

Land, Rights, Laws: Issues of Native Title



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

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

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Abstract

*This paper discusses the statewide framework agreement process in South Australia from its inception in 2000. The framework agreement process seeks to comprehensively address native title claims across South Australia by negotiating agreements between claimant, government, industry, and other stakeholders. This process offers not just an alternative to litigation, but an opportunity to rebuild the capacity of Indigenous people to be self determining and to hold each other accountable in parallel under customary law and contemporary governance institutions. Close attention to this, and to inclusive decision making processes, is emphasised as critical to securing lasting outcomes from negotiations. This paper was written prior to the High Court decision in *Western Australia v Ward*¹ which has subsequently drawn attention to the inappropriateness of pursuing litigation to resolve native title applications.*

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NEGOTIATING COMPREHENSIVE SETTLEMENT OF NATIVE TITLE ISSUES: BUILDING A NEW SCALE OF JUSTICE IN SOUTH AUSTRALIA

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For many Indigenous groups the difficult task of bringing a native title claim to successful determination has been punctuated by dispute, disappointment and the loss of too many old people (and far too many young people) before claims are finalised. The *Native Title Act 1993* (Cth) ('Native Title Act' or 'the Act') has been slow and, at best, ambiguous in delivering meaningful outcomes to Indigenous people. The few claims that have reached determination have not delivered many immediate benefits. Instead, they offer successful claimants some recognition and a basis for negotiating other benefits. For claimants and native title representative bodies (NTRBs) alike, the challenges of the difficult journey through the maze of legal, political and cultural issues present

very significant risks. Because of the narrow rigid frameworks that are applied to native title, the greatest risk is that NTRBs and the native title processes become unwitting agents of a new wave of disempowerment and colonisation.

Rather than just asserting good intentions, NTRBs need to critically engage with the outcomes of efforts to use the Native Title Act to re-establish Indigenous rights. State governments, mining companies and other development interests have always wanted access to land and resources usually against Indigenous opposition. Many Indigenous people have not felt dispossessed – their law makes it quite clear that they own their country and they have fought to assert that law. Now they are doing their fighting under an Act that allows only very limited recognition of their law and their feelings of ownership of country.

In delivering Indigenous people into the legal processes of native title, whatever our intentions, there is a real risk that NTRBs are becoming agents of a new wave of dispossession, disempowerment and destruction.² Yet, despite the significant risks, native title represents the best available base at the moment from which to act to secure Indigenous rights.

In this paper we reflect on the experiences of the Aboriginal Legal Rights Movement (ALRM) in South Australia in developing a negotiations process about native title and other Indigenous rights.³ The South Australian approach has highlighted the need to reorientate native title strategies away from legal issues and expert-centred processes and towards consideration of the way claimants themselves want to work together for change. Negotiations about native title present an historic opportunity for Indigenous groups to address their needs and aspirations for themselves. For NTRBs, careful attention must be given to the way participation and representation happens in the negotiations process, to fostering and empowering Indigenous governance, and to building native title holders' capacity for post-negotiation implementation, service delivery and economic empowerment.

The context of native title negotiations

Ten-Point Plan amendments

The reprehensible and racist amendment of the Native Title Act under the Howard-Costello Government's Ten Point Plan policy weakened the Act's ability to secure benefits for native title interests. Combined with that Government's earlier abandonment of Parliament's commitment to a Social Justice Package, this has placed a significant burden on Aboriginal and Torres Strait Islander peoples.

The ILUA⁴ provisions of the amended Act have been widely acknowledged as one of the very few positive prospects arising from the amendments. This is not the forum for a detailed review of the strengths and weaknesses of the ILUA process, but it is appropriate for us to acknowledge here that our use of the ILUA process in South Australia does not mean that we see the ILUA provisions of the Act as unambiguously positive. They are, however, what we have to work with and we are trying to work with them as best we can.

One of the consequences of the ILUA amendments is that negotiation has become a major emphasis of native title processes. Indeed, the native title process can be seen in terms of three potentially contradictory tendencies – litigation (contested claims, appeals, et cetera), legislation (efforts to reinforce or counteract the consequences of litigation) and negotiation. In South Australia, we have tried to develop political strategies that would increasingly bring these three avenues together to secure Aboriginal rights, proposing a negotiated approach to developing legislation and resolving litigation on the basis of a wide vision of sustainable co-existence and recognition, rather than only pursuing negotiations on a project-by-project basis with the risk that new inequities will arise.

Project-based negotiations and the Cape York model

In previous frameworks for Indigenous rights (for example, land rights legislation) negotiation has mainly been important in mediating the relations between Indigenous communities and mining operations. Some of this orientation persisted in the transitions to native title negotiations (for example, the Century Zinc – Gulf Agreement), and the negotiation of other development projects.

