

# Land, Rights, Laws: Issues of Native Title



Native Title Research Unit  
Australian Institute of Aboriginal and Torres Strait Islander Studies

Contributing to the understanding of crucial issues of concern to native title

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**Editor: Serica Mackay**  
**March 2004**

**Volume 2**  
**Issues Paper no. 26**

## **Abstract**

*Disappointment with both the process and outcomes of native title litigation has led to an increased emphasis on agreement making, including 'comprehensive' agreement making. In seeking to define a 'comprehensive agreement', it is evident that a broad range of agreements currently fall under this general description. Dr Stuart Bradfield discusses a range of current Australian agreements, and (briefly) agreement making in Canada, and suggests that there is value in distinguishing 'comprehensive agreements' as a separate type of agreement with a broad subject matter and a distinct process of negotiation which is underpinned by recognition of Indigenous peoples as political entities.*

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## **Agreeing to Terms: What is a 'Comprehensive' Agreement?**

**Dr Stuart Bradfield**

It is doubtful whether any of the parties involved in the native title process are unequivocally happy with it. As native title law becomes more settled, it seems fewer Indigenous peoples are likely to gain just recognition of their status as land owners. In this context, non-Indigenous interests will not achieve the certainty they desire as longstanding grievances continue. Given this situation, agreement-making has been applauded by all sides as a positive alternative to judicial and legislative resolution of native title related issues.

The increased prominence of agreement making implies some recognition that native title raises fundamental issues for Indigenous and non-Indigenous peoples alike. To this point, most of the native title style agreements have been relatively small scale, localized deals struck to facilitate development and/or the building of infrastructure.<sup>1</sup> Via this process of agreement-making,

Indigenous people are actively having a say about what happens to their country, and are benefiting both practically and financially. However, apparent limitations in this process have added to continued calls for a more ‘comprehensive’ approach to agreement making between Indigenous peoples and the state.<sup>2</sup> For instance, the new strategic plan of the National Native Title Tribunal (NNTT) states that one of its main priorities is to ‘engage with clients and stakeholders to develop, promote and facilitate comprehensive approaches to reach native title and related outcomes.’<sup>3</sup>

The term ‘comprehensive agreement’ has a particular resonance in a jurisdiction such as Canada, where it generally involves negotiation between First Nations and the state about land, and the jurisdiction to be exercised over that land. By contrast, Australia has limited practical experience with ‘comprehensive’ agreements, or settlements, and there is little or no consistency evident in current uses of the term. There is a danger, then, of falling victim to the ‘common Australian gambit of appropriating terminology with agreed meanings elsewhere in the world, ‘domesticating’ it in the Australian context... [and] distorting and reducing it out of recognition.’<sup>4</sup> With that in mind, this paper asks what should be part of an agreement process for it to warrant the description ‘comprehensive’? I agree with Graeme Neate that ‘we must guard against a fascination with language which becomes an end in itself rather than a vehicle for achieving just outcomes...’<sup>5</sup> It would be foolish to dismiss agreements with real practical benefits for Indigenous people, just because they fall short of some abstract definition of what a ‘comprehensive’ agreement should be. However, it seems worthwhile identifying a particular type of agreement which aspires to be more than a simple commercial arrangement, even if it is not an unambiguous nation-to-nation treaty.

As dependence on welfare as an income source remains strong, agreement making with industry offers great potential as an alternative basis for economic development. In recognizing this, I wish to suggest there may be value in distinguishing the term ‘comprehensive’ from other types of agreement which have acquired a certain meaning due to current usage. This investigation proceeds with the assumption that in order to be ‘comprehensive’, an agreement, or a process, should generally involve more than a simple commercial arrangement which facilitates development. An agreement should be comprehensive not only in terms of the number of items to be agreed, or the amount of territory it covers, but also in the extent of recognition afforded Indigenous peoples as partners in a process of political accommodation. While it is far from perfect, this is the essence of the Canadian comprehensive agreement process.

The paper begins by looking very briefly at the Canadian example before surveying some of the various types of Australian agreements which may point to comprehensive processes,<sup>6</sup> and finally addressing what may be ‘comprehensive’ about emerging Australian agreements.

### **Canadian comprehensive agreements**

In Canada, the federal policy of ignoring the distinct status of Indigenous peoples enunciated in the infamous ‘White Paper’ of 1969<sup>7</sup> was abandoned four years later following the *Calder* case.<sup>8</sup> As a consequence of *Calder’s* affirmation of native title, the Trudeau government began a process to comprehensively settle land claims. Always based on assumed rights to land, the policy was refined in 1987 following the constitutional protection of Aboriginal and treaty rights five years earlier to allow retention of title rather than demanding extinguishment. In 1995 the policy was further expanded to recognise the inherent right of First Nations to self-government. These arrangements could be negotiated simultaneously with land issues, as part of a comprehensive settlement. In response to the Royal Commission on Aboriginal Peoples, the federal government affirmed in 1998

that treaties, historic and modern, would continue to be the foundation of relationships between Indigenous peoples and Canada.<sup>9</sup>

From the beginning then, land and the related issue of jurisdiction<sup>10</sup> have been central features of Canadian comprehensive claims processes. Federal and Provincial governments negotiate on the assumption ‘there are continuing Aboriginal rights to lands and natural resources’.<sup>11</sup> Agreements (or modern day treaties’) which result from the process aim, via negotiation, to clarify ‘who has the legal right to own or use the lands and resources under claim’.<sup>12</sup> While each agreement is different, rights and benefits in comprehensive settlements often include full ownership of certain lands in the area covered by the settlement; guaranteed wildlife harvesting rights; guaranteed participation in land, water, wildlife and environmental management throughout the settlement area; financial compensation; resource revenue-sharing; specific measures to stimulate economic development; and a role in the management of heritage resources and parks in the settlement area.<sup>13</sup>

It is not surprising that Canadian approaches are in many ways more ‘comprehensive’ given that this national engagement has been refined over three decades, and builds upon a tradition of treaty-making far older than this. As Michelle Ivanitz suggests, in looking to Canada (and elsewhere) we should note differences in history, law and political will, and always examine comprehensive claims in Canada with ‘a very critical eye.’<sup>14</sup>

Just as Mick Dodson notes we will have to develop ‘a uniquely Australian concept of regional agreements’,<sup>15</sup> so too will we develop our own idea of comprehensive agreements. However there are undoubtedly lessons to be learned from the Canadian experience, particularly the integral nature of land in comprehensive settlements, and the related issue of jurisdiction. At a deeper level, negotiation processes are based on the underlying recognition that contemporary Indigenous societies may wish to order themselves with reference to traditional systems of governance. The necessarily uncertain relationship between different systems of law is then (ideally) negotiated via comprehensive agreement processes.

