

# **The Political Economy of a Treaty: Opportunities and Challenges for Enhancing Economic Development for Indigenous Australians<sup>1</sup>**

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## **ABSTRACT**

This article focuses on the issue of Indigenous Australian property rights and a Treaty. Using a political economy framework, I examine three issues: What mechanisms might provide more resource rights to Indigenous Australians? How effective have treaties with Indigenous people in the Torres Strait and New Zealand been? And what are some of the relevant issues that these two cases raise? I highlight the national benefit that might result from using 'a treaty framework' to enable sustainable Indigenous economic futures, while also warning about some of the hurdles that Australian political economy and institutions might present.

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## Introduction

Indigenous Australians, an estimated 460,000 people, represent 2.4 per cent of the Australian population and are clearly disadvantaged as a group. Early analysis of 2001 Census statistics shows that average individual Indigenous income is 67 per cent that of other Australians, that the Indigenous employment rate is similarly only 69 per cent of that for non-Indigenous Australians, and that the home ownership ratio is an even lower 45 per cent. These differentials are exacerbated for Indigenous people by higher dependency ratios (owing to the relative youthfulness of the population), greater rural and remote residence, and little inter-generational wealth transfer. This economic disadvantage has many explanations, one of which was a destructive colonial encounter resulting in the alienation of land and resource rights to the non-Indigenous colonising state, the British Crown, and then to the Australian state.

Rectification of relative Indigenous disadvantage will be a complex and long-term process, an observation I make knowing that how little solace it provides to marginalised impoverished people today. Many factors cause and perpetuate this disadvantage. First and foremost is the historic exclusion of Indigenous Australians from the mainstream provisions of the Australian state and resulting legacies — shortfalls in education, employment, health, housing, and so on. Second, Australia's political economy links much fiscal support to voting strength and political and commercial influence, rather than need. Third, Australia's fiscal federalism allows cost shifting between different levels of government and requires little accountability for expenditure on the basis of need. Fourth, the geographic location of a significant proportion of the Indigenous population results in disproportionate remoteness from the commercial heartland of 21st century Australia. Fifth, the historic and intergenerational impacts of welfare dependence, relative poverty, and state dependence perpetuate a cycle of poverty and marginalisation. Finally, and paradoxically, there is the resilience of Indigenous cultural values in situations that were historically beyond the colonial frontier; such values currently preclude standard forms of market engagement.

I cannot address all these very complex issues here. Rather, I make two broad observations. First, efforts by the Australian state in the last 30 years to address Indigenous economic disadvantage have been largely inadequate and successes have been rare (Altman 2000). I have recently argued that this can be partially explained by an absence of appropriate governance for enhanced Indigenous economic development (Altman 2002). Second, in the last 30 years there has been a significant focus on the issue of land restoration. From an Indigenous perspective this has been a big success story for Indigenous affairs policy, with an estimated eighteen per cent of Australia now restored to some form of Indigenous ownership (Pollack 2001) and constituting what can be referred to as 'the Indigenous estate'. However, land rights and native title have not come with commercially significant and legally recognised resource

rights — restoration of rights, to date, has only been partial, even in the aftermath of native title law. Further, the majority of Indigenous Australians have not been able to claim back their traditional or historic lands, because according to the law these have now been alienated to private interests and can only be retrieved by purchase.

My focus in this article is the important issue of property rights in commercially valuable resources, termed here ‘resource rights’. Using a political economy framework (that combines economic argument with a recognition of the role of relative power relations), and the idea of ‘treaty’, I examine the following three issues:

- What mechanisms might operate as leveraging devices in the Australian context today to ensure a more level resource rights playing field?
- How effective have treaties been elsewhere to facilitate restitution of resource rights to Indigenous peoples? I limit my comparative analysis to two case studies, north and south: the Torres Strait Treaty and the Treaty of Waitangi.<sup>2</sup>
- What are some of the relevant issues that these two treaty-based cases raise for Indigenous Australians today?

