests, assets and capital to be used towards productive investments, this approach failed to address the concerns of native Alaskans that their land would be protected and remain in their possession until passed to future generations. The corporate structures introduced objectives (maximising profits) and decision making processes that were alien and sometimes threatened the subsistence lifestyle. As Nettheim, Meyers and Craig observe:

There was virtually no connection between ANSCA and the native Alaskan traditional way of life, subsistence.<sup>82</sup>

It is clear now that the negotiation processes for the Settlement were inadequate, that the young Indigenous representatives were inexperienced and failed to consult adequately with their own people living in the villages. There was pressure from government and business to conclude a deal so that oil exploration and production could proceed. Initially, most people thought that a good result had been achieved, given the large area granted and the size of the compensation figure. Thus:

80 *Alaska Native Claims Settlement Act* (43 USC 160-1624) – Public Law 92-203.

81 Nettheim, Meyers and Craig, *op.cit*, p64.

82 *ibid*, p67.



ANSCA initially appeared to offer considerable gains for Alaskan native peoples. However, the design and implementation of ANSCA failed to provide a significant degree of self-determination and culturally appropriate governance structure so that native Alaskans could embrace it, and develop it, to meet their needs and contemporary aspirations.....The tragedy of ANSCA appears to be that it was too much of a top down settlement, by the US government, without sufficient real negotiation with the native peoples of Alaska. The assumptions about corporate and governance structures and Indigenous development have not worn well with time.<sup>83</sup>

The Alaska Settlement is something of a cautionary tale, including the importance of appropriate Indigenous representatives and negotiators, the absolute need to consult fully, the dangers of inappropriate governance structures that, in this case, clearly did not provide a “cultural fit”, and the inappropriateness of large scale surrender or extinguishment of Aboriginal rights and native title. The objective of moving directly to concluding one-off comprehensive settlements or treaties in the name of certainty does not allow for the development, trial and testing of relations between native title parties and governments and their agencies. A more gradual (or incremental) approach is more conducive to improved economic and social outcomes.

## Implications from US law and practice for the Australian situation

### *Sovereignty*

In recognising the continuation of native title post acquisition of sovereignty in Australia, the High Court drew on the authority of decisions in Canada, the United States and New Zealand. As Professor Bartlett has pointed out, the landmark and founding decision in these jurisdictions is the 1823 decision by US Chief Justice Marshall in *Johnson v McIntosh*.<sup>84</sup> Marshall CJ’s doctrine is clearly reflected in the High Court’s recognition of native title in *Mabo*. As Bartlett notes:

The High Court may have expressed a rationale of “full respect” for the rights of the Aboriginal inhabitants, but their specific directions as to proof, nature, content and the extinguishment of native title are all founded upon the pragmatic compromise declared by Chief Justice Marshall in *Johnson v McIntosh*.<sup>85</sup>

The curious difference is that the Australian courts have, despite the Marshall decisions, interpreted the acquisition of sovereignty by the British, unchallengeable in the courts itself as an Act of State, to necessarily require the complete extinguishment of Indigenous sovereignty from that time. The Australian High Court has seen the extinguishment of Indigenous sovereignty,

83 *ibid*, p75.

84 RH Bartlett, *The Mabo Decision*, Butterworths, Sydney 1994, pxi.

85 *ibid*, pxii.



and hence of any law-making or self-governing capacity, as a “cardinal” fact,<sup>86</sup> asserted that “there could be no parallel law-making after the assertion of sovereignty”,<sup>87</sup> and attributed the “inherent fragility” of native title to the loss of Indigenous sovereignty.

This appears to be a misunderstanding of the application of the Act of State doctrine. Nor does it concur with the reality in Australia of an on-going Indigenous polity, with its own laws and sanctions. Over a significant part of Australia two sets of laws are operative – Australian law and Indigenous law. To deny this reality is to create another legal fiction. The recognition of a continuing Indian sovereignty in the United States has not seen the collapse of the American legal system or the dismemberment of the nation.

Thus, Australia has, belatedly, adopted the recognition of the Indigenous rights to possess and use the land decided by the Marshall Court, without the concomitant residual sovereignty which both logically and in fact goes with it. The implications of this disjuncture need to be carefully considered in examining the current imbroglio of native title and land settlements in Australia today. Barrister John Basten has referred to the ambivalence of the [Australian] common law towards Indigenous sovereignty. He notes that “[t]here is a tension between the acceptance that the common law remedies are available to protect rights and interests held under traditional law, and the assertion that there is no room for a parallel system of Indigenous governance...there is at least a danger that the Court has failed to articulate a coherent approach”.<sup>88</sup> In the light of US legal doctrine, and in order to bring coherence to considerations of the relationship between native title and self-governance, the inherent rights of Indigenous Australians to a degree of autonomy or self-government should be reconsidered as a matter of priority.

### *Self-governance*

The development of the Self-Governance project is highly significant. Though based around sovereign tribal government in Indian country, the principles of “contracting and compacting”, the experience to date and the positive outcomes appear to have a quite close bearing on recent Australian developments such as the COAG “whole-of- government” trials.