In using the phrase ‘settlement’, the Canadian process looks to provide a level of certainty. This reminds us that even where native title has been determined in Australia, fundamental underlying issues between Indigenous and non-Indigenous peoples often remain unresolved, suggesting the need for an alternative, or complementary process of broader political engagement. The Canadian decision to deal with Indigenous questions in this comprehensive manner was a policy decision, it was not the result of a single national treaty process. Despite undoubted differences in history and law, perhaps the greatest lesson for Australia lies in the recognition of the Canadian state as home to different peoples, and the Canadian commitment to explicitly engage in a new process of relationship building between Indigenous and non-Indigenous peoples.<sup>16</sup>

### **Current Australian agreements**

The sheer volume of agreements involving Indigenous peoples in Australia, a number of which are included on the Agreements, Treaties and Negotiated Settlements (ATNS) project database,<sup>17</sup> suggests we can rightly speak of an emerging ‘culture’ of agreement-making. Given a history of denying the right of Indigenous peoples to have a say on land they traditionally occupied, this marks a positive and important shift in relations. Just as remarkable is the fact that, after a slow start, it has been industry more than government, that has demonstrated the greatest willingness to ‘deal’ with

native title. This has influenced the types of agreement being reached in Australia, including those that point to a degree of ‘comprehensive’ engagement.

A number of ‘broader’ categories of agreement – Memorandum of Understanding (MoU), Model Indigenous Land Use Agreement, Statement of Commitment, Framework agreement, Regional agreement, and finally Comprehensive agreement – have been chosen for analysis for their potential to include elements which may be described as ‘comprehensive’. It is an understatement to suggest a good deal of ambiguity is evident in categorizing Australian agreements. The distinction between different terms is not always obvious. The elements included in an agreement sometimes suggest it may be more appropriately termed something else. At times, different parties appear to have their own understanding of the terms they use. It is not yet possible to describe a neat typology of Australian native title related agreements, and discussion proceeds with an uncomfortable, but perhaps inevitable, level of generality. Against this shifting background, I will now assess some of the different types of agreement, loosely ordered to indicate increasing potential as ‘comprehensive’ agreements.

### **Memorandum of Understanding**

MoUs are generally ‘process’ agreements in that they tend to refer to the way negotiations will take place, rather than to substantive subjects. Some are in fact referred to as Statements of Commitment. Lack of precision in terminology is further evident in that MoUs have also been described as ‘a type of framework agreement’.<sup>18</sup> There appear to be hundreds in operation between Indigenous peoples, agencies and organisations, and governments, departments, industry bodies and others, which cover areas as diverse as health, housing, service delivery, processing future acts, and general ‘recognition’.<sup>19</sup>

In 2002, the Northern Land Council (NLC) announced the signing of an Exploration MoU template agreement with a number of mining companies, including De Beers Australia Exploration, which aimed to speed up processing of a backlog of exploration licence applications. The NLC suggested template agreements would facilitate development while significantly reducing costs for both it and exploration companies. The agreements guaranteed heritage and environmental protections, consultation with traditional owners, compensation, and provided for future agreements should exploration be successful. A De Beers spokesperson said the company recognised traditional owners and their representative bodies as ‘important stakeholders in our business’.<sup>20</sup>

This type of agreement may also anticipate a more comprehensive agreement. An MOU between the Kimberley Land Council and Argyle Diamond Mine was signed in 2001 agreeing to a protocol for the negotiation of what is described as a ‘comprehensive regional agreement’ between traditional owners and Aboriginal communities of the East Kimberley region, the Kimberley Land Council and the Argyle Diamond Mine. The negotiation seeks to develop a modernised relationship between the mine and East Kimberley Indigenous peoples through regional development, employment opportunities, training, community assistance and financial advice.<sup>21</sup> The proposed land use or comprehensive agreement is yet to be negotiated.

### **Model Indigenous Land Use Agreement**

An Indigenous Land Use Agreement (ILUA) is a voluntary agreement between a native title group and others about the use and management of land and waters. As at 11 March 2004, there were 114

ILUAs registered with the NNTT.<sup>22</sup> Model ILUAs are essentially template ILUAs for the conclusion of specific native title related agreements.

While the ILUA provisions of the *Native Title Amendment Act 1998* (Cth) were widely seen as one of the few positive elements of that legislation, ILUAs have proved to be of limited use in the context of ‘comprehensive’ agreements between Indigenous peoples and others. Some commentators have suggested ‘the ILUA provisions of the Act are largely oriented towards dealing with what non-indigenous interests want to use native title lands for.’<sup>23</sup> A key limitation of the ILUA regime is its failure to recognize any status for native title holding groups ‘beyond one of many private users of land.’<sup>24</sup> It is uncertain at this point how the negotiation of ‘Model ILUAs’ could act to expand upon this recognition, but Model ILUAs, as with MOUs, can assist in the important process of building harmonious workable relationships.

During 2000 the Queensland government and the Queensland Indigenous Working Group (QIWG), negotiated a Model ILUA to assist in processing the exploration backlog in Queensland.<sup>25</sup> The Model ILUA acts as an alternative to the right to negotiate provisions under the NTA, allowing companies and native title parties to either adopt the model or conduct their own negotiations and agreement under the right to negotiate provisions of the NTA.<sup>26</sup> This can fast track benefits flowing to Indigenous communities, though it has been suggested native title parties must guard against internationally recognized rights being washed away via processes which aim to alleviate (State created) backlogs.<sup>27</sup>

In this instance, the role of QIWG in articulating a coherent Indigenous position throughout the process was important in protecting Indigenous interests. Referring to the Queensland Model ILUA, Aboriginal and Torres Strait Islander Social Justice Commissioner Bill Jonas suggests effective Indigenous participation in negotiations ‘ensured human rights standards were satisfied and that the outcome addressed the concerns of both the Government and Indigenous interests - leading to a more workable result.’<sup>28</sup> The association he makes between workability and human rights standards is notable, because the two are not always seen as compatible.

### **Statement of Commitment**

These agreements commit parties to a new and improved relationship. They provide the context within which discussions will take place, rather than detailing the content of those discussions. These statements are suggestive of a ‘comprehensive’ approach in that they acknowledge the need for an entirely new basis of interaction between Indigenous and non-Indigenous peoples, but commitment to this new approach will always need to be monitored.

