

# *The Noongar Settlement: Australia's First Treaty*

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## *Abstract*

There has been a resurgence in debate over the desirability and feasibility of a treaty between Aboriginal and Torres Strait Islanders and the Australian State. The discussion has proceeded on the assumption that no such treaties exist. But is this correct? In this article, we examine the concepts and ideas underlying a treaty, with a view to determining a standard against which agreements and negotiated settlements can be assessed. The standard we apply is informed by the modern treaty-making process in Canada to locate it in contemporary practices and values. We then examine whether any agreement reached in Australia can be regarded as a treaty, including settlements reached under the *Native Title Act 1993* (Cth) and more recent agreements made outside that regime. We conclude that the South West Native Title Settlement, a negotiated agreement between the Noongar people and the Western Australian Government, is Australia's first treaty.

## I Introduction

Treaties are accepted around the world as the means of resolving differences between Indigenous peoples and those who have colonised their lands. They have been reached in the United States ('US'),<sup>1</sup> and Aotearoa/New Zealand,<sup>2</sup> and are still being negotiated in Canada today.<sup>3</sup> In contrast, no treaty between Aboriginal and Torres Strait Islander peoples and the Australian State has ever been recognised. This is despite Australia having experienced decades of debate about whether a treaty should be negotiated with Indigenous peoples.<sup>4</sup>

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<sup>1</sup> See, eg, *Two Row Wampum Treaty* (signed and entered into force 21 April 1613), negotiated between representatives of the Haudenosaunee and Dutch Government in modern upstate New York; *Treaty of 1677* (signed and entered into force 29 May 1677), negotiated between Charles II of England and representatives of the Nottoway, Appomattox, Wayonaoake, Nansemond, Nanztatiko, Monacan, Saponi and Meherrin peoples; *Treaty with the Delawares* (signed and entered into force 17 September 1778) negotiated between the Delaware people and the US government.

<sup>2</sup> *Treaty of Waitangi*, signed 6 February 1840, (entered into force 21 May 1840), negotiated between the British Crown and Māori chiefs.

<sup>3</sup> See, eg, *Mi'kmaq Peace and Friendship Treaty*, signed 15 December 1725, (entered into force 4 June 1726). For modern day treaties, see below Part IIB.

<sup>4</sup> See, eg, Yolngu People, Yirrkala Bark Petition (August 1963); Stewart Harris, *It's Coming Yet: An Aboriginal Treaty within Australia between Australians* (Aboriginal Rights Treaty Committee, 1979); National Aboriginal Conference, 'The Makarrata: Some Ways Forward' (Position Paper

The treaty movement in Australia has been reinvigorated, and is being propelled forward by several events. In February 2016, the Victorian Government announced its commitment to negotiate a treaty with Aboriginal Victorians.<sup>5</sup> Consultative forums have since been held in Melbourne and across regional Victoria to develop a culturally appropriate representative body through which those negotiations can take place.<sup>6</sup> An Aboriginal Treaty Working Group and a Victorian Treaty Advancement Commissioner will provide advice to community and government, and guide the establishment of the representative body.<sup>7</sup> In September 2016, incoming Northern Territory Chief Minister Michael Gunner declared that his Government would establish a subcommittee on Aboriginal affairs to 'drive public discussions on a treaty' between the Territory and Indigenous nations.<sup>8</sup> Although no firm commitment has yet been made, treaty remains on the Government's agenda.<sup>9</sup> In South Australia, events are moving forward more quickly. In December 2016, discussion began between the South Australian Government and three Indigenous nations aimed at finalising a treaty.<sup>10</sup> Following the report of the South Australian Treaty Commissioner in July 2017,<sup>11</sup> the State commenced negotiations with three Aboriginal nations: the Ngarrindjeri, Narungga and Adnyamathanha.<sup>12</sup>

The treaty debate has also assumed prominence as people ask whether the proposed recognition of Indigenous peoples in the *Australian Constitution*<sup>13</sup> should be accompanied by a final, negotiated settlement. At the First Nations Constitutional Convention at Uluru in May 2017, around 250 Aboriginal and Torres Strait Islander delegates called on the Commonwealth to establish a Makarrata Commission.

presented at World Council of Indigenous Peoples, Canberra, April 1981); Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Two Hundred Years Later... Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Feasibility of a Compact or 'Makarrata' between the Commonwealth and Aboriginal People* (1983) xii recommendation 1; Bob Hawke, 'Statement of the Prime Minister: Barunga Festival' (1988) 2(6) *Land Rights News* 22; Council for Aboriginal Reconciliation, 'Reconciliation: Australia's Challenge' (Report, Council for Aboriginal Reconciliation, 4 December 2000) 106 recommendation 6.

<sup>5</sup> Hamish Fitzsimmons, 'Victorian Government to Begin Talks with First Nations on Australia's First Indigenous Treaty', *ABC News* (online), 26 February 2016 <<http://www.abc.net.au/news/2016-02-26/victoria-to-begin-talks-for-first-indigenous-treaty/7202492>>.

<sup>6</sup> See Aboriginal Treaty Interim Working Group, *Aboriginal Community Consultations on the Design of a Representative Body* (December 2016); Aboriginal Treaty Interim Working Group, *Aboriginal Community Consultations on the Design of a Representative Body — Phase 2* (June 2017).

<sup>7</sup> Aboriginal Victoria, *Victorian Treaty Advancement Commission* <<https://www.vic.gov.au/aboriginal-victoria/treaty/victorian-treaty-advancement-commission.html>>.

<sup>8</sup> Helen Davidson, 'Northern Territory Labor Government Announces Majority Female Cabinet', *The Guardian* (online), 12 September 2016 <<https://www.theguardian.com/australia-news/2016/sep/12/northern-territory-labor-government-announces-majority-female-cabinet>>.

<sup>9</sup> NT News, 'Indigenous Treaty Remains on NT Government's Agenda', *NT News* (online), 4 May 2017 <<http://www.ntnews.com.au/news/northern-territory/indigenous-treaty-remains-on-nt-governments-agenda/news-story/299369abf4b496a06aa92ee8e5d0300d>>.

<sup>10</sup> Caroline Winter, 'Treaty: South Australian Government Enters Historic Discussions with Aboriginal Nations', *ABC News* (online), 15 December 2016 <<http://www.abc.net.au/news/2016-12-14/south-australia-enters-historic-treaty-discussions/8120162>>.

<sup>11</sup> Dr Roger Thomas (Treaty Commissioner), *Talking Treaty: Summary of Engagements and Next Steps* (Office of the Treaty Commissioner, Government of South Australia, July 2017).

<sup>12</sup> Department of State Development (SA), *Treaty Discussions* <<https://statedevelopment.sa.gov.au/aboriginal-affairs/aboriginal-affairs-and-reconciliation/initiatives/treaty-discussions>>.

<sup>13</sup> See generally Megan Davis and George Williams, *Everything You Need to Know about the Referendum to Recognise Indigenous Australians* (NewSouth Publishing, 2015).

Makarrata is a Yolngu word meaning ‘a coming together after a struggle’, and the delegates explained that it ‘captures our aspirations for a fair and truthful relationship with the people of Australia’.<sup>14</sup> The Commission would ‘supervise a process of agreement-making between governments and First Nations’.<sup>15</sup>

Despite the emergent treaty negotiations in Victoria, the Northern Territory and South Australia, and the Uluru Convention’s call for a Makarrata Commission, treaty-talk at the national level is plagued by two questionable assumptions. These are that no treaties exist between Indigenous peoples and the Australian State, and that a treaty would amount to a radical, perhaps impossible, shift in Australia’s public law system. In this article, we address the first of these assumptions, that is, whether it is correct to say that no treaty has been signed between Indigenous peoples and the State. This is a key question in the contemporary debate. If Australia has already entered into one or more treaties, this could provide the basis for further like outcomes, and also end questions about the capacity of Australia’s legal system to accommodate such agreements.

In Part II, we examine the concept of treaties between Indigenous peoples and the State to determine what is meant by the term, and the type of agreements it covers. Our approach is substantive, rather than formalistic: we look at the concepts and ideas underlying a treaty, asking what principles and values a comprehensive negotiated settlement should express. This uncovers the fact that there is no one form of ‘treaty’, but a diverse variety of agreements establishing and governing a myriad of interrelationships.<sup>16</sup> We then examine examples of such agreements so that our standard is further developed by way of case studies. As liberal democracies with a similar colonial history and common law systems, Canada, Aotearoa/New Zealand and the US are all natural comparators to Australia. Of these, we look at Canada in particular because treaties are still being negotiated there between the State and First Nations. Consequently, it offers the best opportunity to locate our understanding of a treaty in current practices and public law values, rather than only in historical examples. While there are many modern treaty processes occurring in Canada, including the Yukon and Inuit Land Claims,<sup>17</sup> our focus is on British Columbia. It is the best comparator from Canada given that it involves agreements over land in which a significant number of peoples live (4.631 million in British Columbia, compared to 35 874 in Yukon and 35 944 in Nunavut).

In Part III, we examine whether any agreement reached in Australia can be regarded as a treaty. We explore the negotiated settlements reached under the *Native*

<sup>14</sup> Referendum Council, ‘Uluru Statement from the Heart’ (Statement, Referendum Council, 26 May 2017) <[https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru\\_Statement\\_From\\_The\\_Heart\\_0.PDF](https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF)>.

<sup>15</sup> Ibid.

<sup>16</sup> Marcia Langton, Maureen Tehan and Lisa Palmer, ‘Introduction’ in Marcia Langton et al (eds), *Honour Among Nations?: Treaties and Agreements with Indigenous Peoples* (Melbourne University Press, 2004) 1, 2.

<sup>17</sup> The Yukon Land Claims are conducted under the *Umbrella Final Agreement* (signed and entered into force March 1990); for the Inuit see, eg *Nunavut Land Claims Agreement* (signed 25 May 1993; entered into force 9 July 1993). ‘Modern’ treaties are those negotiated after the 1973 Canadian Supreme Court decision *Calder v Attorney-General of British Columbia* [1973] SCR 313 (*‘Calder’*). See below at Part II(B)(1).

*Title Act 1993* (Cth) ('NTA'), and more recent agreements made outside the native title regime. Of these, a primary focus is the South West Native Title Settlement, a negotiated agreement between the Noongar people and the Western Australian Government.<sup>18</sup> Under this settlement, the Noongar people have agreed to exchange native title rights for a comprehensive package of benefits including recognition of traditional ownership, land, a significant financial future fund and other commitments.<sup>19</sup>

## II Treaties with Indigenous Peoples

### A *What is a Treaty?*

Political communities have long negotiated agreements with neighbours to secure peace and protect and promote their interests. One of the earliest such treaties was settled between the rival Mesopotamian kingdoms of Lagash and Umma between 2550 and 2600 BCE. Expressed in the Sumerian language and inscribed on a stone monument, the Agreement established a territorial boundary between the parties, provided for a system of arbitration if a dispute arose over its interpretation, and designated the ruler of a third State to act as an arbitrator.<sup>20</sup> Evidence also exists that, from the 8<sup>th</sup> century BCE, extensive treaty relations were conducted within ancient China between different nations.<sup>21</sup> Similarly, pre-contact, Indigenous nations developed processes for making and maintaining peaceful diplomatic relations with others.<sup>22</sup> Agreements were also negotiated between warring political communities across Europe.<sup>23</sup> It is no surprise then, that when European colonial powers met Indigenous political communities, negotiated agreements were often struck.

Under the *Vienna Convention on the Law of Treaties*, a treaty is 'an international agreement concluded between States in written form and governed by international law'.<sup>24</sup> This definition might be taken to exclude agreements struck between Indigenous and non-Indigenous peoples,<sup>25</sup> and indeed, many scholarly works on the international law of treaties do not encompass discussion of these

<sup>18</sup> Land, Approvals and Native Title Unit (WA), *South West Native Title Settlement*, Government of Western Australia <<https://www.dpc.wa.gov.au/lantu/south-west-native-title-settlement/Pages/default.aspx>>.

<sup>19</sup> See below Part IIIB(1).

<sup>20</sup> Alexander Orakhelashvili, 'The Relevance of Theory and History — The Essence and Origins of International Law' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar, 2011) 3, 20; Gbenga Oduntan, *International Law and Boundary Disputes in Africa* (Routledge, 2015) 69.

<sup>21</sup> Richard Walker estimates that over 140 treaties were negotiated between 722–476 BCE: Richard Louis Walker, *The Multi-State System of Ancient China* (Shoe String Press, 1953) 82.

<sup>22</sup> Canada, Royal Commission on Aboriginal Peoples, *Report of the Commission on Aboriginal Peoples* (1996) vol 1, 112–14 [3.1]; Leanne Simpson, 'Looking After Gdoo-naaganinaa: Precolonial Nishnaabeg Diplomatic and Treaty Relationships' (2008) 23(2) *Wicazo Sa Review* 29.

<sup>23</sup> See, eg, *Treaty of Durham* (signed and entered into force 9 April 1136); *Treaty of Westphalia* (signed and entered into force 24 October 1648); *Treaty of the Pyrenees* (signed and entered into force 7 November 1659).

<sup>24</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 2(1)(a) ('Vienna Convention').

<sup>25</sup> Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 3<sup>rd</sup> ed, 2013) 16.

agreements.<sup>26</sup> But this approach is unduly limited for two reasons. First, as the Special Rapporteur on the Sub-Commission on Prevention of Discrimination and Protection of Minorities noted in his 1997 report on treaties with Indigenous peoples, in establishing formal legal relationships with peoples overseas, the European parties were clearly aware that they were negotiating and entering into contractual relations with sovereign nations, with all the international legal implications of that term during the period under consideration.<sup>27</sup>

By entering into formal agreements with the Indigenous peoples they met, the European powers acknowledged the legal capacity of those peoples to make such treaties. Even if Indigenous peoples today do not constitute states, the concept of ‘sovereignty’ is fluid, and Australian public law principles can comprehend the notion of shared jurisdiction between polities.<sup>28</sup> Second, the definition adopted under the *Vienna Convention* is expressly limited ‘for the purposes of the present Convention’,<sup>29</sup> and is not determinative of our understanding of political agreements more broadly, nor for defining negotiated settlements between Indigenous peoples and the State.

A holistic approach to understanding treaties avoids marginalising the agreements struck between Indigenous and non-Indigenous political communities. It sees treaties broadly as, for example, ‘formalised records of negotiated agreements between parties, usually states, but sometimes people’,<sup>30</sup> ‘political agreements involving Indigenous peoples and governments that have a binding legal effect’<sup>31</sup> and ‘formal and consensual bilateral juridical instruments’.<sup>32</sup> These definitions can encompass a wide variety of forms, processes and outcomes, reflecting the diverse experiences and perspectives of parties to such agreements across time and space.

Our starting point for establishing a standard by which agreements can be assessed as being treaties is a three-year study by Brennan and colleagues of treaties between Indigenous peoples and the State. This study, the only one of its type so far undertaken in Australia, concluded that such treaties contain three criteria.<sup>33</sup> First, they are based on an acknowledgment by the State that Indigenous peoples were prior owners and occupiers of the land now claimed by the State. This entails recognising that, in the absence of a treaty, the legitimacy of state authority over

<sup>26</sup> No discussion of treaties between Indigenous peoples and non-Indigenous peoples appears in: Enzo Cannizzaro and Mahnoush H Arsanjani (eds), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011); Małgorzata Fitzmaurice and Olufemi Elias, *Contemporary Issues in the Law of Treaties* (Eleven Publishing, 2005); Jan Klabbers, *The Concept of Treaty in International Law* (Kluwer Law, 1998). Cf Ian Brownlie, *Treaties with Indigenous Peoples: The Robb Lectures* (Clarendon Press, 1992).