Ciaran O’Faircheallaigh discusses ‘project-based’ negotiations as a basis for significant advances for Indigenous people.⁵ The ‘Cape York Model’ that he describes provides a benchmark for relatively successful negotiations between Indigenous interests and major mining interests.⁶ It has produced agreements with substantial financial and non-financial benefits for Indigenous groups, and has yielded important lessons and questions for discussion. O’Faircheallaigh’s discussion of the Cape York model emphasises the importance of the negotiation context – the political, commercial and social circumstances – in shaping processes and outcomes in project-based negotiations.⁷ Of particular significance is the success of the Cape York model in circumstances where commercial interests were not legally obliged to negotiate under the Native Title Act or other legislation. Inevitably in Australia, the conversion of strategic possibilities into enforceable agreements has occurred in circumstances that have often been characterised by direct hostility from state governments, and impossible time frames. The very real dilemmas facing NTRBs, native title interests and expert advisers cannot be left unacknowledged.

Here we seek to reflect on our own experience in South Australia of key issues that also arose in Cape York in very different negotiating contexts. In particular, both the Cape York and emerging South Australian processes have had to address common questions concerning:

1. The relationships between Indigenous leadership, expert advisers and community members. There is huge pressure, both internal and external, for native title processes to be expert driven. The pressures on Indigenous leaders, community members and professionals are enormous, and managing these relationships is a major practical challenge.
2. The balance between process and outcomes, including in consultative and decision making stages, in the assessment of potential agreements, and in the difficult strategic choices that arise in complex negotiation contexts. In any negotiations, and particularly those of the scope encompassed by the Cape York and South Australian approaches, people will not be satisfied with the outcomes unless they are also satisfied with the process. Such negotiations are not about ‘doing deals’. Developing achievable timelines and maintaining an orientation to post-agreement implementation and good process are constant challenges.
3. The availability of independent ‘arm’s-length’ resources for Indigenous participation in negotiation. In both Cape York and South Australia, Indigenous groups have generally been unable to finance their own participation in negotiations, relying on commercial and government funding. Even where arm’s-length contracts prevent external interference in the Indigenous process, this dependency confuses accountabilities and is problematic for some Indigenous participants.
4. The nature of accountability and the evaluation of outcomes. The question of how best to hold processes genuinely accountable to The Dreaming rather than contingent circumstances and external agendas are significant and difficult to resolve. Clearly, the role of community elders, communication strategies, the place of language and interpretation, and the location of negotiations all come into play.
5. The amount of resources required is also an issue. Expert advice, community participation, institutional development and other necessary components of empowering negotiation processes will always involve more than those providing the resources want to pay for.

Comprehensive settlement negotiations

Canada's approach to the negotiation of Indigenous rights has received considerable attention in Australia.⁸ The modern treaty process offers a benchmark for people-to-government negotiation of comprehensive settlement of native title issues, but the hostility of state and Commonwealth governments to the idea of treaties, and the pressure arising from project-based negotiations have made comprehensive regional strategies difficult to pursue in Australia.⁹

In contrast to the Australian experience, Canadian governments have increasingly acknowledged that comprehensive negotiations that integrate the consideration of land issues with the consideration of resource claims, governance, services, and other rights are the most appropriate avenue for dealing with First Nation claims. Although extinguishment has conventionally been a condition of these settlements, at the insistence of government negotiators, the Royal Commission on Aboriginal Peoples has found that this is an unnecessary imposition on First Nations.¹⁰

In our response to the SA Government's proposal to negotiate for the settlement of native title issues we have advocated comprehensive negotiations and progressive legislative, administrative, constitutional and procedural reforms, rather than a narrow focus on the specific aspects of native title which are creating difficulties for the government and industry sectors. Rather than merely being concerned to get 'the best deal' for native title holders, our emphasis is on empowerment, building governance and equipping claimant groups for the negotiation of agreements and for their implementation. We have emphasised process, accountability and the consideration of post-negotiation implementation issues.

It is still very early days in the South Australian process. However, we would like to suggest that it is offering Aboriginal people an approach to native title negotiations that does not confine them within a framework that was designed solely by governments and industry. We also suggest that it is a mechanism to support the reconstruction of governance that is accountable to traditional owners and through them to The Dreaming.