The *Western Australian Statement of Commitment to a New and Just Relationship* is an agreement between the Government of Western Australia and ‘Aboriginal Western Australians’ represented by the ATSIC State Council (made up of the 9 Regional Chairs and 4 commissioners from WA), supported by a number of peak bodies. The purpose is to agree on a set of principles for the parties to negotiate a statewide framework that can facilitate negotiated agreements at local and regional levels. Interestingly, these will apparently include recognition of ‘the inherent rights of Aboriginal people’ including traditional ownership of and connection to land and waters, legislative protection of those rights, and a commitment to ‘economic independence’.<sup>29</sup> Strelein notes this agreement is broader than any of its kind, and ‘is unique in combining land and other issues across the broad spectrum of Indigenous peoples relationship with the State.’<sup>30</sup> The crunch will come when negotiations reach the

stage of requiring substantive agreement on terms such as ‘inherent rights’ as ‘first peoples’. It is also far from clear that signing the Statement has led to a demonstrably new spirit of accommodation from the WA government.<sup>31</sup>

Approximately ten per cent of Australia’s local governments have signed some form of agreement with Indigenous representatives.<sup>32</sup> Fairly typical of these local ‘recognition’ agreements is the *Kogarah Municipal Council Statement of Commitment*, signed during Reconciliation Week in 1998. In it, the Council acknowledges the Dharug and Dharawal as the ‘first people’ of the area, ‘celebrates the survival of Aboriginal & Torres Strait Islander People to live according to their own values and customs subject to the law’, and looks forward to a future of ‘mutual respect and harmony.’<sup>33</sup> In a sense, these local government agreements are suggestive of a more ‘Indigenous’ politics which takes seriously formal relationships at a local level, as opposed to the more ‘European’ politics which is defined by, and reinforces, the state.<sup>34</sup> Local government agreements can be enormously important in transforming relationships at a local level.

The extent of activity at this level contrasts with a lack of initiative at the federal level, and may suggest Australian forms of Indigenous self-government will emerge as a bottom-up rather than a top-down process – the latter more characteristic of Canada. So for example, the Northern Territory’s current initiative promoting regionalisation looks to facilitate local aggregation on the way to creating a new level of regional authorities.<sup>35</sup> In time, these actors may acquire the power and legitimacy to negotiate a comprehensive agreement with Territory and/or federal governments which recognise increased autonomy or self-government.

As the Western Australian statement shows, statements of commitment can appear comprehensive in terms of the recognition they afford Indigenous peoples, especially if they are a precursor to more ‘substantive’ arrangements as may be the case in WA. Establishing principles for negotiations like those contained in the WA Statement is important. However, we are entering an important period where governments will need to replace their statements of commitment with action that reflects that commitment. Recognition of Indigenous peoples status as ‘first nations’ with ‘inherent rights’ should have significant implications, including negotiation of jurisdiction and power sharing arrangements. Governments should ensure relationships accord with the spirit, as well as the letter, of such agreements, lest they become more useful for States than Indigenous signatories. It is in learning to shift the whole basis of Indigenous-state relations that the real commitment will be required.

### **Framework agreement**

Currently, framework agreements tend to fall into the category of those agreements that look to provide a context within which negotiations can take place. They have been described as ‘a broad statement of mutual respect and shared objectives’ that can guide the preparation of subsequent agreements.<sup>36</sup> As such, the stated purpose of the NNTT’s template framework agreement is:

To promote efficient, effective, and orderly negotiations leading to completion of an Agreement-in-Principle in respect of the Region. The Framework Agreement sets out an approach to and process for negotiations; identifies the scope of negotiations; and establishes an agenda and a timetable for the negotiations.<sup>37</sup>

Perhaps the most well known framework negotiations are those surrounding the *South Australian Statewide Framework Agreement*. The statewide negotiating process was initiated in 1999 and

involves native title groups, the Aboriginal Legal Rights Movement (ALRM), the South Australian Government, the SA Farmers Federation and the SA Chamber of Mines and Energy. The negotiations seek to establish a process that gives meaningful recognition to native title and to settle native title claims. The parties to the negotiations have agreed to work toward the development of a framework ILUA.<sup>38</sup> Details of the agreement have yet to be worked out, but negotiators suggest the process has highlighted ‘the need to reorientate native title strategies away from legal issues and expert oriented processes and towards consideration of the way claimants themselves want to work together for change.’ While there has been little to show in the way of concrete gains,<sup>39</sup> the incremental building up of Indigenous peoples’ capacity to negotiate is itself seen as one positive outcome of the process.<sup>40</sup>

The increasing prominence of statewide framework agreement processes would seem to reflect the absence of comprehensive processes at the federal level. Strelein suggests the emergence of these processes also recognises the fact that agreements that concentrate on facilitating future act type developments do not remove the need for governments to negotiate with Indigenous peoples over broader issues of ‘unfinished business’.<sup>41</sup>

### **Regional agreement**

At the risk of overgeneralising, the types of agreements above tend either to concentrate on facilitating single developments or providing a template for a series of single projects, or on the other hand, offer largely symbolic recognition.<sup>42</sup> The concept of ‘regional agreement’ appears close to that of ‘comprehensive agreement’ in terms of its ability to link elements of economic development and broader recognition. Mary Edmunds suggests regional agreements promote ‘the systematic involvement of Indigenous people in land and resource management and planning’ and the agreements can develop increased Indigenous control over social and economic matters.<sup>43</sup> A definition of regional agreement that is used widely was offered by Donna Craig and Peter Jull.<sup>44</sup> Citing that definition, Mick Dodson suggests:

[A regional agreement involves] the concept of equitable and direct negotiations between Indigenous peoples, governments and other stakeholders in a region to recognise the rights of Indigenous peoples and to protect them in a contemporary legal system... A regional agreement is a way to organise policies, politics, administration and/or public services for or by an Indigenous people in a defined territory of land (or of land and sea).<sup>45</sup>

In their Report on Greater Regional Autonomy, ATSIC endorsed the idea of a regional agreement stressing these two elements – recognition and protection of rights, and equitable and direct negotiations.<sup>46</sup> They are ‘comprehensive’ because of their ability to ‘provide a legal framework and procedures for linking Indigenous interests in a region with social justice, economic development and environmental protection’ via the establishment of ‘bicultural institutions’.<sup>47</sup> Here Mick Dodson refers to a shift in the relationship between peoples in a particular region, suggesting a notion of comprehensiveness which implies a commitment to more than just one off negotiations.

Langton and Palmer identify the extraordinary range of mechanisms being used by Indigenous peoples and organisations to develop ‘regional framework agreements’ which aim to carve out a place in the regional polity and economy, and facilitate ‘effective governance structures’. These include the NTA and the right to negotiate procedures; State and Territory heritage and land rights legislation; ATSIC regional structures; service delivery by government; the Indigenous Land

Corporation; and management arrangements with National parks and Indigenous Protected Areas.<sup>48</sup> Right across the country, Indigenous peoples are creatively pushing the boundaries of these and other structures in order to increase and maximise their levels of autonomy. The difficulty will always be in bending these structures in ways that were generally not envisaged by their (usually non-Indigenous) creators.