<sup>27</sup> Miguel Alfonso Martinez, Special Rapporteur, *Studies on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations*, UN Doc E/CN.4/Sub.2/1999/20 (22 June 1999) 18 [110].

<sup>28</sup> Sean Brennan, Brenda Gunn and George Williams, “‘Sovereignty’ and Its Relevance to Treaty-Making between Indigenous Peoples and Australian Governments” (2004) 26(3) *Sydney Law Review* 307, 347–9.

<sup>29</sup> *Vienna Convention* art 2(1).

<sup>30</sup> J R Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (University of Toronto Press, 2009) 3.

<sup>31</sup> Sean Brennan et al, *Treaty* (Federation Press, 2005) 3.

<sup>32</sup> Martinez, above n 27, 14 [82]. See further Brennan, Gunn and Williams, above n 28, 309–10.

<sup>33</sup> Brennan et al, above n 31, 3–11.

Indigenous peoples is contested. As part of this first component, the State typically acknowledges the deep injustices done to Indigenous peoples as part of the colonial- and state-building projects, and that this injustice continues to manifest today. Second, the treaties are concluded by way of negotiation, with ‘governments and Indigenous peoples sitting round the table’ and coming to an agreement.<sup>34</sup> Third, while the negotiation process holds many benefits, the treaties must include substantive outcomes. These outcomes should recognise legal rights to protect Indigenous peoples from ‘the wavering sympathies of the [broader political] community’,<sup>35</sup> as well as provide opportunities for sustainable economic development.

These criteria are a useful starting point. However, the study concluded in 2005, and there have been significant events since that time. For example, the United Nations General Assembly’s adoption of the *Declaration on the Rights of Indigenous Peoples* (‘*UNDRIP*’) in 2007,<sup>36</sup> endorsed by Australia in 2009, signals significant developments in Indigenous rights and global democratic governance standards. Although not legally binding, the *UNDRIP* envisages and endorses a pluralised account of the State, where sovereignties are dispersed among multiple polities.<sup>37</sup> For instance, art 3 recognises and affirms that ‘Indigenous peoples have the right to self-determination’, which entails the right to ‘freely determine their political status and freely pursue their economic, social and cultural development’. In exercising this right, art 4 further guarantees that Indigenous peoples have ‘the right to autonomy or self-government in matters relating to their internal and local affairs’.

The Special Rapporteur on the Rights of Indigenous Peoples, has noted that the norms of the Declaration ‘substantially reflect Indigenous peoples own aspirations, which after years of deliberation have come to be accepted by the international community’.<sup>38</sup> For this reason, Indigenous leaders recognised Australia’s endorsement of the Declaration as marking a ‘watershed moment’ in Australia’s relationship with Aboriginal and Torres Strait Islander peoples and as ‘another piece in the jigsaw puzzle of reconciliation’.<sup>39</sup> The terms of, and principles underlying, the Declaration thus serve as an important component of any modern treaty. Indeed, the Declaration creates a framework for Indigenous dialogue and political advocacy with states.<sup>40</sup> It is through treaties that this dialogue may be conducted.

<sup>34</sup> Sean Brennan, ‘Why a “Treaty” and Why This Project?’ (Discussion Paper No 1, Gilbert and Tobin Centre of Public Law, January 2003) 5.

<sup>35</sup> Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia’s Future* (Federation Press, 2003) 8.

<sup>36</sup> GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

<sup>37</sup> Will Kymlicka, ‘Beyond the Indigenous/Minority Dichotomy?’ in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart, 2011) 183, 190.

<sup>38</sup> James Anaya, Special Rapporteur, *Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/65/264 (9 August 2010) 17 [60].

<sup>39</sup> Tom Calma and Mick Dodson respectively, quoted in Sheila Collingwood-Whittick, ‘Australia’s Northern Territory Intervention and Indigenous Rights on Language, Education and Culture: An Ethnocidal Solution to Aboriginal “Dysfunction”?’ in Elvira Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press, 2012) 110, 115.

<sup>40</sup> Megan Davis, ‘The United Nations Declaration on the Rights of Indigenous Peoples’ (2007) 6(30) *Indigenous Law Bulletin* 6, 6.

Other significant developments continue to occur in Canada. That nation has, for many years, engaged in crafting treaties between Indigenous peoples and the State, which are recognised as being ‘solemn agreements that set out promises, obligations and benefits for both parties’.<sup>41</sup> Canada’s experience is of central importance to this article. Our aim in understanding what is meant by a treaty is not to locate the term in historical understandings of the concept that reflect outdated societal and public law values, including as to the limited place of Indigenous peoples within the State. Indeed, what might have been regarded as a treaty in the past may be no more than a tokenistic or sham agreement that falls short of what is now regarded as satisfactory.<sup>42</sup> In contrast, the concept today should be consistent with contemporary legal values such as non-discrimination, self-determination and equality,<sup>43</sup> as reflected in instruments such as the *UNDRIP*.

In the sections below, we refine and develop the criteria of acknowledgement, negotiation, and substantive outcomes, in light of these concerns and more recent developments. We then ground this analysis in the experience of the modern treaty-making process in Canada. The resulting three criteria reveal a substantive rather than formalistic standard that is suitable for use in Australia to determine whether recent agreements amount to a treaty between Indigenous peoples and the State.

## 1 *Recognition as Polities*

The first criteria recognises that a treaty acknowledges that Indigenous peoples were prior owners and occupiers of the land now claimed by the State. Acknowledgement only of this, though, is insufficient. A treaty must also recognise that Indigenous peoples are ‘polities’.<sup>44</sup> A polity is a distinct political community composed of individuals collectively united by identity. It can take many forms, including a nation-state, empire, or a sub-state unit. Indigenous communities in Australia have a long history operating as a distinct society, with a unique economic, religious and spiritual relationship to their land.<sup>45</sup> Despite this, governments have preferred to conceive Indigenous peoples as cultural or ethnic minorities within a larger undifferentiated political community. As Barker has explained, the ‘making ethnic’ or ‘ethnicisation’ of Indigenous peoples is a political strategy that relegates Indigenous peoples’ aspirations and demands to that of just another minority interest,

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<sup>41</sup> Department of Indigenous and Northern Affairs Canada, *Treaties with Aboriginal People in Canada* (15 September 2010) Government of Canada <<https://www.aadnc-aandc.gc.ca/eng/1100100032291/1100100032292>>.

<sup>42</sup> David A Wishart, ‘Contract, Oppression and Agreements with Indigenous Peoples’ (2005) 28(3) *University of New South Wales Law Journal* 780, 820.

<sup>43</sup> Though as *Gerhardy v Brown* (1985) 159 CLR 70 illustrates, reconciling Indigenous rights with rights to non-discrimination and equality can be conceptually difficult.

<sup>44</sup> Marcia Langton and Lisa Palmer, ‘Treaties, Agreement Making and the Recognition of Indigenous Customary Polities’ in Marcia Langton et al (eds), *Honour Among Nations?: Treaties and Agreements with Indigenous Peoples* (Melbourne University Press, 2004) 34, 34–49.

<sup>45</sup> Erica-Irene A Daes, ‘An Overview of the History of Indigenous Peoples: Self-determination and the United Nations’ (2008) 21(1) *Cambridge Review of International Affairs* 7, 13.

erasing their status as a polity and robbing their calls of political force.<sup>46</sup> An important function of a treaty is to redress this by way of appropriate acknowledgement.

Recognising Indigenous peoples as a polity is, therefore, a first step in any treaty relationship. Failure to do so would ‘undermine the purpose and intent’ of any treaty,<sup>47</sup> as it is through such acknowledgement that the State commits to reconcile ‘the pre-existence of aboriginal societies with the sovereignty of the Crown’.<sup>48</sup> Such acknowledgement differentiates Indigenous peoples from other citizens, and distinguishes the agreement from other legal forms such as contracts. It also reflects international law as affirmed in the *UNDRIP*. The Declaration recognises that Indigenous peoples have multiple nested or overlapping nationalities,<sup>49</sup> guaranteeing that Indigenous peoples have the right ‘to a nationality’,<sup>50</sup> as well as the right to ‘belong to an Indigenous community or nation’ determined in accordance with the ‘traditions and customs of the community or nation concerned’.<sup>51</sup> Indeed, art 33 expressly guarantees that membership in an Indigenous nation ‘does not impair the right of Indigenous individuals to obtain citizenship of the States in which they live’.

## 2      *Reached by Negotiation*

A treaty is a political agreement to be reached by way of negotiation. Negotiation is the appropriate process for resolving differences between Indigenous peoples and the State as it: reduces the risk that the rights and interests of significant groups will be ignored; brings relevant information and perspectives to the decision-making process; and recognises that winner-take-all processes are unlikely to endure or to produce good policy.<sup>52</sup> Additionally, as negotiation eschews overly legalistic frameworks, it offers parties a ‘more flexible forum for working out acceptable arrangements’,<sup>53</sup> building relationships based on trust and communication. At a minimum, negotiations must be respectful of each participant’s ‘equality of standing’,<sup>54</sup> reflecting the acknowledgment that Indigenous peoples are polities.<sup>55</sup>

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<sup>46</sup> Joanne Barker, ‘For Whom Sovereignty Matters’ in Joanne Barker (ed), *Sovereignty Matters: Locations of Contestations and Possibility in Indigenous Struggles for Self-Determination* (University of Nebraska Press, 2005) 1, 16 (emphasis altered).

<sup>47</sup> Michael Mansell, *Treaty and Statehood: Aboriginal Self-determination* (Federation Press, 2016) 113.

<sup>48</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1124 [186] (Lamer CJ, Cory and Major JJ) (citations omitted) (‘*Delgamuukw*’). See also *Director, Agriculture Branch, Department of Energy, Mines and Resources v Little Salmon/Carmacks First Nation* [2010] 3 SCR 103, 153 [103] (LeBel and Deschamps JJ).

<sup>49</sup> Keating calls this ‘plurinationalism’: Michael Keating, *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era* (Oxford University Press, 2001) 27. On the possibility of treaties constituting a new form of substantively inclusive citizenship, see Harry Hobbs, ‘Constitutional Recognition and Reform: Developing an Inclusive Australian Citizenship through Treaty’ (2018) 53 *Australian Journal of Political Science* (forthcoming).

<sup>50</sup> *UNDRIP* art 6.

<sup>51</sup> Ibid art 9.

<sup>52</sup> Brennan et al, above n 31, 8.

<sup>53</sup> Christopher McKee, *Treaty Talks in British Columbia: Building a New Relationship* (UBC Press, 3<sup>rd</sup> ed, 2009) 109.

<sup>54</sup> Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (University of Toronto Press, 2014) 102.

<sup>55</sup> James Tully, *Strange Multiplicity* (Cambridge University Press, 1995) 29, 211.

Securing a fair negotiation process is difficult, but approaches in Canada and Aotearoa/New Zealand suggest adapting fiduciary principles may be appropriate.<sup>56</sup> In both countries, courts have developed constitutional principles that structure the relationship between Indigenous peoples and the Crown to avoid ‘sharp dealing[s]’<sup>57</sup> and prevent the settler-State from acting in their self-interest in negotiations. In dealing with Indigenous peoples, both states have ‘trust-like’<sup>58</sup> responsibilities that are ‘analogous to fiduciary duties’.<sup>59</sup> In Canada, these principles derive ‘from the Crown’s assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people’.<sup>60</sup> While ‘[w]hat constitutes honourable conduct will vary with the circumstances’,<sup>61</sup> the Aotearoa/New Zealand courts insist negotiation should be conducted under principles of ‘good faith, reasonableness, trust, openness and consultation’,<sup>62</sup> and ‘with the utmost good faith which is the characteristic obligation of partnership’.<sup>63</sup> These principles are affirmed by the Waitangi Tribunal. In its *Te Whānau o Waipareira Report*, the Tribunal explained that negotiation should be ‘conducted in a spirit of partnership with the mutual goal of enhancing the status of the other party and the quality of the relationship’.<sup>64</sup> These qualities are necessary for any fair negotiation.

The *UNDRIP* further elucidates the appropriate standard for any negotiation. The Declaration provides that states must undertake ‘effective consultation’<sup>65</sup> or ‘[consult] and cooperat[e]’<sup>66</sup> with Indigenous peoples before adopting and implementing measures that may affect them. Such consultation should be ‘undertaken in good faith’ with representatives freely chosen by Indigenous peoples through their own representative structures. It implies ‘no coercion, intimidation or manipulation’, and requires sufficient time and information.<sup>67</sup> This standard recognises Indigenous peoples’ ‘inherent and prior rights to their lands … and respects their legitimate authority’.<sup>68</sup>

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<sup>56</sup> Kirsty Gover, ‘The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism’ (2016) 38(3) *Sydney Law Review* 339.

<sup>57</sup> *R v Badger* [1996] 1 SCR 771, 794 [41] (La Forest, L’Heureux-Dubé, Gonthier, Cory and Iacobucci JJ).

<sup>58</sup> *Guerin v The Queen* [1984] 2 SCR 335, 386 (Dickson, Beetz, Chouinard and Lamer JJ).

<sup>59</sup> *New Zealand Maori Council v A-G (NZ)* [1987] 1 NZLR 641, 664 (Cooke P) (Court of Appeal) (*New Zealand Maori Council* (1987)).

<sup>60</sup> *Manitoba Metis Federation Inc v A-G (Canada)* [2013] 1 SCR 623, 658 [66] (McLachlin CJ and Karakatsanis J) (citations omitted).

<sup>61</sup> Ibid 663 [74] (McLachlin CJ and Karakatsanis J).

<sup>62</sup> *New Zealand Maori Council v A-G (NZ)* [2008] 1 NZLR 318, 337 [81] (O'Regan J) (Court of Appeal) (*New Zealand Maori Council* (2008)).

<sup>63</sup> *New Zealand Maori Council* (1987) [1987] 1 NZLR 641, 664 (Cooke P).

<sup>64</sup> Waitangi Tribunal, *Te Whānau o Waipareira Report* (1998) 234.

<sup>65</sup> *UNDRIP* art 30(2).

<sup>66</sup> Ibid arts 15(2), 17(2), 19, 32(2), 36(2), 38.

<sup>67</sup> Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, 4<sup>th</sup> sess, Agenda Item 4, UN Doc E/C.19/2005/3 (17–19 January 2005) 12 [46]. See also: at 12 [47].

<sup>68</sup> UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights Working Group on Indigenous Populations, *Preliminary Working Paper on the Principle of Free, Prior and Informed Consent of Indigenous Peoples in Relation to Development Affecting Their Lands and Natural Resources That Would Serve as a Framework for the Drafting of a Legal Commentary by the Working Group on This Concept submitted by Antoanella-Itulia Motoc and the Tebtebba Foundation*, 22<sup>nd</sup> sess, Agenda Item 5, UN Doc E/CN.4/Sub.2/AC.4/2004/4 (8 July 2004) 5 [13].

While it is desirable that negotiations be structured to minimise the risk that significant disparities in power, resources, and capacity affect the process and terms of the agreement, such imbalances will not necessarily mean that the political agreement is not a treaty. Negotiations will not occur on a level playing field. All agreements, for example, will be reached based on an assumption of overriding sovereignty of the State. Nonetheless, it is critical to our definition that Indigenous peoples are parties to a fair negotiation, not merely an interest group entitled to be consulted or informed of its progress. The process of reaching such an agreement is itself evidence of a commitment to redefining and securing a just, ‘positive, mutually respectful and long-term’<sup>69</sup> relationship between Indigenous peoples and the State.