A theme that runs throughout this article is ‘opportunities and challenges’. I end with a somewhat open-ended conclusion that highlights the national benefit for all that might accrue from using ‘a treaty framework’ to negotiate means to facilitate sustainable and equitable Indigenous economic futures, while also noting some of the hurdles that Australian political economy and institutions might present for such optimistic futures.

### **Current Leveraging Devices**

Over the past 35 years, during the modern policy era that began after the 1967 Referendum, several laws have been passed that restored land to Indigenous Australians with a proven interest in those lands. As a general rule, land rights have only been granted over areas that were unalienated (that is were owned by the Crown) or already owned by Indigenous people. Also, as a general rule, these land rights have not extended to the sea beyond low water mark, or to resources like minerals or commercial fisheries, which remain owned by the Crown (that is by the Commonwealth or States and Territories). There are some rare exceptions: for example, in New South Wales, the Crown does not own all minerals. Instead, under the NSW *Aboriginal Land Rights Act* (1983), ownership of some minerals is vested

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<sup>2</sup> Bear in mind that as recently as 1973 the Torres Strait might have been transferred to Papua New Guinea (Rowse 2002, pp. 340–43) and as recently as 1900, New Zealand, with its 1840 treaty, might have been an Australian state.

with Aboriginal land owning groups. More commonly, however, the process right of consent provided in land rights laws allows some royalty or resource rent sharing between the Crown, the private sector, and Indigenous interests. This is most clearly the case under Northern Territory land rights law, where in addition to the payment of the equivalents of mining royalties to Indigenous interests, there is also a provision for negotiated payments by resource developers to traditional owners of land. Everywhere though (except in NSW) the Crown maintains ownership of minerals and as a general rule *land* rights are not associated with *resource* rights.

The Mabo High Court judgment (1992) and the subsequent *Native Title Act 1993* (NTA) largely continued land rights statutory practice. The right to negotiate provisions of the NTA are just that: a means to negotiate. The provisions grant a right to a *process* but not a right to a *result*. I have argued elsewhere that this is a weaker process right than the strong process right available under land rights legislation to lever benefits from resource developers (Altman 1994). However, in a number of situations in the post-NTA era and under considerable legal uncertainty, significant compensation agreements have been negotiated, most notably the Century Mine Agreement some five years ago in 1997. The NTA clarified one property issue, but left two unresolved. Under s. 211, the NTA clarified that customary use rights in resources were a common law right, a view that in the aftermath of *Yanner v Eaton* (1999) appears unchallenged as a general rule. The status of commercial property rights in resources was more ambiguous in both Mabo and the NTA. Two recent High Court judgements suggest that native title rights do not automatically confer commercial resource rights. First, the High Court decision in the *Commonwealth v Yarmirr* (2001) appeal precludes exclusive native title access rights offshore.<sup>3</sup> Second, the recent High Court decision in *Western Australia v Ward* (2002) indicates that native title rights in minerals or petroleum are extinguished if vested with commercial interests.<sup>4</sup>

A fundamental economic problem with land rights and native title laws is that they lack mechanisms for facilitating the redistribution of commercially valuable resource rights from the state (or private interests) to Indigenous interests. In other words, disadvantaged Indigenous people need to purchase such valuable rights like anyone else, either from the state or on the market. This focus on commercial rights is not intended to diminish the significance of Indigenous customary rights, it is just that the latter do not seem to be currently challenged because they are not perceived to have

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<sup>3</sup> The rights unsuccessfully sought in *Yarmirr* were to exclusive possession to territorial 'sea country' not to marine species, which would be difficult given their mobility.

<sup>4</sup> In an opinion piece 'Some surprises in recent native title decisions' in *ANU Reporter* 30 August 2002, Jennifer Clarke makes the point that in NSW this decision may not apply because 'the device of asserting Crown property to minerals has not been used except for some coal'. As noted above Aboriginal ownership of some minerals has been given statutory recognition in State land rights law.

market value. This situation might change though if species harvested in the customary economy suddenly became commercially valuable (Altman & Cochrane 2002).