Some of these emerging agreements are currently being described in comprehensive terms. Graeme Neate points to the Goldfields Regional Heritage Protocol developed by the Goldfields Native Title Liaison Council in Western Australia as ‘an example of a regional agreement’.<sup>49</sup> The Protocol was established as a set of principles to guide prospectors, explorers and native title claimants who are attempting to agree on the future uses of areas within the Goldfields region of Western Australia. Reflecting the general lack of agreement on terms, the ATNS refers to it, probably more accurately, as a ‘framework agreement’.<sup>50</sup>

Similarly, the example of the ‘model regional agreement’ put forward by the NNTT aims to facilitate mining in the area it covers, the Kalgoorlie-Goldfields region. The agreement itself acknowledges it does not ‘depart from the existing future act system’, but aims to ensure that system is dealt with in ‘the most timely, reliable and predictable way possible.’<sup>51</sup> This of course will benefit Indigenous as well as non-Indigenous parties. However, it does not explore wider aspects of Indigenous rights beyond the right to benefit from non-Indigenous projects on Indigenous land. Such agreements may have inherent limitations as they often seek to increase the efficiency in existing systems, which may only narrowly recognise Indigenous interests, rather than seeking new ways of doing things. Such agreements are also unlikely to deliver desired outcomes, such as increased political autonomy, regardless of their efficiency.

### **Comprehensive agreements**

The brief survey above suggests it is not easy to categorise or distinguish between agreements, however, this is not surprising given the organic or ad hoc nature of Australia’s culture of agreement making. A lack of federal coordination has contributed to a number of processes taking place alongside, rather than being integrated with each other. Given this variety, is it possible to identify Australian agreements which could be termed ‘comprehensive’? Marcia Langton and Lisa Palmer suggest ‘creative alternatives to engaging solely in a native title determination process do exist — that is, comprehensive agreements that elaborate the substance of the native title recognition as more broadly defined governance rights.’<sup>52</sup> The proposed agreements which most approximate these comprehensive alternatives are emerging at the State level, despite (or because of?) a lack of movement from the federal government.

For example the Western Australian government has committed itself to pursuing ‘comprehensive agreements’ with a number of Indigenous peoples. Its recent budget papers state that, ‘in partnership with ATSIC, State, Commonwealth and non-government agencies’, the WA government will:

- progress the scoping study that forms the basis for negotiating a comprehensive agreement with the Tjurabalan community in East Kimberley;
- progress the development of a framework for a comprehensive regional agreement with the South West Aboriginal Land and Sea Council and the Noongar people; and
- develop a comprehensive agreement with the Shire of Ngaanyatjarraku to ensure community input into enhancement and coordination of services to Ngaanyatjarra Lands communities.<sup>53</sup>



Immediately apparent here is the embryonic nature of comprehensive agreement making between governments and Indigenous peoples. For instance, recognition of the ‘broadly defined governance rights’ identified by Langton and Palmer, seem some way off in the WA process. Negotiations with SWALSC then, are at a stage prior to a framework agreement, which itself is prior to a comprehensive agreement. It is unlikely we will see such an agreement in a hurry for two main reasons. First, the process of negotiating a comprehensive agreement is undoubtedly time consuming. Mick Dodson argues comprehensive regional agreements simply ‘cannot be negotiated quickly’, they ‘must allow for Indigenous time frames’, with negotiating parties adopting a long term policy focus.<sup>54</sup> Second, the unfamiliarity of the process will cause delay – Australians are simply not used to participating in negotiations which look to achieve a political settlement between different peoples or nationalities within the boundaries of a single state.<sup>55</sup>

Meanwhile, other agreements referred to as ‘comprehensive’ take place on a large scale, but appear to share a good deal with many of the industry-driven, project based agreements examined above. Rio Tinto’s publicity describes the *Gulf Communities Agreement* (GCA) as ‘a comprehensive agreement focused on long term objectives and benefits to all parties.’<sup>56</sup> It was signed in 1997 by Pasminco Century Mine Limited, the Queensland Government and three native title groups – the Waanyi, Mingginda, and Gkuthaarn and Kikatj. The Gulf Aboriginal Development Corporation was established under the Agreement at the request of the native title parties, to represent their interests during the implementation phase and life of the Agreement. It plays an important coordination and facilitation role in the continuing operation of the Agreement.<sup>57</sup>

The Agreement can be described as comprehensive in the sense that it covers a relatively wide range of issues and commitments, including social impact assessments, health facilities, compensation at the mine site and along the pipeline corridor, strategic plan funding, and detailed commitments in relation to employment and training. The Agreement has seen the development of local businesses and the hand back to Indigenous owners of Turn-off Lagoons Pastoral lease, with other leases in the process of transfer. Again, uncertainty in the terminology is evident in that the ATNS describe it as a ‘framework agreement.’<sup>58</sup>

Whatever term is used to describe it, the GCA highlights the benefits available to Indigenous communities, as well as the way those benefits serve the needs of industry players. As the then general manager of Pasminco stated, the majority of funding in the agreement is devoted to training and employment related activities. Negotiations reflect mining companies’ relatively recent awareness of the need to ‘involve the local communities in the project development at an early stage.’ With respect to Indigenous people, it is felt ‘this must be accompanied by a clear commitment to recognising their historical affiliation to the land and their traditional values, and to the establishment of a relationship which brings the parties together as partners...’ This is certainly an advance on former relationships between mining companies and Indigenous peoples. Of course the focus for industry remains ‘the overall success of the project’, and the recognition of Indigenous rights is viewed as part of the need to ‘address and balance competing technical and social pressures’ which affect the project.<sup>59</sup>

The *Western Cape Communities Co-existence Agreement* has also been referred to as a ‘comprehensive’ agreement.<sup>60</sup> Signatories include eleven traditional owner groups, four Indigenous community councils (Aurukun, Napranum, Mapoon and New Mapoon), Comalco Limited, the Cape

York Land Council and the Queensland Government. Rio Tinto describes it as a ‘comprehensive regional agreement’ which links present and future mine development at Weipa with regional development, employment opportunities, training, community assistance, and financial advice. The agreement is said to encourage mutual respect and recognition, support for future Comalco mining operations, economic development of Indigenous communities, increased representation in consultations about operations, and increased levels of cultural awareness among Comalco employees.<sup>61</sup>

Further illustrating the strong link between industry and Australian agreements referred to as ‘comprehensive’, Rio Tinto has also negotiated a series of agreements described variously as a ‘comprehensive exploration agreement’, ‘comprehensive exploration access agreement’ or ‘comprehensive conjunctive exploration agreement’. These provide for exploration on Aboriginal freehold land in return for heritage and cultural protection, community benefits, training, employment, and provision for land rents, profit interest and regional development if discovery and mine development occurs.<sup>62</sup> The term ‘comprehensive’ appears to refer to the wide range of elements to be negotiated in these agreements, despite the narrow project context within which the agreement operates. We may still ask whether a deeper level of recognition needs to occur in order to achieve ‘comprehensive’ agreement.