### 3 *Settlement of Claims*

Both sides must accept a series of responsibilities so that the agreement can bind the parties in a relationship of mutual obligation.<sup>70</sup> This goes beyond each party tolerating the other’s existence to accepting their enduring presence, accepting that, in the words of Lamer CJ of the Supreme Court of Canada, ‘we are all here to stay’.<sup>71</sup> Two issues arise: what sort of outcomes will be agreed, and whether the agreement constitutes a full and final settlement of Indigenous and state claims.

Considering the diversity of Indigenous communities across the globe, it is impossible to be prescriptive in terms of outcomes. While the content of negotiated agreements differs, however, to constitute a treaty, an agreement must contain more than mere symbolic recognition; an inherent right to some level of sovereignty or self-government must be recognised and provided for. This may be seen as a concomitant of the recognition of an Indigenous community as a polity, as required under our first criteria.

In Canada, the Chief Justice of the Supreme Court has identified ‘a golden thread’ running through the treaty relationship, whereby the common law recognises the ‘ancestral laws and customs [of] the aboriginal peoples who occupied the land prior to European settlement’.<sup>72</sup> However, as Macklem notes, despite often referring to Indigenous ‘legal systems’<sup>73</sup> or noting that First Nations constituted ‘organized, distinctive societies with their own social and political structures’,<sup>74</sup> the Court ‘has been circumspect about … recognizing and affirming an Aboriginal right of self-government, that is, an Aboriginal right to make laws’ under s 35(1) of the *Canadian Constitution*.<sup>75</sup>

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<sup>69</sup> *First Nation of Nacho Nyak Dun v Yukon* [2017] SCC 58 (1 December 2017) [10].

<sup>70</sup> Brennan et al, above n 31, 9–11.

<sup>71</sup> *Delgamuukw* [1997] 3 SCR 1010, 1124 [186] (Lamer CJ, Cory and Major JJ).

<sup>72</sup> *R v Van der Peet* [1996] 2 SCR 507, 642 [263] (McLachlin J).

<sup>73</sup> Patrick Macklem, ‘The Form and Substance of Aboriginal Title: Assimilation, Recognition, Reconciliation’ in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press, 2017) 325, 335, quoting *R v Sappier* [2006] 2 SCR 686, 713 [45] (Bastarache J).

<sup>74</sup> Maklem, above n 73, 335, quoting *Mitchell v Minister of National Revenue* [2001] 1 SCR 911, 926 [9] (McLachlin CJ).

<sup>75</sup> Maklem, above n 73, 336.

In *Delgamuukw*, a majority of the Court held that Aboriginal title confers a collective right to exclusive use and occupation of land for a variety of purposes not necessarily related to practices, customs and traditions integral to the distinctive Aboriginal culture.<sup>76</sup> As a collective right, Aboriginal title necessarily has a ‘jurisdictional dimension’ because as Slattery explains, ‘there must be some body or bodies endowed with the authority to determine which individuals have the right to use the land and to regulate the ways the land may be used’.<sup>77</sup> However, the majority cautioned that this right is subject to an ‘inherent limit’: land cannot be used in a manner that ‘is irreconcilable with the nature of the claimants’ attachment to those lands’.<sup>78</sup> In *Tsilhqot'in Nation v British Columbia*, the Court affirmed this understanding, holding that the Aboriginal right ‘to use and control the land and enjoy its benefits’<sup>79</sup> is a ‘right to proactively use and manage the land’.<sup>80</sup> Yet, again, the Court confirmed that this right is subject to inherent limitations: as a collective title held not just for the present generation ‘but for all succeeding generations’, land cannot be ‘developed or misused in a way that would substantially deprive future generations of the benefit of the land’.<sup>81</sup> Whatever the scope of this limitation, it is not one that burdens other forms of collective title, such as Crown land, and therefore substantially detracts from First Nations’ right to self-government.

Likewise, in the US, while the Supreme Court recognised the inherent sovereignty of Native American tribes in 1823,<sup>82</sup> this sovereignty is limited<sup>83</sup> and defeasible by congressional action.<sup>84</sup> Further, the scope of self-governance rights over non-Indians is constrained. Tribal nations possess inherent power over their internal affairs, including the authority to regulate the activities of non-Indians who enter ‘consensual relationships’ with the tribe or its members within tribal lands,<sup>85</sup> but it is not clear whether this extends to the power to try civil cases in Indian tribal courts.<sup>86</sup> Similarly, while tribal nations may exercise criminal jurisdiction over Indians (including non-member Indians)<sup>87</sup> within their territory, they have no criminal jurisdiction over non-Indian persons who commit crimes,<sup>88</sup> but, rather, may only ‘exclude persons whom they deem to be undesirable from tribal lands’.<sup>89</sup>

In Aotearoa/New Zealand, debate persists over whether the Treaty of Waitangi protects Māori sovereignty and the extent of those protections. The dispute arises from an inconsistency between the English and Māori texts. Under the English

<sup>76</sup> [1997] 3 SCR 1010, 1082–4 [115]–[117] (Lamer CJ, Cory and Major JJ), 1135 [209] (McLachlin J).

<sup>77</sup> Brian Slattery, ‘The Constitutional Dimensions of Aboriginal Title’ (2015) 71 *Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 45, 46 (emphasis altered).

<sup>78</sup> *Delgamuukw* [1997] 3 SCR 1010, 1088 [125] (Lamar CJ, Cory and Major JJ), 1135 [209] (McLachlin J).

<sup>79</sup> [2014] 2 SCR 257, 275 [18] (McLachlin CJ).

<sup>80</sup> *Ibid* 300 [94] (McLachlin CJ).

<sup>81</sup> *Ibid* 294 [74] (McLachlin CJ).

<sup>82</sup> *Johnson v M'Intosh*, 21 US (8 Wheat) 543 (1823). See also *Worcester v Georgia*, 31 US (6 Pet) 515 (1832).

<sup>83</sup> *Cherokee Nation v Georgia*, 30 US (5 Peters) 1 (Marshall CJ) (1831).

<sup>84</sup> *United States v Wheeler*, 435 US 313, 323 (Stewart J) (1978).

<sup>85</sup> *Montana v United States* 450 US 544, 565 (1981).

<sup>86</sup> *Dollar General Corporation v Mississippi Band of Choctaw Indians*, 136 S Ct 2159 (2016); *Dolgencorp Inc v Mississippi Band of Choctaw Indians*, 746 F 3d 588 (5<sup>th</sup> Cir, 2014).

<sup>87</sup> 25 USC § 1301 (2018); *United States v Lara*, 541 US 193 (2004).

<sup>88</sup> *Oliphant v Suquamish Indian Tribe*, 435 US 191 (1978).

<sup>89</sup> *Duro v Reina*, 495 US 676, 696 (Kennedy J) (1990).

text, the Māori signatories appear to cede their sovereignty to the British Crown. However, under the Māori text, the signatories agreed to cede *kawanatanga* (governorship), while being promised that their *tino rangatiratanga* (full authority) over their land, people and treasure would remain undisturbed. Like all expressions of sovereignty, defining *tino rangatiratanga* is ‘elusive and very much dependent on its context’.<sup>90</sup> Maaka and Fleras note that, for some, *tino rangatiratanga* means Māori sovereignty ‘prevails over the entirety of Aotearoa; for others, it entails some degree of autonomy from the state; for still others, it consists of shared jurisdictions within a single framework’.<sup>91</sup> The Waitangi Tribunal understands *tino rangatiratanga* as protecting autonomy, meaning ‘the ability of tribal communities to govern themselves as they had for centuries, to determine their own internal political, economic, and social rights and objectives, and to act collectively in accordance with those determinants’.<sup>92</sup>

Common across each of these nations is that a treaty incorporates some form of recognition of Indigenous self-government. The extent of this recognition is variable, and need not extend to granting formal law-making and law-applying powers. Rather, it must recognise or establish structures of culturally appropriate governance and means of decision-making and control that amount to at least a limited form of self-government.<sup>93</sup> As we illustrate in the following section on the Canadian experience, this can include governing systems that reflect the Indigenous nation’s own ‘collective sense of self, values, and priorities’, and that extend beyond merely management or administration of programs and services designed and funded by settler-State governments.<sup>94</sup> These outcomes are consistent with the *UNDRIP*, which provides that Indigenous peoples have the ‘right to autonomy or self-government’ in relation to ‘internal and local affairs’,<sup>95</sup> including the ability to wield greater control over land and resources, as well as authority to ensure cultural preservation and integrity.<sup>96</sup>

Recognising a right to self-government is important as it indicates that the purpose of a treaty is more than an act of symbolic recognition. It is recognition of a relationship between Indigenous peoples and the State designed to improve the lives of Indigenous communities, and to secure the foundations for a just relationship. As such, a treaty is more than a contractual agreement. It is ‘an

<sup>90</sup> Brennan, Gunn and Williams, above n 28, 310.

<sup>91</sup> Roger Maaka and Augie Fleras, ‘Engaging with Indigeneity: Tino Rangatiratanga in Aotearoa’ in Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous People* (Cambridge University Press, 2000) 89, 100.

<sup>92</sup> Waitangi Tribunal, *Turanga Tangata Turanga Whenua* (2004) vol 1, 113.

<sup>93</sup> Shin Imai distinguishes four types of self-determination: ‘sovereignty and self-government’, ‘self-administration and self-management’, ‘co-management and joint-management’, and ‘participation in public government’: Shin Imai, ‘Indigenous Self-Determination and the State’ (Research Report No 25/2008, Comparative Research in Law & Political Economy, Osgoode Hall Law School, 2008) 11.

<sup>94</sup> Stephen Cornell, ‘Processes of Native Nationhood: The Indigenous Politics of Self-Government’ (2015) 6(4) *International Indigenous Policy Journal* 1, 13.

<sup>95</sup> *UNDRIP* art 4.

<sup>96</sup> Ibid arts 11–23, 31–6. See also Jeff J Corntassel and Tomas Hopkins Primeau, ‘Indigenous “Sovereignty” and International Law: Revised Strategies for Pursuing “Self-Determination”’ (1995) 17(2) *Human Rights Quarterly* 343, 344.

exchange of solemn promises ... [and] an agreement whose nature is sacred'.<sup>97</sup> This aspect of a treaty is significant in light of empirical evidence from the Harvard Project on American Indian Economic Development that demonstrates that Indigenous sovereignty and self-determination is a necessary condition for successful political and economic development.<sup>98</sup> However, while self-government rights are recognised in all treaties, the extent or scope of this right (save some minimum standard) will be subject to negotiation. This permits differing tiers of self-governance according to the size and aspirations of the Indigenous nation, as is appropriate in countries like Australia where Indigenous communities are 'diverse in culture and circumstance' and consequently have very different needs and aspirations.<sup>99</sup>

In agreeing to a series of mutual obligations and responsibilities, Indigenous polities and the State must accept that the agreement constitutes a settlement, or resolution, of their claims. The extent of any such resolution is contested. In exchange for a package of benefits, Indigenous peoples are expected to consent to withdrawing all current and future claims relating to historical and contemporary dispossession; though of course, claims arising from dispute over aspects of the negotiated agreement can be heard. This satisfies the State's desire for certainty, which Woolford suggests is 'an antidote to an assemblage of questions, risks, and fears held by non-Aboriginal government and business interests'.<sup>100</sup> Of most significance are questions relating to foundational myths about ownership and jurisdiction, and economic concerns surrounding current and future investment. In the past, certainty was achieved by unilaterally extinguishing Indigenous rights; now, they must be negotiated away.

Indigenous peoples may understand the process in a different light. Wary of state demands to surrender their rights and interests, many see them as 'living instrument[s]'<sup>101</sup> that do not settle the relationship, but 'redefine the rules for future engagement'.<sup>102</sup> As political agreements, they can always be reinterpreted and renegotiated, but resolving current and future claims is an integral plank in the new political relationship built by any treaty. That said, while a treaty is intended to be a settlement of claims, a new political relationship will not be successful if it is built on ignoring the past. A treaty may mark a liminal moment signifying a commitment on behalf of the settler-State to acknowledge injustice it carried out and legitimate its possession, but it does not close off that history. Reconciliation is not achieved

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<sup>97</sup> *R v Badger* [1996] 1 SCR 771, 793 [41] (La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ).

<sup>98</sup> The Harvard Project on American Indian Economic Development, *The State of the Native Nations: Conditions under U.S. Policies of Self-Determination* (Oxford University Press, 2007). For an overview see: The Harvard Project on American Indian Economic Development, *Research Overview* <<http://hpaied.org/publications-and-research>>.

<sup>99</sup> Behrendt, above n 35, 87. Cf Mansell, above n 47, 118, noting that one treaty with all Aboriginal and Torres Strait Islander peoples 'would provide a single standard of justice'.

<sup>100</sup> Andrew Woolford, *Between Justice and Certainty: Treaty Making in British Columbia* (UBC Press, 2005) 146.

<sup>101</sup> *New Zealand Maori Council* (1987) [1987] 1 NZLR 641, 656 (Cooke P).

<sup>102</sup> Maureen Tehan et al, 'Sharing Land and Resources: Modern Agreements and Treaties with Indigenous People in Settler States' in Marcia Langton et al (eds), *Settling with Indigenous Peoples: Modern Treaty and Agreement-Making* (Federation Press, 2006) 1, 15.

by signing a treaty, but is an ‘ongoing process of engagement and discussion’.<sup>103</sup> A treaty is a marriage, not a divorce.<sup>104</sup>

This first-principles approach reveals that in order to constitute a treaty, an agreement must satisfy three criteria. First, it must recognise Indigenous peoples as a polity, distinctive from other citizens of the State on the basis of their status as prior self-governing communities. Second, the agreement must be reached by a fair negotiation process conducted in good faith and in a manner respectful of each participant’s standing as a polity. Third, the agreement must contain more than mere symbolic recognition; it must recognise or establish some form of decision-making and control that amounts to at least a limited form of self-government.

## B *Modern Treaty-making in Canada*

Canada’s long history of entering into agreements between Indigenous peoples and the State is instructive for understanding what the term ‘treaty’ should mean in Australia today. In this section, we examine treaties signed between First Nations and the Canadian Crown, especially in British Columbia, in light of our refined standard.

Relationships between the Indigenous peoples of North America and colonists were initially based on lucrative trading arrangements. Eventually, in the 18<sup>th</sup> century, British and French competition for control of land catalysed treaty-making, as both sides formed strategic alliances with First Nations to advance their interests on the continent. After the British had established themselves as the dominant colonial power, King George III issued the *Royal Proclamation Act of 1763*.<sup>105</sup> The Act restricted colonial expansion westwards, guaranteeing Aboriginal ‘Nations or Tribes’ undisturbed possession of their territories, unless purchased by the Crown or ceded via treaty. In recognising Aboriginal claims to ownership and control, the Proclamation serves as an important and early commitment by the Crown to respect the sovereignty of First Nations peoples.<sup>106</sup> Increasing numbers of settlers placed strain on the borders established by the Proclamation, however, and led to the negotiation of land surrender treaties. Described as the ‘era of unsystematic treaty making’,<sup>107</sup> these agreements led Indigenous peoples to surrender large tracts of land to the British in return for defined reserves, annual payments, and rights to hunt, fish and undertake cultural activities over their traditional lands.

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<sup>103</sup> Brian Egan, ‘Resolving “the Indian Land Question”? Racial Rule and Reconciliation in British Columbia’ in Andrew Baldwin, Laura Cameron and Audrey Kobayashi (eds), *Rethinking the Great White North: Race, Nature, and the Historical Geographies of Whiteness in Canada* (UBC Press, 2011) 211, 226.