Statewide negotiations in South Australia

For over three years, the SA Government has been talking to ALRM about negotiating a statewide 'framework' ILUA. The Government has also been talking to the SA Farmers' Federation and the SA Chamber of Mines and Energy about this. In October 2000, native title claimant groups agreed to work towards these negotiations and to represent themselves through a new statewide organisation. To begin our discussion of this experience, we would like to provide a brief overview of the political setting from which comprehensive negotiations have emerged as a realistic possibility.

The political context in South Australia

South Australia's small-l liberal traditions have placed it at the forefront of progressive responses to Indigenous rights at various historic moments. The passage of the *Pitjantjatjara Land Rights Act 1981* (SA), for example, provided secure tenure over a large portion of the State for its traditional Aboriginal owners. The *Aboriginal Heritage Act 1979* (SA) is often recognised as the strongest legislation in Australia for the protection of Aboriginal tradition.

However, our experience is that the progressive provisions of such legislation, on paper, are not matched by just outcomes for Aboriginal people on the ground. The needs of Aboriginal groups in the city and rural towns have had little positive attention in terms of rights, while the delivery of land rights to anangu has not been matched by any consistent support for effective governance, community and economic development.

There has been a prevailing attitude that Aboriginal land rights are something that belongs in the far north and far west of the State, a long way from the city and towns where most South Australians, including most Aboriginal people, live. Conservation, pastoral and powerful mining and energy

interests have reduced the opportunities for land rights in many parts of the State, although the extent of recent purchases of pastoral leases and other rural lands by ATSIC and the Indigenous Land Corporation is now making SA Government agencies realise that supporting Aboriginal people's aspirations and activities 'on country' is their business too.

At the start of the statewide negotiation process, and for much of the time period described in this paper, the Liberal Party held Government in SA in a finely balanced Parliament with Upper House Independents wielding a balance of power. The Labor Government, elected in February 2002, also relies on the support of Independents to govern. The collapse of the State Bank under the previous Labor Government left SA facing extraordinary levels of debt, and has meant that for many years there have been very limited resources to pursue new Government initiatives. Overall the State's population is ageing, some rural industries (notably wool) were seriously depressed for many years and some farming regions (and the State's main urban water supply) are at clear risk from salinity. The buoyant wine industry, the expanding Olympic Dam mine (WMC), recently realised prospects for several new mines, and the Alice Springs Darwin railway stand out as activities which bring some prospect of sustaining net growth in the State's economy.

Government approaches to native title

There have been quite contradictory elements in government approaches to native title in SA. At the same time as the SA Liberal Government was offering to negotiate for the settlement of native title claims, it was pursuing separate and very different strategies through litigation and legislation.¹¹ For example, for the Federal Court hearings held in the De Rose Hill pastoral lease native title claim in 2001 (the *De Rose Hill case*), part of the SA Government's initial case (the preparation of which was allocated nearly \$5 million in the 1999/2000 budget), was that all native title was extinguished in SA by historical Acts of British Parliament which authorised establishment of the colony.¹² In the December 2000 Parliamentary debate on proposed amendments to the *Native Title (South Australia) Act 1994*, a hundred native title claimants were witness to speeches by members of the Liberal Government which strongly asserted the rights of their rural leaseholder constituencies to certainty in tenure and protection from the threat of native title claims, without the slightest acknowledgement of the rights of the Aboriginal people in their own electorates and in their audience.

At the same time, key players in that Government, including the Attorney-General, were honestly seeking a just and sustainable outcome to deliver certainty and on the ground improvements for all parties – including Aboriginal people. Early in the discussions about setting up a negotiating process the Solicitor General indicated that the Government expected negotiated agreements would involve recognition, rather than extinguishment, of native title, and that 'everything is on the table' for potential negotiation.

The SA Government also accepted the authority of the structures for native title claim management and negotiation that claimant communities developed themselves through the re-registration and certification of their claims – the Native Title Management Committees (NTMCs). The Government did not require the submission of connection reports before it would commence negotiations, unlike the situation in some other states. These actions and others are indicative of the constructive approach and goodwill that the previous SA Government showed towards the developing negotiation process and that has continued under the current SA government.

Industry bodies' approaches

There has been clear support from peak industry bodies for the negotiations and a maturing understanding of claimants' concerns for the recognition of native title. The SA Farmers' Federation (SAFF) is the only farmers' organisation in Australia that has made a commitment to reconciliation, and the vision of its leaders encompasses sustainable regional development in partnership with

Aboriginal people. The leaders of the SA Chamber of Mines and Energy (SACOME) have specific concerns about efficiency and certainty in exploration and production and also have a desire to achieve a framework for the planning and implementation of projects that both their own constituents and other parties – including Aboriginal people – consider to be ‘best practice’.