### **Comprehensive recognition?**

It is evident that Australia is now home to a wide range of agreements between Indigenous peoples and non-Indigenous entities. Particularly where resource industries wish to carry out work on Indigenous land, communities are having a say as to what happens on that land, and gaining benefits such as training and employment. This process may also be suggestive of a new level of engagement with Indigenous peoples. Langton and Palmer suggest that while it is not explicitly acknowledged, we are seeing a number of corporations prepared to ‘treat with Aboriginal nations’.<sup>63</sup> This contributes to the fact that:

Project-specific local agreements can have quite broad regional impacts, even in the short term. The process of agreement making – especially in the increasing instances in which State government is involved in the negotiations as an observer or third party – facilitates other negotiations and sets in place processes that can lead to other agreements beneficial to Indigenous people in a region.<sup>64</sup>

The question remains whether these agreements should be referred to as ‘comprehensive’ because of the range (or potential) of benefits accorded Indigenous groups, or should the term be reserved for those agreements with ‘something more’, particularly in terms of land management and political accommodation?

For some, there remains a doubt as to the thrust of agreements which provide citizenship style entitlements (such as to health, housing, employment etc.), but don’t necessarily facilitate the ‘equitable negotiations’ discussed above. For example, when discussing service delivery arrangements, Patrick Dodson recently criticised a number of framework agreements for their ‘practical reconciliation approach’ which actually ‘moves away from a genuine dialogue between Aboriginal and non-Aboriginal people’.<sup>65</sup> Patrick Dodson appears to suggest the need for a layer of negotiations which moves Indigenous-state relations beyond a level of citizenship which is simply ‘the same’ as all other Australians. Similarly, Mick Dodson clearly views comprehensive agreement

making as a ‘constitutional’ exercise,<sup>66</sup> in the broad sense of reimagining Australia and the place of Indigenous peoples within it. UN rapporteur Erica Irene Daes has referred to this process in settler societies as ‘belated state building’.<sup>67</sup> In line with theorists elsewhere, Mick Dodson refers not only to the sort of constitutional change that may see Indigenous peoples recognised as treaty partners, as in Canada or Aotearoa/New Zealand,<sup>68</sup> but suggests that:

We should also explore those constitutional questions which may not directly or immediately involve the national constitution but which are no less fundamental to the *constitutional place of Indigenous peoples in Australia*. In these I would include... provision for comprehensive or multi-functional regional agreements.<sup>69</sup>

I take this to suggest that for some Indigenous peoples at least, comprehensive agreement making must be about fundamental recognition of the distinct place of Indigenous people in this state, via a process that is demonstrably different from those that have gone before. That is, a process which recognises Indigenous peoples (as ‘peoples’ or ‘nations’) who are parties to a process of equitable and direct negotiation with the state. With respect to negotiations over the Tjurabalan area, Peter Yu suggests:

These people want to radically change their relationship with government and the wider Australian community. They are not interested in incremental change whereby ATSIC’s CDEP or CHIP program can be rationalised and combined with State services to achieve a more effective delivery of service.<sup>70</sup>

For Yu, this means recognising Tjurabalan as ‘a nation of Aboriginal people who have responsibilities and obligations to each other under a common system of law and culture and land ownership.’ When compared with the range of agreements discussed above, this places the concept of comprehensive agreement making in an entirely new context. It is suggestive of a relationship ‘between peoples’, with Australia a ‘multi-nation state’,<sup>71</sup> rather than referring to agreements between different stakeholders under the same fixed system. Yu suggests that following ‘the recognition that the Tjurabalan people own their country through native title, it is appropriate that governments should commit to a process of nation building’ similar to that which took place in East Timor.<sup>72</sup> Using similar terms, Patrick Dodson suggests ‘Aboriginal affairs has to be about rebuilding the Aboriginal nations.’<sup>73</sup> Mick Dodson recognises regional and comprehensive agreement processes based on this recognition ‘come closer than other approaches to recognising and restoring Indigenous peoples as political entities in the modern world.’<sup>74</sup>

If comprehensive agreements are to involve recognition of Aboriginal peoples as political entities, they must be about more than just trading access to land for employment, training and other citizenship entitlements. Thought about in this way – as a transformative mechanism of political recognition – the term is suggestive of a significantly increased (and *different*) role for governments. The need for particularly the Commonwealth to explore the type of ‘government-to-government’ relationship seen in other settler societies has often been recognised here. Mick Dodson argued the Commonwealth Government had a ‘crucial role’ in facilitating regional and comprehensive processes.<sup>75</sup> The ATSIC report, ‘Recognition, Rights, Reform’, suggests a clear Commonwealth commitment to the process is fundamental ‘for the successful conclusion of comprehensive agreements comparable to those achieved in Canada.’<sup>76</sup>

There appears to be little willingness to proactively facilitate comprehensive agreements on the part

of the current federal government, or even play what would be a useful coordinating role. Absent such leadership, Indigenous affairs in this area is left to the traditional ‘ad hocerry’ of the States. The federal coalition government has promoted the Council of Australian Government’s ‘whole of government’ process which aims to streamline service delivery to a number of trial communities.<sup>77</sup> At best, this approach implicitly recognises the need for a comprehensive approach to Indigenous-state relations. However the COAG trials have failed to address the fundamental issue of Indigenous control of land (let alone jurisdiction) by choosing sites where land needs have been met through native title or land rights,<sup>78</sup> or avoiding the issue of land altogether.<sup>79</sup> It seems inconceivable that a comprehensive agreement process would be legitimate in Indigenous eyes if it failed to address issues of land dispossession, restitution and management.

In general, the Commonwealth’s approach to native title is limiting, rather than expanding the potential scope of agreements. In the 2002 native title report, Bill Jonas suggests a current difficulty with agreement making is:

The monitoring role that the Commonwealth Government is increasingly assuming in consent determination proceedings with a view to ensuring that the orders made by a court are not inconsistent with the legal standards proposed in the NTA as interpreted by the High Court...It would be unfortunate if, through such interference, technical and discriminatory standards were injected into a process aimed at avoiding lengthy and costly litigation.<sup>80</sup>

This suggests that despite being widely touted as an alternative to it, the emerging culture of agreement making in Australia continues to be limited by the constraints of the current national legal framework.<sup>81</sup>

## **Conclusion**

Patrick Sullivan suggested in 1997 that the recognition of native title was the ‘primary stimulus’ for increased interest in regional agreements.<sup>82</sup> Indeed, the recognition of native title has provided a ‘new framework’ within which movements for regional autonomy can negotiate.<sup>83</sup> Yet we still don’t see Indigenous control over land as an integral feature of native title related agreements unless it is primarily to facilitate non-Indigenous use. This continues government ambivalence toward increasing Indigenous autonomy that Sullivan suggests has been evident since at least the mid 1970s.<sup>84</sup>

In his early overview paper, Sullivan identified different requirements to be met by agreements for them to be termed ‘regional’. The different facets included firstly, administrative changes to increase Indigenous autonomy, and secondly, increased control over Indigenous resources. As Sullivan noted, one could be negotiated at the exclusion of the other,<sup>85</sup> and that seems to be what we have seen in recent years. Agreements currently described as ‘comprehensive’ are mostly resource agreements which have undoubted practical benefits, particularly for economic development, but recognise Indigenous peoples primarily as another stakeholder to be consulted. These agreements provide only implicit, or de facto recognition of Indigenous peoples’ inherent right to govern themselves on their land – a right accepted and mediated in other settler societies via broad ranging agreement, settlement and treaty processes.