<sup>104</sup> Carole Blackburn, ‘Producing Legitimacy: Reconciliation and the Negotiation of Aboriginal Rights in Canada’ (2007) 13(3) *Journal of the Royal Anthropological Institute* 621, 627.

<sup>105</sup> 4 Geo 3.

<sup>106</sup> John Borrows, ‘Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government’ in Michael Asch (ed), *Aboriginal Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (UBC Press, 1997) 155, 169; Miller, above n 30, 290.

<sup>107</sup> Christina Godlewska and Jeremy Webber, ‘The *Calder* Decision, Aboriginal Title, and the Nisga’a in Hamar Foster, Heather Raven and Jeremy Webber (eds), *Let Right Be Done: Aboriginal Title, the *Calder* Case, and the Future of Indigenous Rights* (UBC Press, 2007) 1, 12.

After the Confederation of Canada in 1867, a new form of treaty-making emerged. Between 1871 and 1921, the Crown entered into treaties with various First Nations to pursue settlement, agriculture, and resource development in the West and North.<sup>108</sup> These eleven ‘Numbered Treaties’ involved similar exchanges to those treaties prior to 1867. In exchange for extinguishing their land rights, First Nations typically received limited reserve land, monetary compensation, hunting and gathering rights across a wider area, tools for farming and hunting, and schooling.<sup>109</sup> While the Government intended the treaties to enable the assimilation of Aboriginal peoples into European society,<sup>110</sup> the First Nations themselves sought to protect their traditions and culture from increasing intervention.<sup>111</sup> The signing of Treaty 11 between several First Nations in the Northwest Territories and King George V in 1921–22 marked the final numbered treaty. It is important to note, however, that the situation in British Columbia in Western Canada was unique. Fourteen treaties of limited scope had been negotiated on Vancouver Island prior to 1854,<sup>112</sup> and Treaty 8 extended partially into the north-eastern part of the province. The rest of the province, comprising 85 per cent of the land mass, was not — and had never been — subject to treaties, and successive governments refused to enter negotiations with Aboriginal peoples until Indigenous activism eventually forced the British Columbia Government’s hand.

## 1 *Resurgence of Treaty-making*

The modern treaty-making process developed out of the Canadian Supreme Court’s 1973 decision in *Calder v Attorney-General of British Columbia*.<sup>113</sup> In *Calder*, the Nisga’a Tribal Council sought a declaration that their Aboriginal title in the Nass Valley of north-western British Columbia had never been lawfully extinguished. One justice did not consider the question, instead deciding that the Court did not have jurisdiction to hear the case,<sup>114</sup> leaving six justices to rule on the merits. All six held that Aboriginal title could exist,<sup>115</sup> though splitting evenly on whether the Nisga’a title continued to exist.<sup>116</sup> As such, the appeal was dismissed 4:3.

Although a majority of the Court dismissed the Nisga’a challenge, the decision in *Calder* was momentous, with six justices holding that Aboriginal title is part of Canadian law. This finding prompted the Government of Prime Minister Trudeau to reassess ‘the colonialist assumptions underlying [its] aboriginal policy, and to acknowledge the possibility of Aboriginal self-determination, aboriginal and

<sup>108</sup> Arthur J Ray, Jim Miller and Frank J Tough, *Bounty and Benevolence: A History of the Saskatchewan Treaties* (McGill-Queen’s University Press, 2000) 59.

<sup>109</sup> It is now accepted that the First Nations did not intend to consent to the blanket extinguishment of their rights and title, but merely to share the land, jurisdiction and management over it: Royal Commission on Aboriginal Peoples, above n 22, vol 2, app A 986 [2.2.4].

<sup>110</sup> Macklem, above n 73, 327.

<sup>111</sup> Derek Whitehouse, ‘The Numbered Treaties: Similar Means to Dichotomous Ends’ (1994) 3 *Past Imperfect* 25.

<sup>112</sup> See generally Paul Tenant, *Aboriginal People and Politics: The Land Question in British Columbia, 1849–89* (UBC Press, 1990) 18–30, 218–9.

<sup>113</sup> [1973] SCR 313.

<sup>114</sup> Ibid 427 (Pigeon J).

<sup>115</sup> Ibid 328–9 (Martland, Judson and Ritchie JJ), 394 (Hall, Spence and Laskin JJ).

<sup>116</sup> Ibid 344 (Martland, Judson and Ritchie JJ), 413–6 (Hall, Spence and Laskin JJ).

treaty rights, and self-government as key organizing principles'.<sup>117</sup> Less than seven months after the decision was handed down, the Government announced a new comprehensive land claims policy, under which it would 'negotiate with the representatives of Aboriginal peoples on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or benefit would be provided'.<sup>118</sup> This approach was reiterated in a 1981 policy statement explaining that 'Canada would now negotiate settlements with Aboriginal groups where rights of traditional use and occupancy had been neither extinguished by treaty nor "superseded by law"'.<sup>119</sup> These negotiated agreements largely borrowed from the Numbered Treaties, requiring First Nations to extinguish their rights in land in exchange for more limited, defined rights and monetary compensation.<sup>120</sup>

A dispute over the construction of an extensive hydroelectric scheme in Northern Quebec proved the first test of Canada's new approach towards Indigenous peoples. Construction had commenced pre-*Calder*, and the Quebec Government had not consulted with the Cree and Inuit peoples whose territory would be flooded. An injunction was successfully sought in the Quebec Superior Court,<sup>121</sup> blocking construction until an agreement was negotiated. Although the Quebec Court of Appeal later dismissed the injunction, the legal requirement that an agreement be reached remained in force.<sup>122</sup> Economic and political concerns pressured the parties into a quick process, and the *James Bay and Northern Quebec Agreement* ('JBNQA') was signed within two years, on 11 November 1975.<sup>123</sup> The first modern agreement between Indigenous peoples and the Canadian state, the JBNQA settled Aboriginal land claims with the Canadian and Quebec governments. Under the Agreement, the provincial and federal governments transferred 5543km<sup>2</sup> to the Cree and 8151km<sup>2</sup> to the Inuit,<sup>124</sup> as well as exclusive harvesting rights over an additional 15 000km<sup>2</sup>, and agreed to pay CA\$225 million over 20 years to a newly established Cree Regional Authority and Inuit Makivik Corporation.<sup>125</sup> These bodies were officially

<sup>117</sup> Augie Fleras and Jean Leonard Elliot, *The 'Nations Within': Aboriginal-State Relations in Canada, the United States, and New Zealand* (Oxford University Press, 1992) 45 (citations omitted).

<sup>118</sup> Government of Canada, 'Statement of Aboriginal Claims' (Statement, Department of Indian Affairs and Northern Development (Canada), 8 August 1973) quoted in Lisa Palmer and Maureen Tehan, 'Shared Citizenship and Self-Government in Canada: A Case Study of James Bay and Nunavik (Northern Quebec)' in Marcia Langton et al (eds), *Settling with Indigenous Peoples: Modern Treaty and Agreement-Making* (Federation Press, 2006) 19, 23.

<sup>119</sup> Government of Canada, *In All Fairness: A Native Claims Policy* (Department of Indian Affairs and Northern Development (Canada), 16 December 1981), quoted in Godlewska and Webber, above n 107, 6–7.

<sup>120</sup> Paul Rynard, 'The Nisga'a Treaty: Are We on the Right Track?' (2004) 11(3) *International Journal of Minority and Group Rights* 289, 290; Murray Angus, 'Comprehensive Claims: One Step Forward, Two Steps Back' in Diane Engelstad and John Bird (eds), *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Anansi Press, 1992) 67, 69.

<sup>121</sup> *Kanatewat v James Bay Development Corporation* [1974] Quebec RP 38.

<sup>122</sup> *James Bay Development Corporation v Kanatewat* [1975] Quebec CA 166.

<sup>123</sup> In 1978, the Agreement's terms were extended to include the Naskapi First Nation: see *Northeastern Quebec Agreement* (signed and entered into force 31 January 1978).

<sup>124</sup> *James Bay and Northern Quebec Agreement* (signed and entered into force 11 November 1975) s 5 ('James Bay and Northern Quebec Agreement'); *James Bay and Northern Quebec Native Claims Settlement Act*, SC 1977, c 32, s 3.

<sup>125</sup> *James Bay and Northern Quebec Agreement* s 9.

granted delegated legislative powers under the *Cree-Naskapi (of Quebec) Act*.<sup>126</sup> In return, the Cree and Inuit surrendered Aboriginal title to 981 610 km<sup>2</sup> of the James Bay/Ungava territory.<sup>127</sup> Although heavily criticised for failing to insulate the negotiations from the broader political and economic climate,<sup>128</sup> the *JBNQA* recognises the Cree and Inuit as polities, and guarantees a limited right to self-government with some law-making power.<sup>129</sup>

Notwithstanding the decision in *Calder*, the British Columbia Government refused to recognise Aboriginal title. Once again, it was left to judicial authorities further exploring the scope of Aboriginal interests in land to propel the Government to the negotiating table.<sup>130</sup> In *Guerin v The Queen*, four judges of the Supreme Court declared that Aboriginal title was not created by the *Royal Proclamation Act of 1763*, but rather was derived from the historical occupation and possession by Aboriginal people of their tribal lands.<sup>131</sup> In declaring that Aboriginal title is a pre-existing legal right, the plurality held that Aboriginal title continued to exist on traditional lands not subject to treaties with the Crown and on reserve lands in British Columbia.<sup>132</sup> One year later, in *MacMillan Bloedel Ltd v Mullin*, the Court of Appeal of British Columbia issued a temporary injunction to stop logging on Meares Island in order that the Clayoquot and Ahousaht bands could record and preserve evidence of their title.<sup>133</sup> After the Supreme Court refused to grant leave to appeal, further injunctions were sought and issued, halting resource extraction and construction throughout the province.<sup>134</sup> As McKee notes, natural resource development companies and the Government began to consider whether their own interests would be better served if they entered treaty negotiations.<sup>135</sup> The Supreme Court's 1990 intervention in *R v Sparrow*, where it unanimously held that the 1982 constitutional recognition of Aboriginal and treaty rights 'renounces the old rules of the game' and 'calls for a just settlement for [A]boriginal peoples',<sup>136</sup> added to pressure on the British Columbia Government.

## 2      *The British Columbia Treaty Process*

The British Columbia Treaty Claims Taskforce was established on 3 December 1990. The Taskforce was set up largely to support First Nations, which did not want 'to be caught without a thoughtful, strategic position or to be put into a position where they could be outflanked by more skilled government negotiators'.<sup>137</sup> Established as a tripartite body, it was composed of seven Commissioners, two

<sup>126</sup> SC 1984, c 18. See also Thomas Isaac, 'Aboriginal Self-Government in Canada: *Cree-Naskapi (of Quebec) Act*' (1991) 7(2) *Native Studies Review* 15.

<sup>127</sup> *James Bay and Northern Quebec Agreement* s 2.1.

<sup>128</sup> Martinez, above n 27, 22 [134]–[137].

<sup>129</sup> Bruce A Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (McGill-Queen's University Press, 1990) 167–8.

<sup>130</sup> McKee, above n 53, 30.

<sup>131</sup> [1984] 2 SCR 335, 379 (Dickson, Beetz, Chouinard and Lamer JJ).

<sup>132</sup> Ibid.

<sup>133</sup> [1985] 3 WWR 577.

<sup>134</sup> McKee, above n 53, 29.

<sup>135</sup> Ibid.

<sup>136</sup> *Sparrow v The Queen* [1990] 1 SCR 1075, 1106 (Dickson CJ and La Forest J).

<sup>137</sup> McKee, above n 53, 32.

appointed by each non-Aboriginal government (federal and provincial), and three by First Nations. Consistent with a fair negotiation process, the extra appointee was intended to ‘counteract a potential power imbalance between Aboriginal and non-Aboriginal representatives’, as well as more accurately represent interests of First Nations located across British Columbia.<sup>138</sup> After six months of consultations, the Taskforce made 19 recommendations, all of which were accepted by the three parties. The parties agreed to ‘establish a new relationship based on mutual trust, respect, and understanding — through political negotiations’, and establish the British Columbia Treaty Commission (‘BCTC’) ‘to facilitate the process of negotiations’,<sup>139</sup> symbolising ‘a formal commitment to negotiate modern day treaties’.<sup>140</sup>

Established on 15 April 1993, the BCTC is an independent and impartial body.<sup>141</sup> It is composed of five commissioners, two appointed by First Nations, one each by the Federal Government and the Provincial Government, and one further commissioner agreed to by the three parties. The BCTC facilitates treaty negotiations by ‘monitoring developments and by providing, when necessary, methods of dispute resolution’.<sup>142</sup> As of March 2018, 57 First Nations are participating, and eight have completed treaties under the process.<sup>143</sup>

While each of the eight treaties adopted thus far is specific to the particular First Nation, as well as place, history and circumstance, they share a number of common elements relating to land, resources, governance, finance, and cultural heritage.<sup>144</sup> These common elements assist in elaborating our understanding of what outcomes are likely to be reached under a treaty. The treaties evidence that a land base is a critical precondition for the exercise of self-government. Under the treaties, a portion of the First Nation’s territory is transferred in fee simple for the exclusive use of the First Nation. This includes rights over subsurface resources. Under the *Maa-nulth First Nations Final Agreement*, for example, the Huu-ay-aht First Nation receives 1077 hectares of former Indian Reserves, and 7181 hectares of additional lands.<sup>145</sup> Exclusive resource rights are guaranteed within the First Nation’s territory, with more restrictive resource rights accorded in areas outside their territorial limits. These rights are subject to conservation, as well as public health and safety legislation.<sup>146</sup> In areas outside the First Nation’s territory, certain land use decisions are subject to planning, consultation and joint management.

Most significant, however, are the self-government provisions. Under each treaty, a degree of Aboriginal self-government is recognised. For instance, ch 3 of

<sup>138</sup> Woolford, above n 100, 194 n 2.

<sup>139</sup> British Columbia Claims Taskforce, ‘The Report of the British Columbia Claims Task Force’ (Report, First Nations of British Columbia, Government of British Columbia, Government of Canada, 28 June 1991) 42 app 6 recommendations 1, 3.

<sup>140</sup> McKee, above n 53, 33.

<sup>141</sup> *British Columbia Treaty Commission Act*, SC 1995, c 45, ss 4–5.

<sup>142</sup> McKee, above n 53, 33.

<sup>143</sup> BC Treaty Commission, *Negotiation Update* <<http://www.bctreaty.ca/negotiation-update>>.

<sup>144</sup> Godlewska and Webber, above n 107, 17–18.

<sup>145</sup> *Maa-nulth First Nations Final Agreement*, signed 24 July 2008, (entered into force 1 April 2011) ch 2.1.1(a), 2.3.0.

<sup>146</sup> See, eg, *Tsawwassen First Nation Final Agreement*, signed 6 December 2007, (entered into force 3 April 2009) ch 9 (fisheries), 10 (wildlife), 11 (migratory birds).

the *Yale First Nation Final Agreement* provides that the parties ‘acknowledge’ the right of self-government and governance of the Yale First Nation, and sets out the principles governing the to-be-drafted Constitution, as well as their governance structure, and jurisdiction.<sup>147</sup> Likewise, ch 15 of the *Tla’amin Final Agreement* provides that the Tla’amin Nation ‘has the right to self-government and the authority to make laws, as set out in this Agreement’.<sup>148</sup> Jurisdiction recognised under each treaty typically includes the administration of justice, family and social services, healthcare, and language and cultural education, though federal and provincial law applies where an inconsistency or conflict arises.<sup>149</sup>

These treaties are useful in providing a comparative validation of our standard of what should be regarded as a treaty between Indigenous peoples and the state. First, in all settlements so far adopted, the status of the First Nations as a polity is expressly acknowledged. Interestingly, however, the language is not definitive. The First Nations ‘asserts’ or ‘claims’ aboriginal rights based on their ‘assertion’ of a unique connection with land, the *Constitution* ‘recognises and affirms’ these rights, and the State ‘acknowledge[s] the perspective’ of the First Nation ‘that harm and losses in relation to its aboriginal rights have occurred in the past’, expressing ‘regret if any acts or omissions of the Crown have contributed to that perspective’.<sup>150</sup> Nonetheless, despite the tentative language, through this acknowledgement, the distinctive status of First Nations is unambiguously recognised.