Although there was quite a deal of mistrust early on in discussions between the SA Government, SACOME, SAFF and ALRM about native title, the leaders of all these groups did agree that a statewide ILUA could be a good way of dealing with native title issues. Key issues covered in early talks were each group’s perception of and concerns with: terminology, process, protocols, and reasons for negotiating.

In the first half of 2000, these four parties signed off on a protocol for future ‘without prejudice’ talks about native title issues and jointly produced a brochure about reasons for wanting to negotiate.

The need for a decision by claimants

The farmers’ and miners’ peak bodies had little difficulty in persuading their management boards that negotiation was by far a better option than litigation, but for ALRM the challenge was far greater. It is, after all, the claimants’ native title that is being negotiated and ALRM has no authority in Aboriginal law to talk for their country.

The ALRM Native Title Unit was clear from the outset that negotiations needed to be driven from the grass roots and not from the NTRB – our role is to assist native title claimants to get into the driver’s seat, not to do the driving.

We wanted a negotiation process that is about empowerment and that provides rich knowledge to claimants. We wanted the claimants to own the decisions that they make. We wanted them to feel proud and powerful in these negotiations, and to come away with outcomes that they, not their experts, are responsible for.

We also wanted to avoid locking claimants into a process that would not produce beneficial outcomes until the end of negotiation. Because by that stage they would have invested so much time and effort that it would be very hard for them to say ‘No’ to a proposed agreement – even if they were disappointed by the terms. We wanted to set up a process through which claimants could say either ‘Yes’ or ‘No’ depending on their own priorities and assessments. We therefore targeted a process that would produce positive outcomes along the way even if people walked away from it before concluding an agreement, or even before they got to the negotiating table.

So process has been a huge challenge – and we have learned some difficult and valuable lessons, especially that you cannot achieve anything without recognising the needs of the people and trusting them to tackle the difficulties in a fair and serious way. The way the ALRM Native Title Unit and its advisers thought we would be able to bring claimants to the negotiating table turned out to be quite different to the opinion of the State’s 22 NTMCs.

Statewide meetings

We held a series of statewide meetings over a four month period, from August to December 2000, so as to enable the NTMCs to discuss the issues, hear from experts and eventually make an informed decision about entering into negotiations.

The concept that negotiation was better than litigation was relatively easy to explain. But the claimants were suspicious of the Government’s motives for wanting to negotiate. After all, the Government was also putting through legislation that was about the extinguishment of native title on some five percent of the land in the State. Everyone also felt for the De Rose Hill claimants who would be soon facing Government and pastoralist opposition in the Court, but there was a strong feeling that only the courts – not governments – had ever brought justice.

It was clear that the claimants did not trust ILUAs. They said that they are different to native title, that they water down Aboriginal people's rights and that they mean the extinguishment of native title. This led us to important discussions about the principles that might underpin Aboriginal participation in the proposed negotiations. Aboriginal people stated from the outset that they would not enter into any talks if extinguishment was going to be a condition of agreements.

While it was quite unclear until the end of the third statewide meeting if the NTMCs would support the idea of negotiations, it did become clear early on that people wanted to organise on a statewide basis to lobby on the 'big hard' issues that none of them could deal with easily at a local level. They had no mechanism to do so since previous efforts to form a land council for SA, which has been a long standing aim of many Aboriginal people in the State, had come to nothing. The first action that the NTMCs took together was lobbying Parliamentarians about amendments to the *Native Title (South Australia) Act 1994* (SA) which were before Parliament in the form of the *Native Title (South Australia) (Validation and Confirmation) Amendment Act 1999* (SA) (the 'Validation and Confirmation Bill'). The NTMCs nominated a lobby group which took the claimants' position to the Attorney General and Upper House Independents. In negotiations with the Attorney General they did gain some important concessions in that the legislation did not confirm extinguishment of native title on historic leasehold tenures, as had originally been proposed. However, their grief at the extent of other extinguishment in the legislation and at the racist agendas exposed to them in the Parliamentary debates removed any sense of achievement.

At the third statewide meeting the NTMCs decided in principle to participate in further talks to pursue the potential for a statewide settlement of their claims. They also decided to work on the structure of a new statewide organization – a united voice – to act on native title issues which are common across some, or all, of the groups and which cannot be resolved by local negotiating processes. This group, which as yet is not incorporated, is known temporarily as the Congress. We expect that this body, in some form, will ultimately be seated at the negotiating table.