In looking to categorise future regional agreements, Sullivan suggests the need to ask whether they are ‘about public policy and the administration of Aboriginal lands’, and therefore about defining a

new relationship between Aboriginal people and the state; or are they ‘simply multi-party agreements over resource extraction...[which] provide a new distributive process between Aborigines and other interests,’ or are they both?<sup>86</sup>

For agreements to be truly ‘comprehensive’ I suggest they must have elements of both the former and the latter. To be a useful term, ‘comprehensive’ should refer not just to the range of matters to be included in an agreement, but also the extent of recognition offered to Indigenous people as holders of inherent and distinct rights to land. The Canadian experience indicates comprehensive agreements emerge when the former is underpinned by the latter – when broad ranging agreements are underpinned by the recognition that Indigenous peoples represent a political and constitutional entity, not just ‘another interest’. Building on existing processes, Australian comprehensive agreements could be those which seek a political accommodation to facilitate new relationships while also contributing to Indigenous economic development, and that of the state.

I would propose, then, that the term ‘comprehensive’ be reserved for those agreements with the following (interrelated) elements:

1. Content – comprehensive agreements have a broad subject matter;
2. Process – comprehensive agreements have a distinct process of equitable and direct negotiation;
3. Recognition – comprehensive agreements recognise the Indigenous party as a political entity with inherent rights, as a people or as a nation;
4. Parties – comprehensive agreement must include (at least) an Indigenous people and a government, most appropriately the Commonwealth, as parties.

Of course this proposal raises a number of questions which are not addressed in this paper: What is a ‘broad’ enough subject matter? In the absence of a fiduciary duty, what compels a government to negotiate with Indigenous peoples, let alone ‘equitably’? Exactly how is the Indigenous party – the ‘nation’ or ‘people’ – to be constituted and represented? How are these agreements to be enforced? Rather than prevent it, these and other questions await future attention as part of an ongoing dialogue about the place of Indigenous peoples with/in the state.

The recognition of native title has been of limited practical benefit to most Indigenous people, yet it has provided the space for new ways to think through the issues of our inevitable coexistence. Senator Aden Ridgeway suggested ‘it’s time for a complete rethinking of the way native title issues are resolved and managed in this country. What we need is to establish comprehensive settlements.’<sup>87</sup> In defining just what a comprehensive agreement is, Langton and Palmer suggest ‘the process of engaging in comprehensive agreement making involves economic and political strategies that aspire to the recognition of an autonomous Indigenous jurisdiction and, to varied extents, self-government.’<sup>88</sup> In searching the multitude of agreements with Indigenous peoples, these elements of self-government remain aspirational. In developing an Australian approach to ‘comprehensive agreements’, we should not continue to ignore the broader questions raised by the recognition of native title.

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<sup>1</sup> Citing a 1998 audit by the National Native Title Tribunal (NNTT), Marcia Langton and Lisa Palmer suggest of the 1349 agreements struck by native title parties, 1092 were future act related. Langton and Palmer 2003, ‘Modern Agreement Making and Indigenous peoples in Australia: Issues and Trends’, *Australian Indigenous Law Reporter*, Vol. 8, No.1,

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p.14. This is notable, even taking into account the limitations of the NNTT survey in focusing on ILUAs and Future Act agreements.

<sup>2</sup> In this paper, 'state' refers to the state of Australia, 'State' refers to New South Wales, Queensland etc.

<sup>3</sup> Graeme Neate, 'President's Introduction', National Native Title Tribunal Strategic Plan 2003-2005. Available at: [www.nntt.gov.au/about/strategic.html](http://www.nntt.gov.au/about/strategic.html)

<sup>4</sup> Patrick Sullivan 1997, 'Regional Agreements in Australia: An Overview Paper', *Land, Rights, Laws: Issues in Native Title*, Vol. 1, No. 17, pp.8-9, available at <[www.aiatsis.gov.au/rsrch/ntru/ntru\\_issuespprs.htm](http://www.aiatsis.gov.au/rsrch/ntru/ntru_issuespprs.htm)>

<sup>5</sup> Graeme Neate, 'Land, Law and Language: Some Issues in the Resolution of Indigenous Land Claims in Australia', Paper delivered to the International Association of Forensic Linguists, Sydney, Australia, 11 July 2003, p.77.

<sup>6</sup> In assessing the vast array of agreements being made across Australia, I rely heavily on the database compiled by the 'Agreements, Treaties and Negotiated Settlements Project' (ATNS) at the University of Melbourne. Available at: <http://www.atns.net.au/>

<sup>7</sup> In the name of 'equality', Prime Minister Trudeau's federal Liberal government proposed to abolish the special status of First Nations contained in both the Royal Proclamation and the Indian Act, generating widespread Indigenous opposition. See Harold Cardinal 1969, *The Unjust Society: The Tragedy of Canada's Indians*, Hurtig Publishers, Edmonton.

<sup>8</sup> *Calder v Attorney General of British Columbia* (1973) 7 CNLC 91 (SCC).

<sup>9</sup> Richard Bartlett 2001, 'Canada: Indigenous Land Claims and Settlements' in Brian Keon-Cohen (ed.), *Native Title in the New Millennium*, Aboriginal Studies Press, Canberra, p 357.

<sup>10</sup> I mean 'jurisdiction' in the broad sense of having the right to exercise a power or authority emanating from Indigenous people themselves, rather than the state.

<sup>11</sup> Indian and Northern Affairs Canada, 'Information: Treaties with Aboriginal people in Canada', March 2000. Available at <[www.ainc-inac.gc.ca/pr/info/is30\\_e.pdf](http://www.ainc-inac.gc.ca/pr/info/is30_e.pdf)> [Accessed 20/12/03]

<sup>12</sup> Canada, Claims and Indian Government Sector, Comprehensive Claims Branch, 'Overview'. Available at: <[www.ainc-inac.gc.ca/ps/clm/ccb\\_e.html](http://www.ainc-inac.gc.ca/ps/clm/ccb_e.html)> [Accessed 20/12/03].

<sup>13</sup> INAC, 'Comprehensive Claims (modern treaties) in Canada', 1996. Available at: <[www.ainc-inac.gc.ca/pr/info/trty\\_e.html](http://www.ainc-inac.gc.ca/pr/info/trty_e.html)> [Accessed 20/12/03].