Second, the rigid BCTC process involves six stages, which aims at preventing ad hoc negotiations, and enabling each First Nation to negotiate on the basis of clear and established rules and criteria.<sup>151</sup> This ensures that the negotiations are structured in a manner that minimises the risk that power and resource disparities will influence the terms of the agreement, and is a considerable departure from both the historical treaties and the *JBNQA*. Finally, consistent with art 4 of the *UNDRIP*, all treaties recognise a degree of self-government over internal and local affairs, and provide for shared decision-making over additional domains. Despite some criticism that such self-governance rights are subordinate to the Canadian State,<sup>152</sup> it is consistent with modern treaties that are premised on the overriding sovereignty of the State.

### 3      *The Nisga'a Final Agreement*

Despite the setback in *Calder*, the Nisga'a people continued to advocate for recognition of their lawful title. After a long process, the Nisga'a were finally successful. First signed in 1998 and eventually ratified in April 2000, the *Nisga'a Final Agreement* was the 14<sup>th</sup> modern treaty signed in Canada and the first in British Columbia. Although conducted outside the BCTC, the Treaty contains a similar

<sup>147</sup> *Yale First Nation Final Agreement*, signed 12 March 2011, (entered into force 19 June 2013) ch 3.

<sup>148</sup> *Tla’amin Final Agreement*, signed 10 July 2012, (entered into force 5 April 2016) ch 15.1.

<sup>149</sup> See *Maa-nulth First Nations Final Agreement* ch 1.8.1.

<sup>150</sup> See, eg, *Tsawwassen First Nation Final Agreement* preamble; *Maa-nulth First Nations Final Agreement* preamble (emphasis added).

<sup>151</sup> McKee, above n 53, 112.

<sup>152</sup> Taiaiake Alfred, ‘Deconstructing the British Columbia Treaty Process’ (2001) 3(3) *Balayi: Culture, Law and Colonialism* 37, 39–43; James Tully, ‘Reconsidering the B.C. Treaty Process’ in *Speaking Truth to Power: A Treaty Forum* (Government of Canada, 2000) 3, 8.

pattern: in exchange for a ‘full and final settlement’ in respect of the Nisga’a Aboriginal rights,<sup>153</sup> the federal and provincial governments recognised Nisga’a rights to, inter alia, land, resources, culture, finance and self-governance.

Under the Treaty, the Nisga’a receive ownership in fee simple to 2000km<sup>2</sup> of traditional territory in the Nass Valley. Although comprising only eight per cent of their traditional lands, the Nisga’a retain control and jurisdiction over the use and development of these lands and the forest and mineral resources.<sup>154</sup> Similarly to other treaties, the Nisga’a gain additional resource rights over more extensive territory. This includes the right to hunt (for food, or social and ceremonial purposes) in over 16 000km<sup>2</sup> of land and the right to enact laws to regulate their hunt,<sup>155</sup> as well as the right to fish in over 20 000km<sup>2</sup> of land, and an attendant right to enact laws to regulate their fishery as well as establish and operate commercial fisheries.<sup>156</sup> The Nisga’a exercise their right to self-government via the Nisga’a Lisims Government, 36-member Wilp Si’ayuukhl Nisga’a (legislature) and four village councils. The Nisga’a have legislative authority over matters that directly affect the identity of the Nisga’a nation, including lands, language culture, education, health, child protection, traditional healing practice, fisheries, wildlife, forestry, environmental protection and policing.<sup>157</sup> Notwithstanding the broad ranging jurisdiction, its extent is limited in scope: federal and provincial laws apply where an inconsistency or conflict arises.<sup>158</sup> In addition, the provincial and federal governments committed to CA\$280 million in capital transfers over 14 years to satisfy outstanding claims, and CA\$38 million per year under five-year fiscal financial agreements to fund the operation of the Nisga’a government, so as to enable it to provide public services ‘at levels reasonably comparable to those generally prevailing in northwest British Columbia’.<sup>159</sup>

The Nisga’a self-government powers were challenged by the conservative Liberal Party of British Columbia. Premier Gordon Campbell argued that the treaty provisions were inconsistent with the Canadian Constitution, which exhaustively distributes powers between the federal and provincial governments, extinguishing any right to self-government of the Indigenous peoples. In contrast, the Nisga’a argued that land and rights to hunt and fish would be ‘empty gestures’ if they have no concomitant power to ‘establish rules about the use of that land and those rights’.<sup>160</sup> Justice Williamson of the Supreme Court of British Columbia dismissed the challenge, holding that the right to Aboriginal title ‘include[s] the right for the

<sup>153</sup> *Nisga'a Final Agreement*, signed 4 May 1999, (entered into force 11 May 2000) ch 2(22) (also known as the ‘Nisga’a Treaty’). Note, however, that the Treaty does not contain a “‘surrender’ clause”: Andrew Beynon, ‘The Nisga'a Land Question’ (2004) 11(3) *International Journal on Minority and Group Rights* 259, 267.

<sup>154</sup> *Nisga'a Final Agreement* ch 3(19).

<sup>155</sup> Ibid ch 6(4)–(7).

<sup>156</sup> Ibid ch 8.

<sup>157</sup> Ibid ch 10–12. See also *UNDRIP* arts 4, 11–15, 20, 25–6, 31–5.

<sup>158</sup> *Nisga'a Final Agreement* ch 11(30)–(129). See further Paul Rynard, “‘Welcome In, but Check Your Rights at the Door’: The James Bay and Nisga'a Agreements in Canada” (2000) 33(2) *Canadian Journal of Political Science* 211, 217, 230–5.

<sup>159</sup> *Nisga'a Final Agreement* ch 15(3).

<sup>160</sup> *Campbell v A-G (British Columbia)* [2000] 8 WWR 600, [61].

community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions'.<sup>161</sup>

Similar to treaties signed under the British Columbia process, the *Nisga'a Final Agreement* illustrates how our criteria may be applied in practice. First, the treaty recognises that the Nisga'a were prior owners and occupiers of the land now claimed by Canada, and that they are a distinctive polity. As the *Nisga'a Citizenship Act 2008* (Nisga'a Lisims) signifies, the Nisga'a may continue to live as a distinct society within Canada,<sup>162</sup> enjoying rights under both regimes. Second, the Agreement was negotiated in a manner respectful and reflective of the Nisga'a status as a polity, and structured in such a way to minimise the risk that significant disparities in power would affect the terms of the agreement. Third, the Agreement recognises culturally appropriate forms of decision-making (in this case, amounting to a limited degree of self-government in internal matters) and provides finance to ensure its continuous functioning.

#### 4 *Lessons from the Canadian Process*

The modern treaty-making process in Canada offers insights into how we should understand treaties in Australia today. Reflecting on the *Nisga'a Final Agreement* and the process in British Columbia, Krehbiel argues that 'at its core, treaty making in Canada has historically focused on a relatively straight-forward package of benefits for the First Nation in exchange for extinguishment of its land-based interests within a defined territory'.<sup>163</sup> The package of benefits includes recognising rights to land, resources, governance, and cultural heritage, as well as providing initial and recurring financial compensation in order to enable First Nations to finance their autonomous functions — consistent with art 4 of the *UNDRIP*. It is through these political agreements that the State: acknowledges Indigenous communities as 'polities'; commits to recognising or establishing culturally appropriate structures of decision-making and control that amount to a form of self-government; and legitimises its own sovereignty.

Despite some concerns over process and outcomes, modern treaty-making in Canada reveals that success is important for both Indigenous and non-Indigenous peoples. For non-Indigenous peoples, the treaties legitimate the Canadian State's claim of sovereignty, and provide 'a solid legal basis for future economic development'.<sup>164</sup> More significantly, for First Nations the treaties confirm that, as polities, power and authority resides in the First Nations themselves. As such, they are a medium through which, in the words of Edward Allen, CEO of the Nisga'a Lisims Government, 'we have negotiated our way into Canada, to be full and equal

<sup>161</sup> Ibid [137].

<sup>162</sup> *Nisga'a Citizenship Act 2008* (Nisga'a Lisims).

<sup>163</sup> Richard B Krehbiel, 'Common Visions: Influences of the Nisga'a Final Agreement on Lheidli T'enneh Negotiations in the BC Treaty Process' (2004) 11(3) *International Journal on Minority and Group Rights* 279, 282.

<sup>164</sup> Standing Senate Committee on Aboriginal Peoples, Parliament of Canada, *A Commitment Worth Preserving: Reviving the British Columbia Treaty Process* (June 2012) 8.

participants of Canadian society'.<sup>165</sup> Indeed, at their highest, the treaty relationship is a symbol of equal partnership, based on 'mutual recognition and sharing'.<sup>166</sup> At the same time, each treaty represents the resilience of the Indigenous nation. As Chief Joseph Gosnell remarked at the signing of the *Nisga'a Final Agreement* at New Aiyansh in August 1998: 'Look around you. Look at our faces. We are the survivors of a long journey. We intend to live here forever. And, under the *Nisga'a Treaty*, we will flourish.'<sup>167</sup>

Consideration of the modern treaty-making process also throws into relief the historic agreements struck between First Nations and the British or Canadian State. Although treaties from the 'unsystematic' era onwards recognised Indigenous peoples as rightful holders of title to their traditional lands, they were assimilative instruments designed to further the economic goals of non-Indigenous peoples. They were not intended to secure a just political relationship, but to 'settle' 'once and for all'<sup>168</sup> First Nations claims to their land so that the Crown could exploit natural resources within First Nations territory. Infected by outdated attitudes, these agreements do not recognise Indigenous governance structures, but subsumed Indigenous peoples within the non-Indigenous governmental system.<sup>169</sup> Although both the Canadian State and First Nations who signed these agreements consider them to be treaties, and their existence legitimates the status and aspirations of those Indigenous nations who signed the agreements, they would not satisfy our criteria.

### III Treaties in Australia

#### A *Background*

In the process of colonising Australia, Captain James Cook was instructed to take possession of the 'Convenient Situations in the Country' 'with the Consent of the Natives'.<sup>170</sup> Arthur Phillip, the first Governor of New South Wales, instructed his forces to 'endeavour by every possible means to open an Intercourse with the Natives and to conciliate their affections', 'to live in amity and kindness with them'.<sup>171</sup> Despite this, the British and the respective colonial governments never sought to formalise the relationship with Indigenous peoples. Rather, based on the doctrine of *terra nullius*, colonisation preceded on the foundation that the continent

<sup>165</sup> Edward Allen, 'Our Treaty, Our Inherent Right to Self-Government: An Overview of the *Nisga'a Final Agreement*' (2004) 11(3) *International Journal on Minority and Group Rights* 233, 234.

<sup>166</sup> *Nisga'a Final Agreement* preamble.

<sup>167</sup> Joseph Gosnell, 'No Longer Beggars in Our Own Lands, We Now Go Forward ...', *Vancouver Sun* (Vancouver), 5 August 1998, A11, quoted in Douglas Sanders, "We Intend to Live Here Forever": A Primer on the *Nisga'a Treaty* (2000) 33(1) *University of British Columbia Law Review* 103, 103.

<sup>168</sup> Kenneth S Coates and William R Morrison, 'Treaty Research Report — Treaty No 11 (1921)' (Research Report, Treaties and Historical Research Centre, 1986) 17 (citations omitted).

<sup>169</sup> Gerald Taiaiake Alfred, 'Colonialism and State Dependency' (2009) 5(2) *Journal of Aboriginal Health* 42, 46.

<sup>170</sup> Secret Instructions from Baron Ed Hawke, Sir Piercy Brett and Lord C Spencer to James Cook, 30 July 1768, 1: Museum of Australian Democracy, 'Secret Instructions to Lieutenant Cook 30 July 1768 (UK)', Documenting Democracy <<https://www.foundingdocs.gov.au/item-sdid-67.html>>.

<sup>171</sup> Governor Phillip's Instructions, 25 April 1778, *Historical Records of Australia*, series 1, vol 1 (1914) 13–14.

was ‘vacant’,<sup>172</sup> ‘a tract of territory practically unoccupied, without settled inhabitants or settled law’.<sup>173</sup> This understanding meant ad hoc agreements, like those signed by John Batman with a group of Wurundjeri elders around present-day Melbourne,<sup>174</sup> and George Augustus Robinson’s ‘friendly mission’ in Tasmania,<sup>175</sup> never received official sanction.

It is not clear why the British never signed a treaty with the Indigenous peoples of Australia.<sup>176</sup> The absence, however, clearly affected western political and legal constructions of Aboriginal and Torres Strait Islander peoples; as early as 1836, for example, the Supreme Court of New South Wales declared that Aboriginal people had no law and only ‘the wildest most indiscriminatory notions of revenge’.<sup>177</sup> This attitude operated to exclude Indigenous peoples from the protection of the State and justified colonial governments usurping Indigenous lands.<sup>178</sup> Ongoing agitation about the legitimacy of the Australian nation galvanised Indigenous activism and non-Indigenous supporters in the 1970s and 1980s. Unlike Canada, however, legal and political avenues proved less effective.

In 1971, the Supreme Court of the Northern Territory considered a challenge by the Yolngu people who sought a declaration that they enjoyed legal rights to their traditional land. In *Milirrpum v Nabalco Pty Ltd*, Blackburn J rejected the Yolngu people’s claim of native title over the Gove peninsula.<sup>179</sup> Despite ruling against the Yolngu, Blackburn J held that they possessed ‘a subtle and highly elaborate’ system of laws,<sup>180</sup> and, in a confidential memorandum to Government and Opposition, noted that the morality of a system of Aboriginal land rights was ‘beyond question’.<sup>181</sup> After nine months of deliberation, however, Prime Minister William McMahon announced that the Government would not legislate to permit Aboriginal title to land. Instead, Aboriginal people would be encouraged to apply for leases, which would be considered, provided that the land was put to ‘reasonable’ economic or

<sup>172</sup> Sir Richard Bourke, *Proclamation*, 26 August 1835.

<sup>173</sup> *Cooper v Stuart* (1888) 14 App Cas 286, 291 (Lord Watson).

<sup>174</sup> See Bain Attwood and Helen Doyle, *Possession: Batman’s Treaty and the Matter of History* (Miegunyah Press, 2009).

<sup>175</sup> See George Augustus Robinson, *Friendly Mission: The Tasmanian Journals and Papers of George Augustus Robinson, 1829–34* (Quintus, 2008).

<sup>176</sup> For suggestions why, see Brennan et al, above n 31, 12–13.

<sup>177</sup> *R v Murrell* (1836) 1 Legge 72. This quote does not appear in the case report, but was uncovered in Justice Burton’s ‘Notes for Judgment’, which appear to be a lost portion of the judgment: *Miscellaneous Correspondence Relating to Aborigines*, State Records of New South Wales 5/116. Cf *R v Ballard* (Unreported, New South Wales Supreme Court, Forbes CJ, 21 April 1929). See further Bruce Kercher, ‘Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales’ (1998) 4(13) *Indigenous Law Bulletin* 7, 7–9.