Process at the statewide meetings

As we all know, no Indigenous person can speak for another's country – so the questions of who was going to be involved in any negotiations and how the negotiations could happen without breaching this law needed to be discussed by the NTMC members. As the groups faced the challenges of working together in ways that ensured nobody was speaking about or for another person's land, the need for protocols between the NTMCs and within the statewide meetings became clearer to everybody. The meetings involved all the NTMCs whose country is in South Australia, with Aboriginal people who live in vastly different landscapes from sandhills to mountain ranges to coast – even the Queensland coast! The claimants decided that respect for everyone and their different cultures and ways must be a priority.

The meetings were translated into Yankunytjatjara-Antakirinya, a western desert language, which was not only essential for some of the older participants, but also slowed discussion and complex presentations down, giving everybody time to think about what was being said. This meant that everybody felt they had a chance to understand what was being proposed. At one point, one of our meetings spent several hours discussing how the terms 'negotiation' and 'agreement' should be translated, as the interpreters realised they wanted to use the same Yankunytjatjara-Antakirinya term for both words. This produced a powerful discussion of the need to get concepts and meanings clear, and the value of having a process in which Aboriginal people can speak to governments in their own languages about country.

We learned that making use of diagrams and drawings was a way of helping people understand sometimes complex issues. The NTMCs also made much use of diagrams and models to present their thoughts and ideas about the issues for negotiation and structures for decision making. Just when we thought we were becoming 'expert' at using our circles and arrows to symbolise how the

NTMCs might work together and move into negotiations, one of the NTMC members, Mr Dean Ah Chee, produced his own diagram of what the negotiation process would look like ‘anangu way’. Later he painted it and it has been endorsed by the NTMCs as a logo for the Congress.

One of the big challenges we faced was ensuring that there was good two-way communication between native title (and wider Aboriginal) constituents and the ALRM Native Title Unit. We put a lot of effort into feeding people’s own words back to them, in ‘on the spot’ summaries during the meetings and in follow up meeting reports. We introduced regular newsletters and video newsletters for wider circulation – and found that every solution created new challenges, for example we then had to find ways to keep our mailing lists up-to-date. We also faced, and continue to face, the difficulties for the NTMC members who have to play the middle-man role in communications. Just how do we ensure that the NTMC members can get information out to their constituents – and back from their constituents and to the NTRB?

The other stakeholders

Another big challenge has come from the fundamental lack of understanding that the other stakeholders – the SA Government, the SAFF, and the SACOME – had about Aboriginal ways of life when they first started to talk about negotiating. When representatives of these groups met with the NTMCs at some of the statewide meetings, they started to get a better understanding about what the claimants saw as issues for negotiation and about how the claimants felt about the idea of negotiating.

Claimants were able to ask directly about the motives of these stakeholders’ in the negotiations, and make their own judgements about how genuine the stakeholders were. The process helped key players in the other organizations to understand that the ultimate authority on whether and how to proceed with negotiations rested with the NTMCs and not with the NTRB.

The learning about culture and traditions continues – and it is not just a one-way street as Aboriginal people are also learning about the mining and pastoral industries and government. Even though pilot negotiations about substantive issues only commenced in 2002, the process had by that time been working on the start of building better understanding between Aboriginal people and the wider society for two years. In 2002, with the start of negotiations on specific issues imminent, the ALRM, the SAFF, the SACOME and the government began to implement a program in which people from the various negotiating parties, including the NTMCs and peak bodies, meet and greet and exchange their perspectives (including in role reversal activities). This has proven to be a successful tool to set the stage for cooperative negotiation processes.

Making decisions

One of the challenges for the Congress when the proposal for statewide negotiations was presented to them in the second part of 2000, was actually making the decision about whether or not to negotiate. Understandably many of the NTMC members were nervous about making a wrong decision. In asking them to decide we came face-to-face with a long history of Aboriginal people being able to scapegoat someone else for past failures. Taking responsibility for actually making a decision rather than simply accepting someone else’s recommendation meant that the claimant groups would have to accept that it was their decision.

Given the legal complexities of native title, it is easy for claimants to abdicate this sort of responsibility to lawyers – many of whom reduce native title to winning or losing in a court-based battle and fail to understand the extent to which native title is always about on the ground realities. Some of the NTMCs wanted their lawyers present at all times during the statewide meetings (at great financial cost), and many lawyers would be happy to take-over, seeing themselves as experts in negotiation, native title and process. Yet that approach would have risked leaving out the very people whose rights the negotiations are about and who need to be shaping their own futures.

We aimed for a clear indication from the meetings that any decision about negotiations was informed – that people understood the decision they were making and its implications, whether they said ‘yes’ or ‘no’. It is easy to use a ‘majority vote’ style of decision-making, many Aboriginal meetings do, but we wondered if everyone really would know what they are voting for. There is also the ‘consensus model’ of decision making, which can allow a vocal leadership group to secure endorsement of whatever it has decided.

