

**First alternative or second best:
settling without a native title
determination**

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Outline

- what is settlement without determination?
- why do it?
- what happens elsewhere?
- what are risks and benefits? how do we know?

Thesis – no settlement option is inherently superior, evaluation is a necessity

Forms of settlement

- contested NTA litigation only – determination of native title, note operation of NTA ss.223 and 225
- NTA litigation with settlement – consent determination only
- NTA litigation with settlement – consent determination and parallel ILUA
- settlement without determination – NTA litigation or not

Settlement without determination

- no NTA claim or claim withdrawn
- interim settlements, final settlements or agreements about land and resources
 - *Parks and Reserves (Framework for the Future) Act 2004 (NT)*
 - *Traditional Owner Settlement Act 2010 (Vic)*
 - State and Commonwealth land rights legislation?

Why would a government or a First Nation group settle without a determination?

First Nation

- save time
- better use of money
- a better deal?
- avoid a negative determination
- deal with areas of extinguishment

Government

- build relationship, avoid conflict
- avoid high transaction cost of litigation, invest in outcomes
- achieve policy priorities

Limitations to settlement without a determination

- State and Territory legislation a code for dealing in land, land transfers for settlement must comply
- public land administration legislation largely assumes non-existence of Indigenous proprietary interests
- some NTA future act provisions violate RDA

International practice – US

- constitutional context – exclusive Federal jurisdiction for Indian treaties, Indian lands and recognised tribes
- Federal legislation – Federal monopoly on land surrender agreements (Indian Trade and Intercourse Act 1790, now 25 USC s.177)
- large extents of Federal land in western states, former Territories

International practice – US

- frequency of joint State/Federal action
- concurrent settlement legislation, for example:
 - Western water rights litigation, *Blackfeet Water Rights Settlement Bill 2011* (US)
- Federal ratification of State/First Nation settlement agreement, for example:
 - New England Non-Intercourse Act settlements (*Maine Indian Claims Settlement Act 1980* (US) and *Act to Implement the Maine Indian Claim Settlement 1979* (ME))

International practice – NZ

- constitutional context – quasi-constitutional status of Treaty of Waitangi, Waitangi Tribunal, Maori Land Court, unitary polity with unwritten constitution, role of Maori MPs in MMP electoral system
- Native Land Court, conversion of Maori title
- Native Lands Act 1906 (NZ) and impact on land claims
- redress of grievances and land claims, statutory settlements

International practice – NZ contd.

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Ngāi Tahu Claims Settlement Act 1998

Public Act	1998 No 97
Date of assent	1 October 1998
Commencement	see section 1(2)

International practice – Canada

- constitutional context – *Constitution Act 1982* (Can) s.35(1) protection of ‘existing Aboriginal and treaty rights’,
- s.35(3) – ‘For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired’
- land in provinces, s.91(24) ‘Indians and lands reserved for Indians’ exclusive in Federal Parliament

International practice – Canada

- comprehensive claims policy (vs specific claims, *Specific Claims Tribunal Act 2008* (Can))
- absence of Aboriginal title determinations, predominance of strategic litigation
- legislative ratification, First Nations plebiscite
- examples:
 - James Bay and Northern Quebec agreement – 1977
 - Nisga'a Nation Final Agreement – 1998

International law context

- Declaration of the Rights of Indigenous Peoples
- ICCPR
- CERD
- UN human rights committee system scrutiny, special rapporteur

Downside of pure litigation

- disengaged Executive
- costs
- relationships
- ‘path of least resistance’
- challenge of reform
- some NTA future act provisions
- timeframes determined by court
- burden of proof

Upside of pure litigation

- certainty, one way or the other
- compulsory
- timing not determined by government
- relatively clear criteria for success

Risks of settlement

- adverse legislative change
- adverse Parliamentary appropriation
- public/private divide
- implementation challenge
- path dependence of NTA future act provisions
- political versus judicial scrutiny

Potential benefits of settlement

- wider range of land eligible for inclusion in agreement
- greater focus on outcomes rather than process
- logic of transferring litigation costs avoided to traditional owners
- principled involvement in decision making for country

Mitigating risk

- legislative mandate:
 - ratification or enabling legislation
 - sharing or delegation of public land decision making
- monetary settlements where funds ‘beyond recourse’/ off budget
- RDA precludes discriminatory adverse action
- constitutional protection?

Criteria for evaluation

- more or less land available
- is there Indigenous participation in decision making for land
- security of benefits (land, money, programs)
- viability of litigation option

Claim – national conversation about what constitutes a good land outcome