<sup>178</sup> An 1837 Select Committee report to the House of Commons held that the state of Australian Aborigines was ‘so entirely destitute … of the rudest forms of civil polity, that their claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded’: House of Commons Parliamentary Select Committee on Aboriginal Tribes, Parliament of the United Kingdom, *Report* (1837) 125.

<sup>179</sup> (1971) 17 FLR 141.

<sup>180</sup> Ibid 267.

<sup>181</sup> Memorandum, from Sir Richard Blackburn, quoted in Frank Brennan and Patricia Turner, *No Small Change: The Road to Recognition for Indigenous Australia* (University of Queensland Press, 2015) 137–8.

social use.<sup>182</sup> In response to McMahon's statement, four young Aboriginal men drove from Redfern to Canberra and established a tent embassy on the lawns in front of Parliament House.<sup>183</sup> The ramshackle collection of tents served as a potent 'symbol of unextinguished Indigenous sovereignty', catalysing calls for a treaty.<sup>184</sup>

Over the course of the 1970s and 1980s, treaty-talk was common. Later in 1971, the Larrakia people organised a petition to Queen Elizabeth II, describing themselves as 'refugees in the country of our ancestors', and calling for land rights and political representation.<sup>185</sup> In 1979, the National Aboriginal Conference, an elected Indigenous body advising government, passed a resolution calling for a 'Makarrata'.<sup>186</sup> In the same year, the Aboriginal Treaty Committee, a voluntary, non-government private body composed of prominent non-Indigenous Australians was established, helping to build political momentum for a treaty among the non-Indigenous community.<sup>187</sup> In 1983, the Senate Standing Committee on Constitutional and Legal Affairs delivered a report on the idea of a treaty, recommending constitutional change in order to implement a 'compact'.<sup>188</sup> Finally, in 1988, Prime Minister Bob Hawke adopted the Barunga Statement, promising to negotiate a treaty to respect and recognise Aboriginal sovereignty within the term of the 35<sup>th</sup> Parliament.<sup>189</sup> Met with hostile opposition from the Coalition, who considered it 'a recipe for separatism' and 'an absurd proposition that a nation should make a treaty with some of its own citizens',<sup>190</sup> the treaty did not eventuate, and was quietly shelved in 1991.

## 1 Native Title Processes

Statutory land rights regimes had been enacted in all states except for Western Australia and Tasmania by 1991.<sup>191</sup> While some of these settlements delivered expansive rights — most notably the *Pitjantjatjara Agreement*, which provided direct grants of inalienable freehold land<sup>192</sup> — many were 'much more limited in

<sup>182</sup> William McMahon, 'Australian Aborigines: Commonwealth Policy and Achievements' (Statement, 26 January 1972).

<sup>183</sup> Stewart Harris, 'Anniversary Reflections: "Did the Aboriginal Tent Embassy Achieve Anything? Yes!"', *Canberra Times*, 26 January 1982' in Gary Foley, Andrew Schaap and Edwina Howell (eds), *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State* (Routledge, 2014) 213–14.

<sup>184</sup> Brennan et al, above n 31, 14.

<sup>185</sup> Petition from the Larakia/Larrakia People to Her Majesty, the Queen, 17 October 1972.

<sup>186</sup> See text accompanying above n 14; Julie Fenley, 'The National Aboriginal Conference and the Makarrata: Sovereignty and Treaty Discussions, 1979–81' (2011) 42(3) *Australian Historical Studies* 372, 379.

<sup>187</sup> Harris, above n 4, 15.

<sup>188</sup> Senate Standing Committee on Legal and Constitutional Affairs, above n 4, xii.

<sup>189</sup> Hawke, above n 4.

<sup>190</sup> John Howard, 'Treaty is a Recipe for Separatism' in Ken Baker (ed), *A Treaty with the Aborigines?* (Institute of Public Affairs, 1988) 6, 6.

<sup>191</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); *Aboriginal Land Rights Act 1983* (NSW); *Aboriginal Land Act 1991* (Qld); *Torres Strait Islander Land Act 1991* (Qld); *Aboriginal Lands Trust Act 1966* (SA); *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA); *Maralinga Tjarutja Land Rights Act 1984* (SA); *Aboriginal Lands Act 1970* (Vic).

<sup>192</sup> *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) ss 15, 17.

scope'.<sup>193</sup> Importantly, however, 'absent any legally enforceable right to land, these settlements remained essentially ad hoc, limited in utility for other Indigenous peoples, and predicated on a supportive political environment'.<sup>194</sup> The High Court of Australia's decision in *Mabo v Queensland (No 2)*,<sup>195</sup> and subsequent enactment of the NTA, radically altered this underlying framework, transforming Aboriginal and Torres Strait Islander peoples' moral claims into legal rights.<sup>196</sup> The NTA recognises and protects Indigenous Australians' native title and establishes a procedure for dealing with native title claims.

Agreements under the NTA bear formal similarities to treaty negotiations. Similar to the process in Canada, the legal architecture of the NTA privileges conciliation rather than litigation. While applications for a 'determination of native title' are initially commenced as proceedings in the Federal Court of Australia,<sup>197</sup> the Court practises an intensive case management scheme to identify points of agreement, and to refer particular issues to mediation.<sup>198</sup> As of 5 March 2018, 416 native title determinations have been made.<sup>199</sup> Of these, 328 were by consent, 47 were litigated, and 41 were unopposed.<sup>200</sup>

Even where the parties agree to conciliation, the process can be lengthy. Determination of native title operates as a judgment against the 'world at large',<sup>201</sup> therefore it is critical that all parties 'who hold or wish to assert a claim or interest in respect of the defined area of land' are represented.<sup>202</sup> This may include several Indigenous nations with conflicting claims over land, not to mention pastoralists, mining interests and State and Federal Governments. As such, finalising areas of common ground can be difficult. It is not surprising then that negotiations can take several years, or more. For example, in November 2014, the Kokatha people were finally successful in finalising a consent determination that had taken 18 years.<sup>203</sup> The Kokatha native title claim covers over 33 807km<sup>2</sup> of land, including significant pastoral leases such as Roxby Downs station, BHP Billiton's Olympic Dam mine, and areas used by the Australian Government Department of Defence to conduct training operations. In addition to the significant land base, the Kokatha people are guaranteed non-exclusive rights to hunt, fish, camp, gather and undertake cultural activities including ceremonies and meetings, and to protect places of cultural significance on country.<sup>204</sup>

<sup>193</sup> Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*' (2003) 27(2) *Melbourne University Law Review* 523, 530.

<sup>194</sup> Harry Hobbs, 'Locating the Logic of Transitional Justice in Liberal Democracies: Native Title in Australia' (2016) 39(2) *University of New South Wales Law Journal* 512, 536.

<sup>195</sup> (1992) 175 CLR 1.

<sup>196</sup> Garth Nettheim, '"The Consent of the Natives": *Mabo* and Indigenous Political Rights' (1993) 15(2) *Sydney Law Review* 223, 224.

<sup>197</sup> NTA ss 13, 61.

<sup>198</sup> Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993* (Cth), Report No 126 (2015), 358 [12.7].

<sup>199</sup> National Native Title Tribunal, *Statistics* (5 January 2018) <<http://www.nntt.gov.au/Pages/Statistics.aspx>>.

<sup>200</sup> Ibid.

<sup>201</sup> *Dale v Western Australia* (2011) 191 FCR 521, 540 [92] (the Court).

<sup>202</sup> *Western Australia v Ward* (2000) 99 FCR 316, 368 [190] (Beaumont and von Doussa JJ).

<sup>203</sup> *Starkey v South Australia* (2014) 319 ALR 231; the Kokatha Native Title Claim was registered on 17 November 2014 (File No SCD2014/00).

<sup>204</sup> Ibid 246–7 [94].

Several developments to simplify the process and expedite completed agreements have been enacted. Indigenous Land Use Agreements ('ILUAs') were introduced as part of the 1998 Amendments to the *NTA*.<sup>205</sup> They are voluntary agreements that may be struck between native title groups and other groups concerning the use of land and waters. This creative process permits flexible and pragmatic settlements, and have proved popular for many native title groups. As of 5 March 2018, there are 1199 ILUAs registered with the National Native Title Tribunal, compared to 406 native title determinations.<sup>206</sup> ILUAs cover a diverse range of agreements, including, for example, providing for Indigenous access to pastoral leasehold, granting access to natural resources on native title land, compensation, or employment and economic opportunities for native title groups.<sup>207</sup> Agreement can be negotiated in the absence of a costly and lengthy application for the determination of the existence of native title,<sup>208</sup> and, depending on the precise agreement struck, can 'offer substantial scope for economic development'.<sup>209</sup> Once registered, the ILUA binds the parties and all persons holding native title to the area, even if not a party to the agreement.<sup>210</sup> However, despite some clear benefits and potential,<sup>211</sup> ILUAs have fallen far below the comprehensive agreements struck in Canada or treaties more broadly. As their name suggests, ILUAs do not grant ownership over land, but concern *use* of land and waters.<sup>212</sup>

Limitations under ILUAs are inherent to the *NTA* process, and while settlements reached under the *NTA* satisfy the first and second of our criteria, they fail the third, and do not constitute treaties. First, native title recognises Indigenous peoples as both traditional owners and occupiers of the land, and so as polities. The source of native title rights and interests is the system of traditional laws and customs of the Indigenous peoples themselves. As such, native title is 'an acknowledgment of the continuation of Indigenous society as a source of authority'.<sup>213</sup> Second, as the statistics indicate, native title is primarily reached by way of negotiation. Although Indigenous Australians seeking to claim native title find that the process is structured against their interests, negotiations are conducted on the basis that Indigenous

<sup>205</sup> *Native Title Amendment Act 1998* (Cth) sch 1 item 9, amending *NTA* pt 2 div 3 sub-div B.

<sup>206</sup> National Native Title Tribunal, above n 199. Though note that many native title consent determinations involve ILUAs.

<sup>207</sup> National Native Title Tribunal, *About Indigenous Land Use Agreements (ILUAs)* <<http://www.nntt.gov.au/ILUAs/Pages/default.aspx>>.

<sup>208</sup> Fred Tanner, 'Land Rights, Native Title and Indigenous Land Use Agreements' in Martin Hinton, Daryle Rigney and Elliott Johnson (eds), *Indigenous Australians and the Law* (Routledge, 2<sup>nd</sup> ed, 2008) 147, 157.

<sup>209</sup> Maureen Tehan and Lee Godden, 'Legal Forms and Their Implications for Long-Term Relationships and Economic, Cultural and Social Empowerment: Structuring Agreements in Australia' in Marcia Langton and Judy Longbottom (eds), *Community Futures, Legal Architecture: Foundations for Indigenous Peoples in the Global Mining Boom* (Routledge, 2012) 111, 122.

<sup>210</sup> *NTA* s 24EA(1). See further Christos Mantzaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (Federation Press, 2000) 250.

<sup>211</sup> Note that the Noongar Settlement is to be registered as six ILUAs, indicating that ILUAs have unrealised potential as part of a comprehensive negotiated agreement: see below Part IIIB.

<sup>212</sup> Lisa Strelein, 'Symbolism and Function: From Native Title to Indigenous Self-Government' in Lisa Strelein (ed), *Dialogue About Land Justice: Papers from the National Native Title Conferences* (Aboriginal Studies Press, 2010) 127, 131.

<sup>213</sup> Ibid 128.

peoples, as prior owners and occupiers of their traditional land, are entitled to be present, rather than merely updated on its progress.

Although agreements under the *NTA* regime recognise Indigenous peoples as polities, the State has not accepted, nor recognised, the concomitant inherent right to self-government. This is a fine distinction, but an important one. While basing the source of native title rights and interests in the normative system of the traditional owners suggests that the courts recognise an inherent right to self-government, legislation and case law has constrained the content of native title rights to 'land and waters'<sup>214</sup> and, at present, does not recognise a right to self-government.<sup>215</sup> Further, *NTA* settlements acknowledge prescribed bodies corporate that act as trustees to hold and manage native title rights and interests,<sup>216</sup> but these bodies are not granted even limited self-governance powers. Rather, they are merely intended to protect and manage native title and to ensure certainty for governments and other parties interested in accessing land and waters.<sup>217</sup>

## 2 *Non-Native Title Processes*

The limitations inherent in the *NTA* process have constrained Indigenous peoples' ability to transform their moral interests into legally enforceable rights. As a result, calls for a fundamental rethink to the *NTA* have been made,<sup>218</sup> propelling alternative, political agreements made outside the native title system. These arrangements provide greater flexibility and offer some economic benefits but fall short of the political agreements reached in Canada.

The *Traditional Owner Settlement Act 2010* (Vic) ('*TOSA*') is one such alternative. Designed 'to advance reconciliation and promote good relations' between the Victorian State and Indigenous Australians,<sup>219</sup> the *TOSA* enables traditional owners to pursue a negotiated 'recognition and settlement agreement'<sup>220</sup> with the State Government outside the native title regime. The overarching settlement agreement includes four sub-agreements relating to: land, land-use, funding, and natural resources.<sup>221</sup> An ILUA is also registered under the *NTA*,<sup>222</sup> making the Agreement legally binding. As part of any agreement, the traditional owners must withdraw all current and future native title claims.

<sup>214</sup> *Western Australia v Ward* (2000) 99 FCR 316; Australian Law Reform Commission, above n 198, 242 [8.68].

<sup>215</sup> Sean Brennan et al, 'The Idea of Native Title as a Vehicle for Change and Indigenous Empowerment' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle For Change and Empowerment?* (Federation Press, 2015) 2, 4; Jeremy Webber, 'Native Title as Self-Government' (1999) 22(2) *University of New South Wales Law Journal* 600.

<sup>216</sup> *NTA* pt 2 div 6.

<sup>217</sup> *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) reg 6.

<sup>218</sup> Australian Law Reform Commission, above n 198. For judicial commentary suggesting the need for a more fundamental reconceptualisation of the State's interaction with Aboriginal and Torres Strait Islander people see: *Western Australia v Ward* (2002) 213 CLR 1, 231 [529] (McHugh J), 398 [970] (Callinan J).

<sup>219</sup> *TOSA* s 1.

<sup>220</sup> *Ibid* pt 2.

<sup>221</sup> *Ibid* pts 3 (land), 4 (land use), 5 (funding), 6 (natural resource management).

<sup>222</sup> *Ibid* ss 10, 30.