The approach we used was an ‘opt-in’ system. When matters reached a crucial stage, each NTMC withdrew into its own workshop sessions to debate the issues and consider its position. Each NTMC then reported to the whole meeting on its decisions and the reasons for them.

The questions we asked people to decide on were always framed ‘on the spot’ to reflect what had emerged as the key considerations in the preceding ‘plenary’ debates. Although we did distribute meeting agendas, and sometimes proposals for decision, in advance of the meetings, we were never in control of where the meetings would actually go. Since we have been aiming for a claimant centred process, we considered our lack of control to be a good thing.

On the closing day of a historic meeting at Coober Pedy in October 2000, which was scheduled as the meeting where the NTMCs would decide whether the proposal for statewide negotiations had a future, the questions that the NTMCs were asked to decide on were framed as follows:

- Do you want to go ahead with the development of processes and procedures for negotiation? If yes, nominate your representatives for the Congress Working Group.¹³
- Should we call this a ‘South Australian Settlement Agreement’ rather than an ‘ILUA’?
- Your group needs to agree that the Congress Working Group is a working group and is not authorised to make significant decisions – it will report its recommendations to Congress.
- What will be the role of the Native Title Unit (of ALRM)?

In debates within their own workshops and in reporting back to the full meeting, the NTMCs rose to the challenge of making the hard decisions for the future.

The workshops were a powerful mechanism for decision making. They encouraged all of the NTMC members to have a say, at least within their group, and allowed the groups to work through statewide issues in the context of their own local issues and concerns. In the report-back sessions all the NTMCs bore ‘witness’ to each other’s considerations and decisions. As is evident from the footage in the video newsletters about the statewide meetings, this decision making process was a powerful portrayal of the meaning of ‘informed consent’. After the decision at the Coober Pedy meeting to stick with the statewide negotiation proposal, one NTMC member described it as “not leading us like sheep, but forcing us to make *our* decision”.¹⁴

Structural outcomes and future action

The statewide meetings of the NTMCs in 2000 allowed the NTMCs to make an informed decision about whether to pursue negotiations with the Government, farmers and miners, and to decide on a structure which they could use to develop and direct their role in the negotiations. It allowed the NTMCs to be accountable to each other in their decisions and to show their support for each other and for the negotiations. Through the meetings the ALRM has developed a good process for supporting Aboriginal people to make informed decisions.

However, we have not yet secured our achievements through the proper resourcing of the Congress and the NTMCs as the drivers of the negotiations process. The full budget prepared for the process anticipates facilitating training, organisational and political development, and building industry knowledge to ensure that the NTMCs are able to negotiate on their own (and their claimant communities’) behalf, and that they can monitor and enforce any agreements achieved.

Supporting submissions to the Government for funding have explained the longer term orientation of this approach as one which targets substantive Indigenous empowerment. It moves beyond a series of short term ILUA deals negotiated by experts, to mechanisms for achieving rights, responsibilities, community development, economic opportunity, social and institutional reform and coexistence on the ground. Inevitably, the budget required is substantial. It is certainly beyond the expectations of those who anticipated that claimants would only need resources to fund lawyers and other technical experts to negotiate, plus a few consultative meetings.

Perhaps the biggest challenge in achieving a secure, sustainable and beneficial outcome from the South Australian approach remains convincing funding bodies about the practical realities of doing this work. While all the stakeholders are keen for negotiations to proceed, it has been impossible to secure the funds for the process to occur in a way that would allow effective capacity building for the implementation of any agreements that are reached, or that would develop the Congress as an effective agent of Aboriginal self-determination and governance in South Australia.

Funding this process has been problematic from the start and it would not have got started at all without the former SA Liberal Government's financial support.¹⁵ Initially the State agreed to fund the process until December 2000, which allowed the statewide meetings to occur, and allowed the NTMCs to come to a decision to pursue negotiations, to start to develop the Congress, and to prepare a longer term budget. However, it quickly became clear that funding, or the lack of it, was going to be an issue that would jeopardise the process continuing.

Early in 2001 the ALRM Native Title Unit started a lobbying campaign, writing to many state and Federal Members of Parliament including the Prime Minister's Office. We had meetings with many politicians, some of who agreed to support our quest for money. In SA we met with Government ministers, the opposition, the Democrats and Independents. All expressed support for the statewide negotiations.

In mid July 2001, ATSIC announced it would assist the process and committed \$400,000 to keep the negotiations alive. Since then the negotiations have proceeded at a pilot scale involving three NTMCs, principally funded by the SA Government with ATSIC contributions to claimant costs. Thus the process is proceeding, but the scope of our vision for rebuilding South Australia 'with native title built in', is far from guaranteed.