An emerging issue is whether the NTA framework might facilitate the conversion of customary resource rights to commercial rights. This is especially significant when the same marine species might have customary and commercial applications, as in fisheries. There are certainly precedents for this to occur in Australian waters (see Torres Strait Treaty discussion below), although in situations where commercial rights have been conferred by the state on private interests, there seem to be few mechanisms to resume and then divest existing commercial rights to Indigenous interests, primarily because the significant financial resources to buy-back such commercial rights are not available.

Indeed, in most situations, commercial rights currently have precedence over mixed Indigenous customary and commercial interests. The following example, based on my fieldwork in central Arnhem Land in 2001 and 2002, demonstrates this clearly. In the Maningrida region, commercial barramundi fishing in river mouths adversely impacts on the Maningrida community's commercial interest in a sports fishing catch-and-release joint venture, as well as on customary fishing activity. The commercial fishers are only interested in barramundi and other fish netted, termed by-catch, are discarded and wasted. Local Aboriginal residents find such waste offensive. Coastal Licence provisions of the Northern Territory *Fisheries Act* allow Aboriginal customary harvesting of barramundi, but specifically exclude their commercial participation in this fishery. Commercial licences are scarce and expensive and even if purchased by local people do not allow exclusion of other commercial interests. The value of the joint venture and Aboriginal customary fishery currently exceeds that of the regional commercial barramundi fishery and has far greater potential for sustainable growth — indeed the commercial fishery has the potential to deplete the large fish on which the sports fishing venture is dependent, but local people have no means to stop it.

There are still legal uncertainties under the NTA framework that might see commercial resource rights vested in Indigenous stakeholders. One is in situations where commercial use conflicts with customary use. Another is in situations where new forms of commercial property might be created, an issue I return to later. Finally, there is the important issue of financial compensation for historic extinguishment of native title. While such compensation would not automatically provide resource rights, in particular circumstances it might provide a means to trade significant compensation dollars for property rights in commercially valuable resources.<sup>5</sup>

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<sup>5</sup> This might yet prove to be an important intergenerational issue and possibilities may exist to negotiate now for future resource rights for Indigenous interests to offset Commonwealth and

## Case Studies: North and South

In discussions about economic development opportunity leveraged by treaties (or so called ‘political solutions’), Indigenous Australians tend to look to North America to the situations of Indigenous nations (see, for example, Aboriginal and Torres Strait Islander Commission 1995). I intend to look briefly at two treaties closer to Australia that might provide useful pointers to how treaty-based levers might be used. I choose these cases because I have worked in these regions and because these precedents have greater relevance to Australia’s political economy and legal system.

### *The Torres Strait Treaty*

The Torres Strait Treaty between Australia and Papua New Guinea was completed in 1978 and ratified in 1985. The treaty defines the areas of jurisdiction for marine species and describes the Torres Strait Protected Zone, which is managed by the Protected Zone Joint Authority (PZJA). The primary purpose of the Zone is to acknowledge and protect the traditional way of life and livelihood of Islanders, especially their rights to customary fishing and to free movement. While Islanders are not signatories to the Treaty, the Commonwealth is charged with representing their interests. However, although the Treaty is designed to protect customary fishing rights, it is also charged with making optimal use of commercial fisheries (Altman, Arthur & Bek 1994).

The Queensland *Torres Strait Fisheries Act* (1984) which derives from the Treaty embodies a broad goal of enhanced Islander economic development through increased participation in commercial fishing (Arthur 1998). Licensing arrangements are designed to encourage Islander participation in commercial fisheries. Islanders can fish commercially under an arrangement called ‘community fishing’, which involves a waiving of the standard license requirements (Altman, Arthur & Bek 1994, p. 12). However Arthur (1998) argues that the term ‘community fishing’ understates the commercial nature of the activity.

Islanders have had the opportunity to use the Treaty as a lever in negotiations with the Commonwealth Government to earmark a proportion of fisheries to Islanders (Altman, Arthur & Bek 1994). Because of the Treaty and its provisions, governments at the Queensland and Commonwealth levels are bound to negotiate with Indigenous communities in the region to a degree not evident in other parts of Indigenous Australia. Arthur (1999, pp. 60–1) argues that the Torres Strait Treaty has promoted a culture of regionalism and agreement-making in the Strait (see also Arthur 2001). The Strait is the most Indigenous region of Australia (80 per cent of

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State contingent liabilities, while avoiding current political conflict with existing resource users. In essence such negotiations might involve doing a deal for the next generation and beyond.

the regional population) and even though the Treaty is not with Islanders, it raises the profile of the region and its people.