For many Indigenous peoples, the breadth of the available outcomes is appealing. So far two agreements with traditional owner groups, arising out of or complementing native title determinations, have been finalised. The *Gunaikurnai Settlement Agreement* was the first to be reached under the *TOSA* in October 2010. Under the Agreement, the State acknowledges the Gunaikurnai people as the traditional owners of an area in Gippsland, and recognises that they hold native title over certain Crown land in that region. In addition, the State commits to funding the Gunaikurnai people to enable them to manage their affairs and respond to their obligations under the settlement; grants rights of access and use on Crown land for traditional purposes including hunting, fishing, camping and gathering; and invites the Gunaikurnai people to co-manage over ten national parks and reserves.<sup>223</sup> In 2013, the Dja Dja Wurrung people became the second to reach a settlement under the *TOSA*. The *Dja Dja Wurrung Settlement* includes: acknowledgement of past injustices; transfer of two historically and culturally significant freehold properties; six parks and reserves as ‘Aboriginal title’ and joint management of those lands; hunting, fishing and gathering rights; and almost \$10 million in funding by the State for investment in economic development initiatives chosen by the Dja Dja Wurrung.<sup>224</sup> The *TOSA* has only operated since 2010, but it has already been praised by the Aboriginal and Torres Strait Islander Social Justice Commissioner as setting ‘the benchmark for other states to meet when resolving native title claims’.<sup>225</sup>

Both the Gunaikurnai and Dja Dja Wurrung settlements include joint management of land and resources as an integral element of the package. If conducted on a firm basis of formal recognition and active participation in decision-making processes, collaborative land and resource management strategies can empower local communities.<sup>226</sup> These processes also have the potential to break down the disjunction between Indigenous and non-Indigenous cultural norms, providing an opportunity for ‘cross-cultural development of management processes and conflict resolution’,<sup>227</sup> reinforcing both the official acknowledgement of past injustices and grounding a just relationship going forward.<sup>228</sup>

The *TOSA* process offers similar benefits to the negotiated treaties in Canada. Each begins with an acknowledgment of past injustices and recognition that the Indigenous peoples are the traditional owners of the land. A small portion of Crown land is transferred (neither permits private property to be transferred) as freehold

<sup>223</sup> Victorian State Government, ‘Gunaikurnai Native Title Agreement’, Department of Justice and Regulation (Vic) <<http://www.justice.vic.gov.au/home/your+rights/native+title/gunaikurnai+native+title+agreement>>.

<sup>224</sup> Victorian State Government, ‘Dja Dja Wurrung Settlement’, Department of Justice and Regulation (Vic) <<http://www.justice.vic.gov.au/home/your+rights/native+title/dja+dja+wurrung+settlement>>.

<sup>225</sup> Australian Human Rights Commission, *Native Title Report 2011: Aboriginal and Torres Strait Islander Social Justice Commissioner* (2011) 8. For examination of the *TOSA* in relation to water rights, see Katie O’Bryan, ‘More Aqua Nullius? The *Traditional Owner Settlement Act 2010* (Vic) and the Neglect of Indigenous Rights to Manage Inland Water Resources’ (2016) 40(2) *Melbourne University Law Review* 547.

<sup>226</sup> Alfonso Peter Castro and Erik Nielsen, ‘Indigenous People and Co-management: Implications for Conflict Management’ (2001) 4(4) *Environmental Science and Policy* 229, 230.

<sup>227</sup> David Lawrence, ‘Managing Parks/Managing “Country”: Joint Management of Aboriginal Owned Protected Areas in Australia’ (Research Paper No 2, Parliamentary Library, Parliament of Australia, 1996–97) 24 (citations omitted).

<sup>228</sup> Hobbs, above n 194, 547.

title or Aboriginal title; land use and access rights are granted over wider areas; and the First Nation or Traditional Owners are entitled to jointly manage additional parks or reserves. Significantly, the State commits to provide funding to Indigenous-run bodies whose role is to identify, protect and promote the interests of their community. Capital transfer packages are intended both to support Indigenous communities build capacity and as compensation for the ‘surrender’ of current and future claims.

Notwithstanding the benefits of the *TOSA* regime, it is more limited than the Canadian agreements and does not meet our criteria for a treaty. While Indigenous peoples are recognised as a polity, and negotiation is conducted respectful of each participant’s equality of standing, the *TOSA* process does not recognise Indigenous self-government to a sufficient extent. Rather, self-government is limited merely to joint management of national parks and reserves.<sup>229</sup> Joint management arrangements can bring benefits to Indigenous peoples, and — importantly — the traditional owner land management boards will be composed of a majority of members appointed from nominations made by the traditional owner group,<sup>230</sup> so decisions can be made without the consent of non-Indigenous members. Nonetheless, the scope of decision-making power is minimal. Absent broader powers of decision-making, the Gunaikurnai and Dja Dja Wurrung bodies are limited to a communication channel with government as service-delivery organisations. Additionally, and problematically, not all activities that have a significant impact on the rights of traditional owners require their consent,<sup>231</sup> weakening their ability to manage their land and community as required under art 32 of the *UNDRIP*. These agreements are a positive step forward, with the potential to avoid lengthy negotiations under the *NTA*,<sup>232</sup> but they are not treaties.

## B *The Noongar Settlement*

The Noongar people live in the south-west corner of Western Australia. Traditionally, their country extended from Jurien Bay to the southern coast, and east to Ravensthorpe and Southern Cross, some 200 000km<sup>2</sup>.<sup>233</sup> Over this wide expanse of land, different subgroups of Noongar people — the Ballardong, Yued, Whadjuk, Wardandi, Pinjarup, Bibbulmun, Wilman, and Mineng — live, but they constitute one community, speaking dialects of a common language.<sup>234</sup> From time immemorial,

<sup>229</sup> See, eg, Gunaikurnai Traditional Owner Land Management Board, *Vision and Mission* <<https://www.gunaikurnai.com.au/about>>.

<sup>230</sup> *Conservation, Forests and Lands Act 1987* (Vic) s 82M(3)(a).

<sup>231</sup> *TOSA* pt 4 divs 2–4.

<sup>232</sup> Though note that only two agreements have been finalised since 2010, one of which (Gunaikurnai) was negotiated almost entirely under the *NTA*: see Katie O’Bryan, ‘The Gunaikurnai Consent Determination: Is This the High Water Mark for Native Title in Victoria?’ (2011) 7(24) *Indigenous Law Bulletin* 7.

<sup>233</sup> Stuart Bradfield, ‘Settling Native Title: Pursuing a Comprehensive Regional Agreement in South West Australia’ in Marcia Langton et al (eds), *Settling with Indigenous Peoples: Modern Treaty and Agreement-Making* (Federation Press, 2006) 207, 208.

<sup>234</sup> *Bennell v Western Australia* (2006) 153 FCR 120, 192–3 [273]–[276] (Wilcox J).

through the British acquisition of sovereignty in 1829, and still today, the Noongar people have observed their traditional laws and customs.<sup>235</sup>

The Noongar Settlement has its origins in a native title claim. During the 1990s and early 2000s, the South West Aboriginal Land and Sea Council ('SWALSC') oversaw the amalgamation of six native title claims into a single claim encompassing the entirety of Noongar country. This claim area was divided by the Federal Court of Australia into two parts: Part A encompassing Perth and the surrounding non-urban areas; and Part B covering the rest of the claim. In 2006, Wilcox J of the Federal Court examined Part A, and determined that the Noongar people held native title rights to occupy, use and enjoy lands and waters.<sup>236</sup> Hailed as the first decision recognising native title over a capital city,<sup>237</sup> it was subsequently overturned by the Full Federal Court in 2008.<sup>238</sup> Instead of continuing litigation, in December 2009, the SWALSC and the State Government agreed to pursue a negotiated outcome outside of the *NTA*. Four years later, in July 2013, the Government released the terms of its settlement offer and, in October 2014, the SWALSC Noongar Nation Negotiation Team, and the Western Australia Government reached an agreement-in-principle on the text of the settlement. The Settlement takes the form of six ILUAs for the original six specific claim areas. Despite some opposition, these were approved by the Noongar people at a series of authorisation meetings held between January and March 2015.<sup>239</sup> On 2 February 2017, those opposing the deal were successful in preventing four of the ILUAs from being registered, with the Federal Court holding that the *NTA* requires all native title claimants to agree.<sup>240</sup> Illustrating the political nature of agreements with Indigenous peoples, however, the Federal Government swiftly introduced legislation to amend the *NTA* in order to permit the settlement to proceed.<sup>241</sup> Following a Senate Committee Report, the Bill was passed in June 2017.<sup>242</sup> Applications to register the ILUAs have been lodged, and the parties are waiting on a decision by the Native Title Registrar.<sup>243</sup>

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<sup>235</sup> See South West Aboriginal Land and Sea Council, John Host and Chris Owen, '*It's Still in My Heart, This is My Country': The Single Noongar Claim History* (UWA Publishing, 2009).

<sup>236</sup> *Bennell v Western Australia* (2006) 153 FCR 120, 328–9 [832]–[841] (Wilcox J).

<sup>237</sup> Human Rights and Equal Opportunity Commission, *Native Title Report 2007* (2008) 146 (citations omitted).

<sup>238</sup> *Bodney v Bennell* (2008) 167 FCR 84.

<sup>239</sup> Kathryn Diss, 'Claimants Ink \$1.3 billion Western Australia Noongar Native Title Deal', *ABC News* (online), 30 March 2015 <<http://www.abc.net.au/news/2015-03-30/south-west-noongar-native-title-deal-inked/6357746>>.

<sup>240</sup> *McGlade v Native Title Registrar* (2017) 340 ALR 419, 463 [242]–[244] (North and Barker JJ); *NTA* s 24CD(2)(a).

<sup>241</sup> Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 (Cth) sch 1 cl 1, amending *NTA* s 24CD(2)(a).

<sup>242</sup> Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 [Provisions]* (2017). The Bill was enacted as the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth).

<sup>243</sup> Lands, Approvals and Native Title Unit (WA), above n 18.

## 1 What Does the Settlement Contain?

The Noongar Settlement is the largest and ‘most comprehensive’<sup>244</sup> agreement to settle Aboriginal interests in land in Australian history, comprising ‘the full and final resolution of all native title claims in the South West of Western Australia, … in exchange for a comprehensive settlement package’.<sup>245</sup> The Noongar people have agreed to surrender any native title rights and interests that exist in the area under the Agreement, and consent to the validation of all potentially historically invalid acts in relation to those areas.<sup>246</sup> As the preamble to the *Land Administration (South West Native Title Settlement) Act 2016* (WA) makes clear, the package of benefits is intended to compensate the Noongar people ‘for the loss, surrender, diminution, impairment and other effects’ levied on their native title rights and interests.<sup>247</sup> Involving approximately 30 000 Noongar people and covering approximately 200 000km<sup>2</sup>, the total value of the package is \$1.3 billion, and includes agreement on rights, obligations and opportunities relating to land, resources, governance, finance, and cultural heritage.

First, as part of the Agreement, the Western Australian Parliament enacted the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA). The first piece of legislation in Western Australia to include the Noongar language,<sup>248</sup> the Act recognises the Noongar people as the traditional owners and occupiers of South West Western Australia, and their continued relationship with country.<sup>249</sup> The Preamble acknowledges in full:

- A. Since time immemorial, the Noongar people have inhabited lands in the south-west of the State; these lands the Noongar people call Noongar boodja (Noongar earth).
- B. Under Noongar law and custom, the Noongar people are the traditional owners of, and have cultural responsibilities and rights in relation to, Noongar boodja.
- C. The Noongar people continue to have a living cultural, spiritual, familial and social relationship with Noongar boodja.
- D. The Noongar people have made, are making, and will continue to make, a significant and unique contribution to the heritage, cultural identity, community and economy of the State.
- E. The Noongar people describe in Schedule 1 their relationship to Noongar boodja and the benefits that all Western Australians derive from that relationship.
- F. So it is appropriate, as part of a package of measures in full and final settlement of all claims by the Noongar people in pending and future applications under the *Native Title Act 1993* (Commonwealth) for the

<sup>244</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 November 2015, 8903 (Colin Barnett, Premier).

<sup>245</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 October 2015, 7313 (Colin Barnett, Premier).

<sup>246</sup> *Land Administration (South West Native Title Settlement) Act 2016* (WA) preamble [2].

<sup>247</sup> *Ibid* preamble [3].

<sup>248</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 22 March 2016, 1496 (Peter Collier, Minister for Aboriginal Affairs).

<sup>249</sup> *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA) s 5.

determination of native title and for compensation payable for acts affecting that native title, to recognise the Noongar people as the traditional owners of the lands described in this Act.<sup>250</sup>

In the second reading speech, the Minister for Aboriginal Affairs, Peter Collier, acknowledged the deep injustices that had been done to the Noongar people since the British arrival in 1826. He recounted the ‘one-sided struggle over land and resources’, the ‘devastating spread of introduced diseases’, the hardening of attitudes towards Aboriginal people at the turn of the 20<sup>th</sup> century and the ‘repressive and coercive system of control’ mandated by the *Aborigines Act 1905* (WA), the impact of which ‘still resonates throughout Western Australian society’.<sup>251</sup> And yet, despite this ‘history of oppression and marginalisation’, the ‘Noongar people have survived’ and continue ‘to assert their rights and identity’.<sup>252</sup> During debate over the Bill, parliamentarians frequently reiterated the significance of this acknowledgement. Antonio Buti, MLA noted that it indicated that the Government ‘has understood that it is important to recognise the legal, historical and moral rights of traditional owners’,<sup>253</sup> while David Kelly MLA lauded the Bill and called for further negotiations across the State.<sup>254</sup>

Establishing and resourcing governance institutions is an integral aspect of the settlement. Six Noongar Regional Corporations and one Central Services Corporation will be created, and will receive \$10 million in funding support each year for 12 years. A capital works program will commit additional funding to build office accommodation and a Noongar Cultural Centre. The Central Services Corporation is responsible for assisting and providing services to the Regional Corporations. It will act as a centralised administrative body with the capacity and professional expertise to maintain, protect and promote the culture, customs, traditions and language of the Noongar people. The Regional Corporations will have a similar role, but will also be responsible for managing the traditional land and waters within their regions, developing regional priorities and engaging with government and third-party stakeholders to further the community interests and priorities of the Noongar people.

The settlement includes a significant transfer of land to the Noongar people. Approximately 320 000 hectares of Crown land will be transferred into the Noongar Boodja Trust (‘NBT’) over five years, establishing a sizeable land estate upon which the Noongar people can exercise self-determination.<sup>255</sup> The NBT will function as a perpetual trust, upon which the Western Australia Government will make funding instalments of \$50 million (indexed) yearly for 12 years. As noted above, capital transfer payments are key elements of any broader settlement, as it demonstrates an understanding that economic development is critical to securing a just and equitable

<sup>250</sup> Ibid preamble.

<sup>251</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 22 March 2016, 1496–7 (Peter Collier, Minister for Aboriginal Affairs).

<sup>252</sup> Ibid.

<sup>253</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 November 2015, 8652 (Antonio Buti).

<sup>254</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 2016, 1409–10 (David Kelly).

<sup>255</sup> See *Land Administration (South West Native Title Settlement) Act 2016* (WA) s 10.

relationship between Indigenous peoples and the State. It also guarantees the continued functioning of Indigenous institutions, as required under art 4 of the *UNDRIP*. Additionally, 121 freehold properties will be refurbished and transferred to the NBT as part of a Housing Program.

The settlement also grants certain rights to the Noongar people over Crown lands not transferred. As part of the Agreement, the Minister for Lands must grant a land and water access licence to each Regional Corporation to allow the group to access and undertake customary activities on certain unallocated Crown land and unmanaged reserves.<sup>256</sup> Subject to the licence, the Noongar people will be able to: visit and care for sites and country; gather, prepare and consume bush tucker and traditional medicine; conduct ceremonies and cultural activities; have meetings, camp and light camp or ceremonial fires on country.<sup>257</sup> Similarly to the Gunaikurnai and Dja Dja Wurrung settlements, the Noongar people will be invited to co-manage land and resources in land outside their territory. Although no joint-management agreement has yet been struck, the overarching negotiated settlement set out prescriptive parameters over future agreements. Joint-management decisions will be made by a body composed of up to 12 persons; six nominated by the Noongar Regional Corporation, and six by the Chief Executive Officer of the Department of Parks and Wildlife; a chairperson will be nominated by the Corporation.<sup>258</sup> This body will make all management decisions relating to the management and development of the Park, including on the value of the land and waters to the culture and heritage of Noongar people, and the methods to determine, conserve, protect and rehabilitate.<sup>259</sup> As has been noted above, joint-management arrangements have the potential to improve employment opportunities for Indigenous peoples.