Conclusion: getting the scale of accountability and governance right

It is quite clear that the process of negotiating a just and sustainable resolution of native title issues is best addressed through the informed involvement of native title holders. It is less clear how that can be achieved in the current climate. It is also clear that many vested interests, including some that are deeply entrenched in Indigenous domains, are willing to see native title reduced to a set of legal issues – without properly acknowledging that the content of native title, and its implications for Indigenous approaches to questions of governance, empowerment and negotiation, are inescapably within the domain of those people who speak directly for country.

Litigation of claims must often proceed as a basis for securing a place at the negotiation table. But support for expert-centred processes at the expense of claimant-centred processes is putting things the wrong way around. Existing Indigenous power structures and institutional arrangements – in the form of ATSIC, NTRBs, and community organizations – often reflect the problems and legacies of whitefella ways of operating. Emphasising 'national' strategies risks cutting off the 'bottom-up' development of strategies to reconstitute the foundations of Indigenous governance and self-determination in The Dreaming. It also risks replacing the participatory demands of The Dreaming with the representative processes of the colonisers.

In South Australia, we seem to have built a new scale for doing things. The opportunity that opened when the former State Government talked about a 'statewide framework agreement' has allowed the

ALRM to bring together all native title claimant groups across the State to decide for themselves how they want to be organised, how they might work together, and where they want to take things. The Congress potentially represents a new alternative ‘representative body’, one whose structure makes it accountable to native title communities through the NTMCs they have established. In contrast, the ALRM is structured to be accountable to the residential communities of Aboriginal people who elect its board members at annual meetings – a structure which reflects the significant role the ALRM had established in criminal law, human rights representation, and advocacy prior to its designation as an NTRB.

Through their action in setting up the Congress, the NTMCs have constructed two new scales for Aboriginal politics in South Australia. First, they have reasserted the primacy of their claim-based domains and organization. This is consistent with the basic principles of The Dreaming and ensures that local issues are dealt with locally. Local agreements, even if they are negotiated under principles and procedures which apply across the State, will still be negotiated by the locals for the locals.

Second, the NTMCs have constructed a new scale of Indigenous self-governance at the whole-of-state scale. This brings them into a negotiating relationship with the State and major industry groups in which they decide, they do the driving, and they see themselves in as equals. This, it seems to us, is a unique situation in Australia. Elsewhere we see the notion of treaty negotiations as largely abstract, chaotic and legalistic, and as lacking accountability to country. The Congress provides a concrete arena for negotiation of the range of issues that any treaty-making process must address. It offers the framework of Indigenous cooperation that any treaty-making process must develop. It builds the understandings, knowledge and skills that claimants need to implement whatever is negotiated. It also tackles the key question of how The Dreaming, and not whitefella structures, should frame the whole process.

In many ways, the construction of new institutions and scales of governance and empowerment is the urgent task of native title. It is unfortunate and reprehensible that governments and their agencies hesitate to come to terms with the costs and needs of this process. If we were to talk about ‘natural’ disasters removing the infrastructure of local governance of White Australia (for example, town halls, libraries, schools, roads, bridges et cetera) we would very quickly see the mobilisation of massive federal and state funds to support community efforts to rebuild. But when we talk about the very unnatural disaster of colonial repression, genocidal frontiers, and systematic denial of rights, we find even ostensibly ‘progressive’ groups want to turn to experts to solve the ‘problems’.

We have started working instead in South Australia to rebuild the capacity of Indigenous people to be self determining and to hold each other accountable in parallel under customary law and contemporary governance institutions. We hope that we contribute to an alternative future that just might make more sense to people on the ground.

¹ (2002) 191 ALR 1.

² For an early comment on this tendency, see Bartlett, R. 1996. Dispossession by the National Native Title Tribunal, *Western Australian Law Review*, 26, pp.108-137.

³ This paper was prepared for presentation at the NTRB conference *The Past and Future of Land Rights and Native Title*, held in Townsville, August 2001 and reflects experiences up to that time. It has been selectively updated in recognition of some key subsequent events but no attempt has been made to update the detail related to progress in the statewide negotiation process.

⁴ Indigenous Land Use Agreement. This term is awkward and inaccurate, as the ILUA provisions of the Act are largely orientated towards dealing with what non-indigenous interests want to use native title lands for.