The Torres Strait Treaty is not without tensions, even within such a relatively well-defined and homogeneous region. One problem is the unequal distribution of resources within Torres Strait. For example Indigenous commercial fishers living on the western islands earn about twice the income per head per year of those on the eastern islands because they have better access to marine species that sell for much higher prices (Altman, Arthur & Bek 1994, p. 12). Another issue is the authority that the PZJA has to monitor and manage the customary fishing for turtles and dugong, currently limited to a sustainable harvest of 2,600 turtles and 860 dugongs per annum. These limits may override customary native title rights and options to commercially harvest these species (even within the set limits) are illegal. Finally, even though the Treaty has reserved three very valuable prawning licenses for Torres Strait Islander people, Islanders have found it difficult to participate in this most lucrative component of the regional commercial fishery. This is partly because significant capital is required to invest in prawn trawlers and because this is a highly specialised and extremely commercially competitive fishery. Also, to be commercially viable, trawlers need to operate in other northern prawn fisheries where such concessions have not been provided.<sup>6</sup>

The Torres Strait Treaty exemplifies the complex relationship between, in this case, sea rights and commercial rights in marine resources. Commercial property rights will be influenced by customary or statutory sea ownership, species origin, customary and historical utilisation of species, and modern commercial fisheries effort (Altman, Arthur & Bek 1994, p. 17).

### ***The Treaty of Waitangi***

The British Crown and 539 Maori chiefs entered into the Treaty of Waitangi, beginning in 1840. In 1975, the Waitangi Tribunal was established after the passing of the *Treaty of Waitangi Act* (1975). The Tribunal's brief was to investigate claims made by Maori that they have been adversely affected by Crown breaches of the Treaty. At first, the Tribunal could only investigate breaches occurring after 1975. However, in 1985, the Tribunal's mandate was greatly enhanced by statutory amendment allowing it to address Maori grievances dating back to 1840. In 1988 the Tribunal's powers were greatly increased again with respect to Crown forest land and State Enterprise lands. The Tribunal could now order, rather than merely recommend, that land be reacquired by Government at current market value and

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<sup>6</sup> This raises the issue of the potential for trade in inalienable property. For example, Torres Strait Islander interests should be able to use these commercial property rights in joint ventures. To ensure intergenerational equity, such trade could be limited to stipulated time periods.

returned to Maori claimants (Ward 1999, p. 35). As Ward (1999, p. 29) notes, the redress of historical grievances came to be seen in terms of the goal of recovering an economic base for each Maori tribe. The Tribunal's approach is to 'support packages which restore a lost economic base bearing in mind the extent and nature of the loss and the current needs of the community' (Williams 2001).

The Treaty of Waitangi's Second Article (Article the Second) has proven to be the key lever in the modern era for negotiating both resource rights and compensation from the Crown. In this Article, the Crown agreed in 1840 to confirm and guarantee the Chiefs intergenerational, exclusive, and undisturbed possession to their lands and its resources, in return for vesting of radical title, or absolute ownership, with the Crown. This Article has been used, to simplify considerably, as the lever in negotiations over resource rights and compensation that have intensified considerably over the last fifteen years. I concentrate here on only two examples, resource rights in commercial fisheries and settlement of historical grievances.<sup>7</sup>

In 1986, the Individual Transferable Quota system (ITQ) was introduced to regulate all commercial offshore fisheries in New Zealand. The ITQ granted new rights to catch certain numbers of fish, by species, within the sustainable levels of total allowable catches (or TACs). As Memon and Cullen (1991, p. 81) note this management system is based on the creation of tradeable individual property to ensure biological sustainability and economic efficiency — it aims to avoid 'Tragedy of the Commons' resource depletion associated with common property (see Ostrom et al. 1999). Tradeable quotas represented a new form of property and Maori were able to effectively use the leverage provided by Article the Second of the Treaty as a means for negotiating access to resource rights in commercial fisheries.