<sup>14</sup> Michelle Ivanitz 1997, 'The Emperor Has No Clothes: Canadian Comprehensive Claims and their Relevance to Australia', *Land, Rights, Laws: Issues in Native Title*, Regional Agreements Paper No. 4, p.19, available at: <[www.aiatsis.gov.au/rsrch/ntru/ntru\\_issuespprs.htm](http://www.aiatsis.gov.au/rsrch/ntru/ntru_issuespprs.htm)>

<sup>15</sup> Mick Dodson 1995, *Indigenous Social Justice: Strategies and Recommendations Vol. 1, Submission to the Parliament of the Commonwealth of Australia on the Social Justice Package*, Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, Sydney, p.79.

<sup>16</sup> For discussion of these ideas see Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Ottawa, 1996, especially 'Volume 2: Restructuring the Relationship'.

<sup>17</sup> ATNS Project Database, see above note 6.

<sup>18</sup> Aboriginal and Torres Strait Islander Commission (ATSIC), Regional Agreements Manual, p.4. avail at [www.atsic.gov.au/about\\_atsic/regional\\_agreements/Default.asp](http://www.atsic.gov.au/about_atsic/regional_agreements/Default.asp)

<sup>19</sup> See ATNS site, [http://www.atns.net.au/br\\_m\\_function\\_agreements.htm](http://www.atns.net.au/br_m_function_agreements.htm)

<sup>20</sup> Northern Land Council Media Release, 'MOUs smooth explorers path in Top End', 5 June 2002.

<sup>21</sup> ATNS site, <http://www.atns.net.au/biogs/A000094b.htm> [Accessed 11/3/04].

<sup>22</sup> See [http://www.nntt.gov.au/ilua/browse\\_ilua.html](http://www.nntt.gov.au/ilua/browse_ilua.html) [Accessed 11/3/04].

<sup>23</sup> Parry Agius, Jocelyn Davies, Richie Howitt and Lesley Johns 2002, 'Negotiating Comprehensive Settlement of Native Title Issues: Building a New Scale of Justice in South Australia', *Land, Rights, Laws: Issues of Native Title*, Vol. 2, No. 20, footnote 4, p.12.

<sup>24</sup> Lisa Strelein 2004, 'Symbolism and Function: From Native Title to Indigenous Self-Government' in M. Langton, M. Tehan, L. Palmer, K Shain (eds), *Honour Among Nations?*, Melbourne University Press, forthcoming, p.4.

<sup>25</sup> The Model ILUA can be viewed at <http://www.nrm.qld.gov.au/nativetitle/pdf/statewide.pdf>

<sup>26</sup> The Aboriginal and Torres Strait Islander Social Justice Commissioner's Submission to the Ministerial Inquiry to Identify Strategies to Increase Resources' Exploration in Western Australia, at paragraph 4.1.1. Available at: [http://www.hreoc.gov.au/social\\_justice/native\\_title/submissions/greenfields.html](http://www.hreoc.gov.au/social_justice/native_title/submissions/greenfields.html) [Accessed 12/03/04]

<sup>27</sup> Langton and Palmer, see note 1 above, p.9.

<sup>28</sup> See note 26 above, at paragraph 4.1.1.

<sup>29</sup> 'Western Australia Statement of Commitment to a New and Just Relationship between the Government of Western Australia and Aboriginal Western Australians'. Available at:

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[www.cultureandarts.wa.gov.au/images/alldocuments/planandpolicy/statementofcommitmentfinal11.pdf](http://www.cultureandarts.wa.gov.au/images/alldocuments/planandpolicy/statementofcommitmentfinal11.pdf) [Accessed 11/3/04].

<sup>30</sup> Lisa Strelein, see note 24 above, p.5.

<sup>31</sup> Patrick Dodson contrasted the government's 'lack of action' with its 'ambitious claims' in Patrick Dodson, 'Time for Action on Native Title', *Reaching Agreement*, Western Australian Aboriginal Native Title Working Group Newsletter, November 2002, Issue 4, p 1.

<sup>32</sup> Langton and Palmer, see note 1 above, p.39.

<sup>33</sup> <http://www.atns.net.au/biogs/A000578b.htm> [Accessed 22/1/03].

<sup>34</sup> For discussion of this idea in the context of the term 'sovereignty', see Peter d'Errico 1997, 'American Indian Sovereignty: Now You See It, Now You Don't', Inaugural lecture in the American Indian Civics Project, Humboldt State University, Arcata, CA, USA, October 24. Available at: <http://www.nativeweb.org/pages/legal/sovereignty.html> [Accessed 12/12/03].

<sup>35</sup> Information on the Northern Territory government's policy of 'Building Stronger Regions – Stronger Futures' can be found at <http://www.dcdsca.nt.gov.au/dcdsca/intranet.nsf/pages/BuildingStrongerRegions> [Accessed 11/3/04].

<sup>36</sup> ATSIC Regional Agreements Manual, see note 18 above, p.4.

<sup>37</sup> See NNTT, [www.nntt.gov.au/agreements/files/TemplateregionalAgreementNFA/NGF2.DOC](http://www.nntt.gov.au/agreements/files/TemplateregionalAgreementNFA/NGF2.DOC) [Accessed 12/2/04].

<sup>38</sup> See <http://www.atns.net.au/biogs/A001072b.htm> [Accessed 11/12/03].

<sup>39</sup> A number of agreements involving native title claimants, the minerals industry, the South Australian government and a pastoral lessee were announced in December. See <http://www.iluasa.com/news.asp> [Accessed 11/3/04].

<sup>40</sup> Parry Agius et al., see note 23 above, p. 2.

<sup>41</sup> Lisa Strelein, see note 24 above, p. 5

<sup>42</sup> In calling it 'symbolic', I do not diminish the importance of this type of recognition. On the contrary, it may be true, as Peter Craven suggested, that 'if we are to change the direction of our history, then a symbolism, grounded in experience, is our best hope'. Peter Craven 2003, 'Introduction', in Germaine Greer, 'Whitefella Jump Up: The Shortest Way to Nationhood', *Quarterly Essay*, Issue 11, p.vi.

<sup>43</sup> Mary Edmunds (ed) 1998, *Regional Agreements: Key Issues in Australia, Volume 1, Summaries*, Native Title Research Unit AIATSIIS, Canberra, p. 7.

<sup>44</sup> Donna Craig and Peter Jull 1994, 'Regional Agreements – Options for Australian Indigenous peoples', paper prepared for the Aboriginal and Torres Strait Islander Social Justice Commissioner, p 4.

<sup>45</sup> Mick Dodson, see note 15 above, p.78.

<sup>46</sup> ATSIC 2000, *Report on Greater Regional Autonomy*, 2000, available at <[http://www.atsic.gov.au/issues/Indigenous\\_Rights/Regional\\_Autonomy/Greater\\_Regional\\_Autonomy/Report%20on%20Greater%20Regional%20Autonomy.doc](http://www.atsic.gov.au/issues/Indigenous_Rights/Regional_Autonomy/Greater_Regional_Autonomy/Report%20on%20Greater%20Regional%20Autonomy.doc)> See for example discussion on p 32.