Enhanced employment and socio-economic opportunities are a key element of the Settlement. To this end, the Agreement proposes to develop a Community Development Framework and a Noongar Economic Participation Framework. These initiatives aim to improve Western Australian human services agencies' communication and collaboration with Noongar people, and to improve economic participation outcomes for Noongar people in the South West. Finally, the settlement contains two complementary heritage protection agreements. The Noongar Heritage Partnership Agreement will set out a framework through which the Department of Aboriginal Affairs and the relevant Regional Corporation can work in partnership to identify, record, protect and manage Noongar Heritage values and sites within the agreement area. The Noongar Standard Heritage Agreement will improve processes for the preservation of heritage. The Noongar Settlement is far-reaching, but is it Australia's first treaty?

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<sup>256</sup> Ibid s 13.

<sup>257</sup> *Wagyl Kaip & Southern Noongar Indigenous Land Use Agreement*, signed 8 June 2015, (not yet in force) annex O preamble [F] ('*Wagyl Kaip & Southern Noongar Indigenous Land Use Agreement*').

<sup>258</sup> Ibid annex N ss 3, 4.1. This compares unfavourably to the Victorian arrangements where traditional owners may nominate a majority of members to the board: see above Part IIIA(2).

<sup>259</sup> *Wagyl Kaip & Southern Noongar Indigenous Land Use Agreement* annex N s 3.1(a)(i).

## 2     *Is the Noongar Settlement a Treaty?*

There is common agreement that the Noongar Settlement is a milestone in the history of Western Australia. In the second reading speech on the Noongar Recognition Bill, Premier Colin Barnett explained that the settlement is the ‘most comprehensive native title agreement proposed’ in Australia.<sup>260</sup> Other members of the Western Australia Parliament reiterated this. The Minister for Aboriginal Affairs, Peter Collier, remarked that the Bill ‘has greater significance than simply one element of a native title agreement and will ultimately stand alone as a historic, overdue recognition of the Noongar people’.<sup>261</sup> The Deputy Opposition Leader, Roger Cook noted that the Agreement ‘is the single most important thing this government can do’.<sup>262</sup> Certainly, as McCagh writes, the ‘scale and scope of the package offered by the [Noongar Recognition] Bill are seemingly unprecedented’.<sup>263</sup>

Scholars witnessing the negotiations and final agreement have contended that the Settlement reflects developments within native title dispute resolution. Young, for example, considers that the package ‘breaks new ground’ and reflects ‘an important maturing of native title dispute resolution’.<sup>264</sup> Likewise Morris considers that the Agreement demonstrates that native title settlements can be expanded to ‘include cultural redress, an accounting of history and formal apologies, in addition to land and financial compensation’.<sup>265</sup> Morris argues that if this process was ‘pursued wholeheartedly’ it could ‘help propel practical recognition of Indigenous languages and heritage, as has occurred in New Zealand’.<sup>266</sup> Indeed, the Noongar nation’s ‘innovative’ comprehensive settlement ‘shows some of the potential that already exist’ for structuring an appropriate relationship between the State and Indigenous peoples.<sup>267</sup>

Notwithstanding the significance of the Agreement, there has been little recognition that the Noongar Settlement may constitute the first treaty signed between Indigenous Australians and the State.<sup>268</sup> Writing generally about the process

<sup>260</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 October 2015, 7313 (Colin Barnett, Premier). See also Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 November 2015, 8903 (Colin Barnett, Premier).

<sup>261</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 22 March 2016, 1497 (Peter Collier).

<sup>262</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 November 2015, 8688 (Roger Cook, Deputy Opposition Leader).

<sup>263</sup> Michael McCagh, ‘Native Title in the Southwest: The Noongar Recognition Bill’ (2015) 8(18) *Indigenous Law Bulletin* 26, 26.

<sup>264</sup> Simon Young, ‘From the Bike to the Bus: the Noongar Native Title Settlement’, *The Conversation* (online), 15 July 2013 <<https://theconversation.com/from-the-bike-to-the-bus-the-noongar-native-title-settlement-15955>>.

<sup>265</sup> Shireen Morris, ‘Lessons from New Zealand: Towards a Better Working Relationship between Indigenous Peoples and the State’ (2015) 18(2) *Australian Indigenous Law Review* 67, 79–80.

<sup>266</sup> Ibid.

<sup>267</sup> Brennan et al, above n 215, 4–5.

<sup>268</sup> Michael Mansell suggests that it ‘has some elements of treaty making’, but does not constitute a treaty because it ‘does not include empowerment or independent long-term funding or deal with Aboriginal sovereignty’: Mansell, above n 47, 121–3. Former Minister for Aboriginal Affairs Fred Chaney considers it to be a treaty: Fred Chaney, ‘Uluru Proposals Deserve Better than a Knee-Jerk Reaction’, *The Sydney Morning Herald* (online), 7 June 2017 <<http://www.smh.com.au/comment/uluru-proposals-deserve-better-than-a-knee-jerk-reaction-20170606-gwl7pz.html>>.

of regional agreements, Anker suggests that this reflects the Australian Government's prioritisation of practical reconciliation, and aversion to the concept of Indigenous self-determination, and its potentially radical consequences.<sup>269</sup> Anker appears correct; Western Australian legislators have generally chosen their words carefully, and in praising the process and outcomes of the Agreement have shied away from calling it a treaty, with some expressly rejecting the comparison.<sup>270</sup> Nonetheless, some parliamentarians have been less reticent. In the same debate, Peter Tinley, a member of the shadow ministry, lauded the settlement calling it 'in effect' a treaty and arguing that 'it would be a fantastic outcome' if it could be extended to 'all Indigenous people in Western Australia'.<sup>271</sup> Deputy Opposition Leader Cook also remarked on this fact. In debate on the Noongar Recognition Bill, Cook noted:

By its very nature, the Noongar agreement is in fact a classic treaty; it is a coming together between two nations to agree upon certain things, and in doing so, finding a way forward together and recognising each other's sovereignty. By recognising each other's sovereignty, they decided how they would continue to coexist in a manner that they agreed to through negotiation. Yothu Yindi sung 'treaty now', and that is what we are doing here; this is a treaty between the government of Western Australia representing the newcomers, and the nation of the Noongar people.<sup>272</sup>

Tinley and Cook are correct. The South West Native Title Settlement does more than augur a new development of native title negotiations: the Settlement is Australia's first treaty between Indigenous peoples and the State.

First, the treaty recognises the Noongar as both traditional owners of the land and as a distinct polity, differentiated from other Western Australians. Participants involved in the negotiation explicitly connected their aims to recognition of Noongar nationhood: at the initial negotiation meeting in 2010, the Noongar lead negotiator Glen Kelly, insisted on a 'nation to nation' dialogue;<sup>273</sup> throughout the process the Noongar people identified as a nation, organised as a nation, and acted as a nation. This status was explicitly recognised by the conservative Western Australian Government. Upon notification that the Noongar people had voted to accept the Settlement, Premier Barnett issued a press release, noting that 'break-through agreement' was 'a historic achievement in reconciliation' and an 'extraordinary act of self-determination by Aboriginal people...provid[ing] them with a real opportunity for independence'.<sup>274</sup> In debates over the Recognition Bill, Deputy Opposition Leader Cook agreed, averring that the Settlement 'is the single greatest

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<sup>269</sup> Kirsten Anker, *Declarations of Interdependence: A Legal Pluralistic Approach to Indigenous Rights* (Ashgate, 2014) 178.

<sup>270</sup> See, eg, Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 2016, 1416 (Antonio Buti).

<sup>271</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 2016, 1418 (Peter Tinley).

<sup>272</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 November 2015, 8688 (Roger Cook, Deputy Opposition Leader).

<sup>273</sup> Glen Kelly and Stuart Bradfield, 'Winning Native Title, or Winning Out of Native Title? (2012) 8(2) *Indigenous Law Bulletin* 14, 15; Brennan et al, above n 215, 12–13.

<sup>274</sup> Department of Premier and Cabinet (WA), 'Noongars Vote to Accept Historic Offer' (Media Statement, 30 March 2015) <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2015/03/Noongars-vote-to-accept-historic-offer.aspx>>.

act of sovereignty by the Noongar nation since settlement,<sup>275</sup> and William Johnston, MLA lauded the Bill as providing ‘proper recognition of the Noongar people being not just the occupiers of the land, but the governing force of the land’.<sup>276</sup>

Second, the Settlement was agreed to via a political negotiation respectful of each party’s equality of standing, evincing a commitment to secure a just relationship between Indigenous peoples and the State. In recognising the Noongar nation, the Settlement emphasises the interconnectedness and interrelationship of Indigenous and non-Indigenous Australians in South West Western Australia. Repeatedly highlighted is the idea that the Agreement is ‘ultimately an investment in both the Noongar community and the shared future of the Western Australian community as a whole’,<sup>277</sup> because both communities ‘walk together in this journey’.<sup>278</sup> Although Noongar nationhood is achieved subject to the overriding sovereignty of the Australian State, the treaty redefines the political relationship between Noongar and the Western Australian State, and achieves a just, equitable and sustainable settlement.

The successful Agreement further emphasises the significance of negotiation outside rigid legal frameworks, as the appropriate process to resolve the political relationship between Indigenous peoples and the State. Glen Kelly and Stuart Bradfield, CEO and Manager of Negotiations of the SWALSC respectively, have explained that the Noongar believed that the NTA process would prove inadequate for their aspirations. They recognised that in many areas of their country, native title rights had been extinguished, and where rights may be found to exist, Australian law would recognise rights only to non-exclusive use and possession. Further, much of the extinguishment occurred prior to the enactment of the *Racial Discrimination Act 1975* (Cth), meaning that while ‘a win in the courts would provide formal recognition as traditional owners … it would provide little else’.<sup>279</sup>

Third, the settlement contains more than mere symbolic recognition. In consideration of surrendering their native title rights and interests and validating all potentially invalid acts committed on their territory, the Noongar people receive a package of benefits similar to those negotiated under Canada’s modern treaty-making process. The Noongar are guaranteed a sizeable land base, non-exclusive rights to resources over an extended area, a large and sustained financial contribution from the State Government, and enhanced cultural heritage protection. Together, these elements serve two goals key to any treaty: they acknowledge the injustices of the past, and serve the Noongar people’s future by strengthening culture and enhancing economic opportunities. It is true that the self-governance rights are not as extensive under the Noongar Settlement. There is no scope (at present) for a Noongar government, and the Noongar people are not entitled to pass legislation.

<sup>275</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 November 2015, 8688 (Roger Cook, Deputy Opposition Leader).

<sup>276</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 2016, 1407 (William Johnston).

<sup>277</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 October 2015, 7313 (Colin Barnett, Premier).

<sup>278</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 18 November 2015, 8567 (David Templeman).

<sup>279</sup> Kelly and Bradfield, above n 273, 15.

However, as we noted above, these elements are not necessary to constitute a treaty; what is required is the recognition or establishment, and resourcing, of institutions and structures of culturally appropriate governance and means of decision-making and control that amount to at least a limited form of self-government. Such a relationship is consistent with art 4 of the *UNDRIP* and the arrangements found in the modern treaty-making process in Canada. In this regard, the Central Services Corporation and the six Noongar Regional Corporations will develop and implement culturally appropriate policies based on local and regional priorities. Although similar in form to Registered Native Title Bodies Corporate, their substantial funding and key position within the broader settlement highlight the more significant role they will play. These bodies formalise self-governance arrangements, and may ‘pave the way’ for ‘robust forms of Indigenous jurisdiction’.<sup>280</sup> The bodies also serve as conduit for engagement with the State Government and third parties, granting the Noongar people a ‘seat at the table’ of decision-making.

The Noongar Settlement provides more than merely a seat at the table, however. As Kelly and Bradfield have explained, their goal was:

to secure recognition and cultural and customary rights over our traditional lands, and consequently, to lay a platform of self-determination. We do not seek to be restricted to a marginal set of rights on a very limited amount of land. This means political empowerment and political status that enables a much higher level of control and influence over our affairs.<sup>281</sup>

It is through the Central Services Corporation and six Regional Corporations, that the Noongar will exercise stronger, and more capable, institutions of Aboriginal governance, and, significantly, substantive decision-making and control. This control is sufficient to satisfy our third criteria. As the Agreement satisfies all three of our criteria, the South West Native Title Settlement is Australia’s first treaty.

#### IV Conclusion

In this article, we have explored the concepts and principles underlying negotiated agreements between Indigenous peoples and the State to understand what constitutes a treaty. A first principles assessment, and close examination of the modern treaty-making process in Canada, reveals that a treaty contains three elements. First, recognition that Indigenous peoples are polities, and so are distinctive and differentiated from other citizens within the State. Second, that settlement is achieved via a broad-ranging political agreement negotiated in good faith and in a manner respectful of each party’s standing as a polity. Third, that the State recognises or establishes, and resources, structures of culturally appropriate governance with powers of decision-making and control that amount to (at least) a limited form of self-government. Treaties are not merely symbolic instruments; they entail transferring some decision-making power from the State to Indigenous polities. The extent and scope of that self-governing power will differ according to

<sup>280</sup> Dylan Lino, ‘Towards Indigenous-Settler Federalism’ (2017) 28(2) *Public Law Review* 118, 131.

<sup>281</sup> Glen Kelly and Stuart Bradfield, ‘Negotiating a Noongar Native Title Settlement’ in Sean Brennan et al (eds), *Native Title From Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 249, 250.

context, but *some* decision-making power must be transferred. In consideration, Indigenous peoples must accept that the settlement constitutes a resolution of their claims against the State.

Assessing agreements made under and outside the *NTA* regime against these criteria indicates that the Noongar Settlement comprises the first treaty between Indigenous peoples and the State in Australia. This is a noteworthy achievement. It rectifies an absence long regarded as problematic. In 1832, for example, in the aftermath of the ‘Black War’, George Arthur, Governor of Van Diemen’s Land, remarked that it was ‘a fatal error … that a treaty was not entered into with the natives’ there. He recommended to the Colonial Office that an understanding be reached with the Indigenous peoples before a new colony was established in South Australia ‘to prevent a long-continued warfare’.<sup>282</sup> With the signing of the Noongar Treaty, Australia has — at long last — finalised a treaty.

The Noongar Treaty has two important consequences for future debate. First, the Noongar Treaty demonstrates how much of the current debate is misdirected in focusing upon the idea of a national treaty. Treaty processes are underway at the state and territory level in Victoria, the Northern Territory and South Australia, and have led to the first such outcome in Western Australia. As in Canada, we can expect negotiations to occur predominately at this level. Significantly, these are moving forward despite the rhetoric emerging nationally as part of the constitutional recognition process. Second, in registering the comprehensive political agreement as six ILUAs, the Agreement evinces that treaties can be achieved in a manner consistent with Australia’s existing public law system. Indeed, this can be done in a relatively straightforward way, with the key impediments being political will and successful compromise between Indigenous peoples and the State.

If the Noongar Treaty emerges as a popular and fruitful settlement, it can provide the basis for further treaties with Aboriginal and Torres Strait Islander peoples. Such negotiated treaties will mark an important break from a system that for many decades has disregarded the views of Indigenous Australians, and reinforced their feelings of powerlessness. As Glen Kelly, CEO of the SWLSC and Noongar lead negotiator, has explained, the Noongar Treaty ‘will have a massive and revitalising effect on Noongar people and culture’.<sup>283</sup>

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<sup>282</sup> Letter from George Arthur to R Hay, September 1832. Stored at the Tasmanian Archive and Heritage Office, file no CO280/35.

<sup>283</sup> Diss, above n 239.