Initially, the Maori 'right to negotiate' was recognised in the *Maori Fisheries Act* (1989), which established a new institution: the Maori Fisheries Commission. This Commission was empowered to negotiate on behalf of all Maori with respect to rights in fisheries resources. In the subsequent negotiated fisheries settlement of 1992 (embodied in the *Treaty of Waitangi (Fisheries Claim) Settlement Act* 1993), Maori received 23 per cent of the commercial sea-fish quota, with the figure coming close to 50 per cent when new species were incorporated. This win did not come without concessions on the part of Maori, including agreeing to relinquish future treaty claims in respect to all commercial sea-fisheries — this was a once-and-for-all fisheries settlement (Ward 1999, p. 48).

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<sup>7</sup> Another significant resource is forestry. In 1988, as part of the New Zealand Government's debt reduction strategy, the cutting rights to half a million hectares of Crown plantation forest was sold, and the land on which it grew was licensed. In the case of Maori successfully claiming such land, the Crown was obliged to return the land and pay compensation, and there is a 35 year termination period to allow harvesting of forestry resources (Ward 1999, pp. 38–39). These provisions are incorporated in the *Crown Forest Assets Act* (1989).



In opening possibilities to settle historical grievances in the early 1990s, a large number of claims was lodged with the Waitangi Tribunal. Concerned by this flood, in 1994 the Government announced a plan to offer a 'fiscal envelope' approach to quickly settling all Treaty claims. A supposedly non-negotiable cap of \$NZ1 billion was earmarked for settlements of all claims over a ten year period. Maori were unhappy with this unilateral approach, lack of consultation, and the proposal to preclude any Maori ownership interest over rivers, sub-surface minerals, and natural resources in the settlement process. Ward (1999, pp. 175–76) believes that the \$NZ1 billion is not enough to provide fair settlements for all tribes — not only do claims continue to be lodged with the Tribunal at a rate of 70 per year, but the Tainui and Ngai Tahu settlements alone, admittedly large tribes (or 'iwi'), already total nearly \$NZ350 million.

The challenges of ensuring outcomes from the two initiatives examined here have been immense, with issues of equitable distribution of fisheries benefits and the quantum and distribution of compensation looming large. In the fisheries settlement, for example, the Crown emphasised that all Maori should benefit, and that fishing quota distribution should occur through 'iwi', or tribal, entities. However, these social institutions are not clearly defined. Responsibility for distribution was devolved to the Maori Fisheries Commission, which is largely made up of representatives of iwi. The Commission created models based on distribution of fish to the great disadvantage of tribes with large populations and limited coastlines. Further, urban Maori who no longer have strong ties to iwi have felt hard done by, arguing that they represent genuine communities who wish to receive their quota directly and be recognised as a form of iwi. The High Court however, found that the 'iwi' in the *Treaty of Waitangi (Fisheries Claim) Settlement Act* (1993) refers to 'traditional iwi'. As Ward (1999, p. 51) notes, the basis on which fishing quota are permanently distributed will have significant ramifications for the rights of all Maori under the Treaty of Waitangi.

On compensation for historical grievances, the Tribunal's process emphasises *reparation* rather than full legal *restitution* (or the value of the property at time of loss plus compound interest since). Because full restitution would be extremely expensive, the state views it as politically unpalatable to the majority of New Zealanders. Reparations are cheaper because they only seek to restore some of the lost economic base. The Tribunal aims to orient settlements towards the future rather than past, emphasising that the Crown's primary obligation to Maori under the Treaty was to promote their future survival and well-being (Ward 1999, p. 33). However, it is still unclear what criteria should be used in considering appropriate quantum and form of reparations in future settlements. While settlements made to date provide important precedents, it is not obvious how new claims can be compared to current negotiated outcomes. Ward (1999, p. 174) asks 'is the *area* of land lost during colonisation the

main criterion? Or the number of people affected, and hence the per capita area remaining? Or the degree of coercion or manipulation involved in the taking?'