<sup>47</sup> Mick Dodson, see note 15 above, p. 79.

<sup>48</sup> Langton and Palmer, see note 1 above, p. 15.

<sup>49</sup> Graeme Neate, 'Exploring the Role of the National Native Title Tribunal in Reaching Agreements over Native Title', paper presented to Assessing the Impact of Native Title and Cultural Heritage in 2002: Negotiating Balanced Outcomes for all Parties, Novotel Hotel, Brisbane, 16 April 2002, p. 34

<sup>50</sup> ATNS website, <http://www.atns.net.au/biogs/A001053b.htm> [Accessed 24/11/03].

<sup>51</sup> Model Regional Agreement – Kalgoorlie-Goldfields region. Available at: [http://www.nntt.gov.au/agreements/files/Model\\_Regional\\_Agreement/](http://www.nntt.gov.au/agreements/files/Model_Regional_Agreement/) [Accessed 24/11/03].

<sup>52</sup> Marcia Langton and Lisa Palmer 2003, 'Modern Agreement Making in Australia: Issues and Trends', paper delivered to the Native Title Conference, Alice Springs, June 3-5.

<sup>53</sup> The Government of Western Australia Budget Papers 2003-04, Part 12 Indigenous Affairs, available at: [http://ourstatebudget.wa.gov.au/BP2\\_Part12/part12indigenousaffairs.pdf](http://ourstatebudget.wa.gov.au/BP2_Part12/part12indigenousaffairs.pdf), p 992

<sup>54</sup> Mick Dodson, see note 15 above, p.79.

<sup>55</sup> This unfamiliarity has meant a reluctance to explore new processes (such as treaty) as well as those that already exist, such as s86F of the NTAA, which states: "Some or all of the parties to a proceeding in relation to an application may negotiate with a view to agreeing to action that will result in any one or more of the following: (a) the application being withdrawn or amended; (b) the parties to the proceeding being varied; (c) any other thing being done in relation to the application. The agreement may involve matters other than native title."

<sup>56</sup> ATNS website, <http://www.atns.net.au/biogs/A000081b.htm> [Accessed 21/1/04].

<sup>57</sup> ATNS website, <http://www.atns.net.au/biogs/A000081b.htm> [Accessed 21/1/04].

<sup>58</sup> ATNS website, <http://www.atns.net.au/biogs/A000081b.htm> [Accessed 21/1/04].

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<sup>59</sup> Mr Ian Williams 1999 (Executive General Manager of Mining, Pasmaico Ltd), 'Century Zinc Project', The Australian Academy of Technological Sciences and Engineering Symposium, The Spirit of the Snowy 50 Years On, Nov 1999.

<sup>60</sup> See

<http://www.legalprofiles.com.au/areas/Native%20Title/brisbane/premier/blakedawsonwaldron/blakedawsonwaldron.htm> [Accessed 27/11/03].

<sup>61</sup> ATNS website, <http://www.atns.net.au/biogs/A000088b.htm> [Accessed 12/1/04].

<sup>62</sup> See [http://www.rio.com/library/microsites/SocEnv2001/content/neighbour/program/174d\\_landuse.pdf](http://www.rio.com/library/microsites/SocEnv2001/content/neighbour/program/174d_landuse.pdf) [Accessed 21/12/03].

<sup>63</sup> Langton and Palmer, see note 1 above p. 17.

<sup>64</sup> Langton and Palmer, see note 1 above, p. 19.

<sup>65</sup> Patrick Dodson, Address to the ACTU Congress, Melbourne, 21 August 2003. Available at:

[http://www.actu.asn.au/congress2003/news/1061437834\\_22275.html](http://www.actu.asn.au/congress2003/news/1061437834_22275.html) [Accessed 11/3/04].

<sup>66</sup> Mick Dodson, see note 15 above, p. 77.

<sup>67</sup> Erica-Irene A. Daes, *Discrimination Against Indigenous people - Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples*, UN Doc; E/CN.4/Sub.2/1993/26/Add.1.

<sup>68</sup> For example, Canadian political philosopher James Tully suggests we reconceive of our constitution as a 'form of accommodation' of cultural diversity: 'A constitution should be seen as a form of activity, an intercultural dialogue in which the culturally diverse citizens of contemporary societies negotiate agreements on their forms of political association over time in accordance with the three conventions of mutual recognition, consent and cultural continuity.' James Tully 1995, *Strange Multiplicity: Constitutionalism in an age of Diversity*, Cambridge University press, Cambridge, p.30.

<sup>69</sup> Emphasis added. Mick Dodson, see note 15 above, p.77.

<sup>70</sup> Peter Yu, 'Aboriginal Rights and Governance: A Kimberly Perspective', Indigenous Governance Conference, Canberra, 3-5 April 2002.

<sup>71</sup> For discussion see Will Kymlicka 1995, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Clarendon Press, Oxford.

<sup>72</sup> Peter Yu, see note 69 above

<sup>73</sup> Patrick Dodson, see note 64 above.

<sup>74</sup> Mick Dodson, see note 15 above, p.83.

<sup>75</sup> Mick Dodson, see note 15 above, p.83.

<sup>76</sup> Aboriginal and Torres Strait Islander Commission 1995, *Recognition, Rights and Reform: Report to Government on Native Title Social Justice Measures*, p. 57.

<sup>77</sup> For information see Di Hawgood 2003, 'Imagine What Could Happen if We Worked Together: Shared Responsibility and a Whole of Government Approach', paper delivered to the Native Title Conference, Alice Springs, 3-5 June.

<sup>78</sup> For example Turabalan, Wadeye and Cape York.

<sup>79</sup> See Lisa Strelein, see note 24 above, p.6.

<sup>80</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002* (see chapter 5 footnote 23). Available online at [http://www.hreoc.gov.au/social\\_justice/ntreport\\_02/chapter5.html#f23](http://www.hreoc.gov.au/social_justice/ntreport_02/chapter5.html#f23) [Accessed 11/3/03].

<sup>81</sup> Lisa Strelein, see note 24 above, p.5.

<sup>82</sup> Patrick Sullivan, see note 4 above, p. 3.

<sup>83</sup> Lisa Strelein, see note 24 above, p.3.

<sup>84</sup> Patrick Sullivan, see note 4 above, p.3.

<sup>85</sup> Patrick Sullivan, see note 4 above, p.4.

<sup>86</sup> Patrick Sullivan, see note 4 above, p.4.

<sup>87</sup> Aden Ridgeway, The Mabo Lecture, 'Where We've Come From And Where We're At With The Opportunity That Is Koiki Mabo's Legacy To Australia', Native Title Conference, Alice Springs 3-5 June 2003.

<sup>88</sup> Langton and Palmer, see note 52 above, 2003.

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ISSN 1326 - 0316

ISBN 0 85575 443 5

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