⁵ O’Faircheallaigh, C. 2000. *Negotiating Major Project Agreements: the ‘Cape York Model’*, AIATSIS Research Discussion Paper 11, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

⁶ O’Faircheallaigh himself is explicit in saying that the Cape York Model is only one of a number of approaches to negotiation that should be debated in terms of their effectiveness for Aboriginal people (O’Faircheallaigh op. cit, p.2). See also C O’Faircheallaigh, in prep, Accountability in the negotiation of indigenous mineral agreements, forthcoming as a chapter in a book on the issue of accountability (details unknown), kindly provided in draft form by the author.

⁷ O’Faircheallaigh 2000 op. cit. See also O’Faircheallaigh, C. 1996. *Making Social Impact Assessment count: a negotiation-based approach for indigenous peoples*, Centre for Australian Public Sector Management, Griffith University, Brisbane; O’Faircheallaigh,

C. 1999. Process, politics and regional agreements, in *Regional Agreements – key issues in Australia: Vol 2 Case Studies*, M. Edmunds (ed), AIATSIS, Canberra, pp.343-362.

⁸ See for example, Richardson, B. J. and D. Craig, et al. 1995. *Regional Agreements for indigenous lands and cultures in Canada*, North Australia Research Unit, Darwin; Ivanitz, M. 1999. The emperor has no clothes: Canadian Comprehensive Claims and their relevance to Australia, in *Regional Agreements – key issues in Australia: Vol 2 Case Studies*, M. Edmunds (ed), AIATSIS, Canberra, pp.319-342.

⁹ We acknowledge the efforts of the Cape York Land Council as an exception here, but also note the hostility of several Queensland governments to any cooperation with the CYLC's regional approach. Similarly, regional efforts in Central Australia and Western Australia have been met with hostility for some time, although prospects are much more promising under current governments than they have previously been. Regional approaches in areas of New South Wales have met with government inaction and hostility. In Victoria, there has been some consideration of statewide processes by the State and the NTRB, but this remains rather preliminary in our understanding.

¹⁰ Royal Commission on Aboriginal Peoples, 1996. *People to People, Nation to Nation: highlights from the Royal Commission on Aboriginal Peoples*, Minister of Supply and Services, Ottawa.

¹¹ In drawing attention to conflicting strategies of the former SA Government, we do not wish to suggest that the Government's offer to negotiate a settlement of native title claims was not genuine. We consider that the Government acted in genuine good faith, but we also want it to be clear that achieving and maintaining political support for Aboriginal rights in SA is not automatic or straightforward. Given the finely balanced economic and electoral situation that the incoming Labor Government has found itself in, the challenges of gaining and maintaining such support may prove to be little different in future.

¹² "However, during the course of the trial, counsel for the State announced that he had been instructed to inform the Court that the State would no longer pursue that argument." (*De Rose v State of South Australia* [2002] FCA 1342 (1 November 2002) at [237]). In the outcome of this case, Justice O'Loughlin found that a determination of native title was potentially available to the claimants since native title had not been extinguished by the tenure history, but that the claimants had lost the required connection to the claim area in the period since 1978 when the last of the Aboriginal stockmen left the property. Here we can only reflect on the wisdom of Justice McHugh's words in *Western Australia v Ward* [2002] HCA 28 (8 August 2002) at [561], "It may be that the time has come to think of abandoning the present system, a system that simply seeks to declare and enforce the legal rights of the parties, irrespective of their merits. A better system may be an arbitral system that declares what the rights of the parties *ought to be* according to the justice and circumstances of the individual case." [original emphasis] The comments seem equally pertinent to the *De Rose Hill case*, even though the judgement against the claimants hinged not on detailed examination of historical and current tenures for evidence of extinguishment, as in the *Ward case*, but on a detailed examination of the historical and current evidence for connection, or lack of it, to that particular part of their country encompassed by the station.

¹³ A Working Group with two representatives from each NTMC had earlier been proposed by this meeting as the mechanism for considering how a statewide organisation representing the NTMCs would be structured, and its budget needs.

¹⁴ The ALRM engaged an independent consultant to review the process and the role played by the Native Title Unit. A report has been published and is available at <http://www.iluasa.com/alm.asp#Publications> (Morrison, J. 2001. *Uniting The Voices: Independent Review of Aboriginal Legal Rights Movement Native Title Unit's facilitation of decision making by South Australian Native Title Management Committees, July-October 2000*, Native Title Unit, Aboriginal Legal Rights Movement, Adelaide).

¹⁵ Other stakeholders have been receiving funding from the Federal Attorney-General's Department, but at the outset the ALRM was unable to obtain Federal funding other than its ATSIC allocation. This allocation was already tied up in the *De Rose Hill* litigation, the negotiation of future acts, and routine claim management. Until very recently there was nothing to spare for a project like this.

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