It was mistakenly believed in the mid-1980s that historical land grievances could be addressed and compensated relatively easily. One of the biggest difficulties was the proviso in the 1975 legislation (left unchanged in 1985 amendments) that any Maori person who believed they had been injured by Crown actions in breach of the Treaty could lodge a claim. This led to a flood of unrelated and sometimes conflicting claims. There was, and still is, no requirement on Maori to '... constitute properly representative and accountable bodies charged with preparing claims, having them researched, presenting a common view to the Tribunal, and negotiating remedies with government' (Ward 1999, p. 31).<sup>8</sup>

### **Some Comparative Issues for Indigenous Australians**

The two examples of 'overseas' Treaties provided here obviously have their own particular histories and political contexts. Nevertheless, they raise some comparative issues that might be instructive for Indigenous Australians in the 21st century.

The triggers for a better resource rights deal for Indigenous people in both cases have been the formation of new laws and new property rights, which has meant that although the Crown may have had to forgo future income streams, it has not had to pay directly to acquire rights for Indigenous interests. The exception has been the few settlements negotiated under the fiscal envelope framework in New Zealand. Interestingly though, as a general rule it has been hard negotiation rather than the courts that have delivered beneficial outcomes based on the Treaty of Waitangi, as O'Regan (2002) highlights.

Another feature of these treaty-linked resource agreements and settlements has been their negotiation with relatively geographically discrete and demographically significant groups (Torres Strait) or with neatly-defined and demographically significant social entities (iwis such as the Tainui and the Ngai Tahu). In the Torres Strait case, it is noteworthy that Islanders account for about 80 per cent of the regional population, while in New Zealand, both Ngai Tahu (39,000 members) and Tainui (12,000 members) rank among the seventeen iwi with populations exceeding 10,000 in the 2001 Census (Statistics New Zealand/Te Tari Tatau 2002).

Also critically important in expanding resource rights in fisheries (and also in forestry) has been Maori political mobilisation under the auspices of the Treaty of Waitangi to negotiate for an economic stake in commercially valuable industries. This strategy is

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<sup>8</sup> This is in marked contrast to Australia where almost all negotiations must be undertaken by incorporated Aboriginal representative organisations stipulated by laws.

easy to recommend, but difficult to implement without a degree of government support. For example, in Australia a state-driven reform agenda is looking to establish new property rights in onshore and offshore waters. With Indigenous Australians owning a significant proportion of the continent and its coastline, it would seem self-evident that a proportion of any new property rights in water would be hypothecated (or reserved) for Indigenous interests. It is far from clear if that is the intent of government policy, or whether proposed reforms are merely to protect the interests of existing users. Similarly, there are potential new forms of property (like carbon credits) and associated future markets where Indigenous interests could make legitimate claims and nationally significant contributions.

Gaining exclusive property rights can be difficult, however, as the following case demonstrates. In 2001, a diverse group including the Northern Land Council's Caring for Country Unit and the Bushfires Council of the Northern Territory developed the Arnhem Land Fire Abatement Project for consideration by the Australian Greenhouse Office (AGO) under its Greenhouse Gas Abatement Program. The project aims to deliver 300,000 tonnes of measured carbon abatement per annum that might be commercially tradeable after 2008 if Australia ratifies the Kyoto Protocol. However, the AGO claimed that were the project to proceed with Commonwealth support, then property rights in tradeable carbon would need to be vested with the Commonwealth. Unless such new commercially valuable property rights are vested with Aboriginal interests, it is unclear what incentive they would have to continue abatement after 2008 (Altman 2001).

Distributional difficulties with the Treaty of Waitangi also resonate with some recent Australian experience in the post-land rights and post-native title eras. In particular, in the divesting of newly created resource rights there are always Indigenous winners and non-winners. The divesting of newly acquired fishing quota in New Zealand has left urban-based groups potential non-winners.<sup>9</sup> In Australia, it is possible to envisage provision of commercial fishing licenses in some situations, as in the Maningrida case discussed above, but even in such remote situations identifying all individual beneficiaries could be difficult. Such problems are far more pronounced where there has been longer and more disruptive contact history. McAvoy (2002, pp. 3–5) outlines a case exemplifying the complex problems that might arise in such contexts. Some people in NSW were removed from forested areas and resettled in coastal areas. These people had not traditionally relied on fishing for their subsistence, but came to develop economic reliance on coastal resources. Because governments