However, Self-Governance is much more than better coordination of projects and programs, or even enhanced consultation and participation (which had already been provided in the US by the federal self-determination policy). It is all about Indian control (and accountability). It is about self-government, the on-ground practical application of the inherent sovereignty of Indigenous peoples anywhere, whether part of the explicit legal codes or not. The realities of Indigenous control and priority-setting are demonstrated in the comments of Chief Melanie Benjamin quoted above. The problem in Australia is that there

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86 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) HCA 58 (12 December 2002) per Gleeson CJ, Gummow and Hayne JJ at [55].

87 *ibid.*, at [44].

88 J Basten, “Beyond Yorta Yorta”, *Land Rights, Laws: Issues of Native Title*. Issues Paper no 24, AIATSIS, October 2003, p4.





has been little approach to anything like such self-government. As Diane Smith has pointed out: “There is currently no Indigenous self-government jurisdiction in Australia, as there is, for example, in the United States of America”.<sup>89</sup>

Indigenous leader Gerhard Pearson has put the situation thus:

It is easy for government bureaucracies to accept so-called “whole-of-government” approaches, coordinated service delivery and so on. It is much harder for them to let go of the responsibility. On one hand we have the almost complete failure on their part to lead and facilitate social and economic development in Indigenous Australia. On the other hand, our experience is that the government bureaucracies are resistant to the transfer of responsibility to our people.<sup>90</sup>

Perhaps the main lesson from the US Self-Governance Project is the need to link a secure land base to the negotiation and delivery of programs. The Self-Governance approach in the US is not conceivable without a land base (the Tribal reservations) and self-determination. However, to make it work, the Harvard Project has identified the central importance of developing effective and appropriate governance mechanisms. Thus governance, land and native title, and negotiated arrangements for funding and programs (in the American context, “Compacts”) provide a basis for nation building and re-building. There is no reason why the same cannot apply in Australia.

### *Federal/State jurisdictions*

In Australia the states are real players in native title because of concurrent jurisdiction in a way that does not exist in the US. The legal/constitutional relationship in the US is essentially between the federal government and the Tribes. The powers of the states in Australia expose native title to greater risk and a lack of uniformity between different jurisdictions. The role of the states in respect of native title was enhanced in the 1998 amendments to the *Native Title Act*. In particular, the types of rights and procedures available can vary significantly between jurisdictions, as long as minimum requirements set out in the NTA are met. As well, policy and administrative practices vary with the political philosophies current in each state and territory jurisdiction. The range of practices and policies adopted is highlighted in Chapter 3. This situation can be argued to be neither equitable nor efficient. It increases the transaction costs of negotiating over the use of native title lands.

### *Individualising/privatising Indigenous lands*

While there may be some merit in proposals to “free up” land held by Indigenous Australians under statutory land rights or native title, and to allow for greater individual responsibility in relation to land held by communal title, two cautionary

89 D Smith, “Building Effective Indigenous Governance. The Way Forward for Northern Territory Regions and Communities”, Background Issues Paper, *NT Indigenous Governance Conference* November 2003, p4. Available at <[www.nt.gov.au/cdsca/indigenous](http://www.nt.gov.au/cdsca/indigenous)>. Last visited 14 November 2003.

90 G Pearson, “Man Cannot Live By Service Delivery Alone”, *Opportunity and Prosperity Conference*, Melbourne November 2003. Available at <[www.capeyorkpartnerships.com](http://www.capeyorkpartnerships.com)>. Last visited 14 November 2003.



notes arise from the American experience. One is that these proposals may be premised on assimilationist motives or goals, in which group rights and identity are seen as standing in the way of individual enterprise and success. This is a value of the majority, not Indigenous, society. Secondly, in practical terms, such policies can lead to the legal or de facto loss of significant amounts of traditional lands, which already have been reduced to a small remnant of the former complete occupation and ownership of the country. Some US reservations have been seriously undermined as a result of the allotment policies.

### *Trust/fiduciary obligation*

The role of the Department of Justice, based on the trust and guardianship role of the US Government, is positive and constructive in its support of and protection for the rights of Native Americans. This surely provides a contrast to the role of such departments and agencies in Australia. Perhaps analogous Australian agencies could look with benefit to American practice and experience.

### *Dangers of poorly negotiated land claims*

The lessons arising from the Alaska Native Title Claims Settlement appear to confirm the findings of the Harvard Project from other contexts, namely the need for Indigenous governance structures that provide a good “cultural fit”. This has been a major issue in Australia where the foisting of a variety of “community” council structures on settlements and missions in Australia from the late 1960’s on in the name of “self-management” or “self-determination” contributed to undermining traditional authority structures, had little credibility in the eyes of community members, and may well have contributed to the social dysfunction that has developed in many communities over the past 20 to 30 years – in Harvard Project terms, there was a monumental lack of cultural fit.

It might also be observed from the experience of the Alaska Settlement that any agreements that involve voluntary extinguishment or surrender of native title rights should be approached with a high degree of caution.