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<sup>9</sup> It has also led to an emerging debate about whether *iwi* (people, tribe) or *hapu* (sub-tribe) are the appropriate social institutions to hold resource rights or receive compensation an issue first brought to my attention in discussions with Jo Diamond, a Maori doctoral student at the ANU, and raised in a recent workshop paper by Sissons (2002). These debates are not dissimilar to those about the exact membership of traditional owner and native title groups in Australia.

encouraged Indigenous reliance — commercial and domestic — on marine resources in some areas, it can be argued that it is now inequitable to exclude those same Aboriginal people or their descendants from commercial and customary fisheries out of concern about species sustainability. But precisely this is occurring.

A related distributional issue is intergenerational equity. Treaties are relatively rigid agreements and so relatively difficult to amend as circumstances change. A treaty has the sense of being a formal conclusion and ratification of an agreement between peoples or between a group of people and the state. In New Zealand (and also in North America) most treaties include a requirement for the extinguishment of any further claim: the state is trading beneficial provisions for future certainty. In New Zealand, there has been opposition to once and for all settlements. In the 1994 Tainui settlement for \$170 million, a ‘relativity clause’ was inserted to ensure that if the fiscal envelope expanded in the future beyond \$NZ1 billion, Tainui would be eligible for seventeen per cent of any additional benefit available.<sup>10</sup> Another question is whether property rights should be tradeable, an issue raised in Australian policy debates from time to time with respect to using Indigenous owned land as collateral for raising commercial loans. Such tradeability raises the spectre that current land and resource owning generations might benefit at the expense of future generations. It seems preferable on intergenerational equity grounds that both land and resource rights remain inalienable, but leasable for negotiated time frames.

### **A Treaty Framework: Economic Opportunities, Challenges, and the Way Ahead**

In the immediate post-Mabo period, 1992–1996, the Australian state appeared willing to consider an overall tripartite compact with Indigenous Australians that would include the *Native Title Act* framework (with its right to negotiate and compensation provisions), the establishment of an Aboriginal and Torres Strait Islander Land Fund, and a Social Justice Package. The last element of this compact was never delivered,<sup>11</sup> and since 1996, the potential leverage provided by native title law has been diluted by the 1998 amendments and subsequent High Court rulings. Both the Commonwealth and the High Court have closed off legal options to vest with Indigenous people the commercially valuable rights I argue are necessary to promote Indigenous economic development. Meanwhile, Indigenous economic marginalisation remains. Current

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<sup>10</sup> This arrangement might represent a good outcome from a Tainui perspective, but a potentially bad outcome with a view to intertribal equity from a policy perspective.

<sup>11</sup> The Keating Government’s commitment to deliver on the Social Justice Package is far from clear and certainly in contrast to the Aboriginal and Torres Strait Islander Land Fund that attracted a fiscal commitment for a ten-year period of \$1.26 billion, no dollar commitments were made to the Package. Indeed the Commonwealth minister at the time has recently hinted that dollars were not necessarily the issue (Tickner 2001, p. 322).

Commonwealth policy emphasises incorporation into the mainstream economy by use of citizenship rights over Indigenous rights. Census data cited earlier suggest that in its first five years, 1996–2001, this assimilationist strategy has failed — the socio-economic status of Indigenous Australians as a group does not appear to have improved, if income, employment, and housing are useful indicators.

Indigenous Australians face the challenge of finding ways to be politically persuasive without being dismissed as polemical. Their political opportunity rests with the duality inherent in the term ‘right’, which can refer to a claim or title that is either ‘morally just’ and/or ‘legally granted’. Failure of legal avenues to establish resource rights might require political negotiations that emphasise social justice. The persuasiveness must come from the argument that the economic cost of continued Indigenous disadvantage to Australia, as a nation, is just too high and the potential benefits that will result from enhanced national capacity associated with improvements will be significant. Even if for self-interest alone, the nation must invest as soon as possible to address the issue of Indigenous underdevelopment.

Who Indigenous Australians should negotiate with remains a critical question. At the beginning of the 21st century, the answer might lie with the states and territories. This might seem a party partisan observation, but it is not intended in this way. Rather, this answer merely highlights that the federal government is unambiguously opposed to the native title interests that will still remain pivotal as a lever in much negotiation — government policy favours commercial over native title rights. It is also the case, however, that there might be some need for devolution, and states and territories might be more appropriate jurisdictions for negotiations. This is especially so in those areas where regional Indigenous economic and political power is significant — be it in regional NSW or remote Northern Territory. The very fact that I can raise this possibility shows how much the Australian Indigenous affairs environment has changed since 1996, although it is noteworthy that an alliance between Torres Strait Islander interests and the Queensland State Government in the early 1970s was instrumental in negotiation of the Torres Strait Treaty.

Negotiation for a better resource rights deal with the states and territories might be one strategy.<sup>12</sup> But such a strategy will need to be run in concert with others including:

- using the *Native Title Act* and the remaining leveraging power of the right to negotiate

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<sup>12</sup> A potential issue here is how land councils and native title representative bodies and State and Territory governments will adjust their relations that historically have been oppositional to become more cooperative in future.

- the targeting of any newly-emerging property rights for an equitable sharing with Indigenous interests
- possibly most significantly, the use of compensation payments (or associated contingent liabilities) for extinguished native title to buy commercially-valuable resource rights — for now or for the future.<sup>13</sup>

It is now clear that the heterogeneity of Indigenous circumstances is not compatible with a one-size-fits-all economic development model. To generalise, where Indigenous people reside in Australia's commercial heartland, economic development will probably require enhanced market engagement. In remote situations where the market is largely absent, enhanced engagement in the customary economy, including harvesting wildlife or using Indigenous knowledge to manage fires and abate carbon emissions, might be a preferable alternative (Altman 2001). Certainly, to date economic development options have not been delivered realistically in Australia. Customary rights have not been extendable into the commercial sector. Land rights have come without resource rights. Where resource rights have been provided, it has been without opportunities for raising capital, and/or without the delivery of appropriate skills and institutional capacity — governance has not been oriented to economic development. Nowhere has this been more apparent than where beneficial regional agreements (based on land or native title rights) have been associated with blatant substitution funding or cost shifting by governments. The net financial impact of newly won Indigenous rights may have seen the dilution of citizenship rights actually offset the benefits of agreements. This is a possibility that must be carefully monitored and actively resisted.

Enhanced Indigenous property rights in resources that could be negotiated under a treaty framework will, I argue, assist greater Indigenous market engagement. But I am wary that evidence from elsewhere indicates that such rights might not be equitably distributed within the broader Indigenous community and there are risks of political contestation and fragmentation — and vulnerability to the 'wedge politicking' so apparent during recent native title debates. Another danger is that treaty-based resource rights *per se* might be regarded as *the* new panacea for Indigenous underdevelopment.

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<sup>13</sup> The potential to negotiate for future benefits might provide a means to diffuse opposition from current resource owners especially if funded from future windfall gains to government. An example might be the earmarking of a portion of revenue from future Telstra sales for Indigenous benefit in much the same way as for other interest groups. Future revenue from newly-created property would be an even more appropriate source for purchasing property rights for Indigenous interests. An international example is the Crown Forestry Rental Trust in New Zealand (see Ward 1999, p. 39).

In 1974, Woodward sagely warned that the granting of land rights could only be a first step on a long road towards self-sufficiency and eventual social and economic equality for Indigenous Australians (Woodward 1974, p. 138). Some twenty years later, I echoed this view with reference to native title, suggesting that not only will it also provide just a first step, but that this first step will need to be taken alongside other strategies to enable Indigenous economic empowerment and competitiveness (Altman 1994, pp. 74–5). Now, nearly a decade later again, it is clear that a multiplicity of approaches and strategies will be needed to provide greater economic opportunity for Indigenous Australians. A treaty framework to facilitate negotiation of agreements for enhanced resource rights at sub-national levels could provide one important option.

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