

Limits & Possibilities of a Treaty Process in Australia  
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**LAND CLAIMS: A NEGOTIATED OPTION**

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Thanks to AIATSIS for giving me the opportunity to come here to speak, as well as to the Research School of Social Sciences, which has been a great place to be during my time here.

What I will do first is just to outline basically my academic goals in my overall work, and then I will give the structure of what I am going to talk about today.

The approach I prefer is particularly comparative. It is anchored within the literatures of political science and looks at the state itself. My position is that law and anthropology have been the dominant academic disciplines working in this field. As a result of the matters of interest within those disciplines the literature has not taken that close a look at the motivations behind state action in the area of land claim negotiations. This talk is a distillation of my thinking after conducting a number of interviews in the fieldwork that I have, up till this point, conducted. That would have been in Canada, New Zealand and now Australia.

First I want to structure my remarks by reminding everyone that the Aboriginal rights movement since World War II has become very much an international rights movement. That does not mean that changes within the dialogue or the dialectic of the movement have not occurred. You can trace from the time of the war a change from a civil rights based dialogue to, within the last 15 to 10 years particularly, a focus on Aboriginal rights. To paraphrase Charles Taylor<sup>1</sup>, this reflects a change from a politics of equal dignity amongst individuals to a politics of difference. This is a politics of claiming explicit cultural and collective recognition.

Another shift in emphasis during the development of this movement in the last 40 years has been a progressively louder call to deal with Indigenous sovereignty as a key policy demand. This has always been paired with an older, more grounded call – pun intended, actually – to deal with Indigenous land rights. The call to deal with Indigenous land rights occurs on at least two levels, the first being in terms of addressing historic grievances regarding land loss and dispossession, and the second being in terms of dealing with and grappling with continuing and future property rights.

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<sup>1</sup> See Charles Taylor, “The Politics of Recognition”, in Amy Gutman (ed.), *Multiculturalism: Examining the Politics of Recognition*; Princeton NJ: Princeton University Press, 1994

My focus is on the land claims part of this international movement. Land is interesting because it is the heart of our political economy. The ability of governments to both own and regulate the use of land is a key act of governance. So land claims and the act of challenging this governmental role are key to questioning the legitimacy of the state itself.

Why examine land claims negotiations themselves? I think these are important because these negotiations are political arenas where the practical impact of state – Indigenous relations is hammered out. The call for the state to respond to land claims of Indigenous peoples is key. This public policy arena is a critical site where the politics of distribution and the politics of recognition meet. In the response of governments to this policy demand lies the coming together of materially defined interest group politics and the identity politics of post-materialist social movements. So there is a real coming together within this public policy arena.

Land claims negotiations are also important because, as venues where originally only Indigenous – state land-based policy outcomes are defined, they represent structured opportunities where the larger set of Indigenous – state relations can be redrawn. This of course is contingent on the ability of Indigenous activists to enlarge on the agenda of the negotiations, bringing other issues into play, such as health and education issues or self-government issues writ large.

I have set two basic tasks for myself today. The first is to outline the choices that states have when asked to respond to Indigenous land claims and the costs and risks associated with each of these choice options. Second, I will address key issues affecting the modern land claims negotiations context in Canada, New Zealand and Australia. I will focus on three issues, the first being the contemporary impact of the historical practice of signing treaties, the second being the role of courts and litigation and the third being some of the effects that federalism has on this negotiations environment.

These three issues are not the only things, obviously, which are interesting about land claims negotiations, but I identify them as being particularly critical in gaining an understanding of the factors which underpin and reinforce the choice of governments to negotiate land claims settlements versus the other options open to them. These issues are critical because they allow an understanding of who is sitting around the table, why they are at the table, why they continue to sit there and whether in the end a settlement is actually reached.

I started my presentation by inserting land claims policy within certain literatures or debates within political science. I evoked the need to address both the interest group and social movement literatures and the recent writings of political theorists on the politics of recognition – well-known theorists such as Charles Taylor, Jürgen Habermass and Will Kymlicka. The literature on the politics of recognition focuses primarily on costs and risks to groups when pursuing their political strategies, strategies which may emphasise economic redistribution or cultural recognition. (This is exemplified by the exchange between Nancy Fraser and Iris Marion Young in the *New Left Review*.)

The eye of this literature has not yet turned to consider the recognisor, the agent which decides through its action to recognise a group according to that group's terms and its aspirations. The call for recognition made by cultural groups the world over, including but not limited to Indigenous peoples, is based on the assertion that, to paraphrase Charles Taylor, non-recognition or mis-recognition can inflict harm and can be a form of oppression.<sup>2</sup>

If one accepts this normative base for a politics of recognition, one must accept the notion that the act of recognition by the state – as recognition by the state is the most sought after in the public sphere – can carry with it both harm and good, and we need to ask the further question of whether the state itself has an interest in distributing this good or this harm. So what considerations behoove the state to supply this sought after public good, this recognition? On how many levels can recognition be provided? I can identify at least two.

The first is the content of the Indigenous interest being recognised, whether it be a property right, a right to self-government, a mere right of notice or a right to negotiate. The second is the level of voice given to Indigenous people in the structures created to ensure that they are heard. Are they cast as a public voice like other public voices? Are they accorded a position where without their input and approval no satisfactory outcome can be reached? Recognition thus has at least two aspects, one on the level of procedure and the other on the level of content.

What of the state's interest in how it bestows recognition on either of these levels? Does the state itself have an interest in this act? Are all acts equally preferred in this regard? How do actors within the state itself (whether they be judges, bureaucrats, legislators or cabinet members) differentiate between the acts of recognition which are open to them? Are they evaluated as such, and if so, according to what criteria and by whom? Do the three branches of the state – the judiciary, the legislative and the executive – have equally useful or equivalent methods to recognise Indigenous interests? There are, of course, obvious differences in their respective toolkits, for only the judiciary can recognise a common law right of native title or inherent sovereignty; only the executive can enter with Indigenous peoples into a treaty in the sense of the term used at international law; and only the legislature can confer its blessing to incorporate such a treaty into statutory law. I ask these questions to make the point that the state itself is complex, and that the actors and actions in a politics of Indigenous recognition must be unpacked.

I ask in my research, focusing on the executive branch of the state, how governments respond to Indigenous land claims, and so I must be explicit about what I conceive these response options to be. I will describe for you how I analytically differentiate the choice situation by asking the following questions: What are these options? How are they different? And what are the risks and costs associated with each?

Taking a look at how governments choose to respond to land claims requires one to have an idea of the goals that governments have, what these goals are that form the basis of

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<sup>2</sup> Taylor, Charles, *The Politics of Recognition*, p.25

government motivations for choice. We can characterise government interests in at least three ways: fiscal, electoral and cultural/ideological. In doing so, it is easier to keep in view that the decision to provide a public good so vaguely called 'recognition' is a product of not just the ideological nor only of the electoral nor only of the financial. One can begin to ask under which conditions one goal trumps the other.

The first option in my mind is a simple one, the do-nothing option. The histories of Indigenous – state relations show that governments have not been neutral, non-interfering and benign actors – far from it. What I mean by 'doing nothing' in this presentation is to say that when governments choose the status quo. If the choice to do nothing is essentially a choice to ignore or neglect Indigenous demands to deal constructively with Indigenous land rights, it can be said to be a choice of non-recognition. It must be appreciated that the choice of non-recognition is not cost – or risk – free, and the choice of governments to engage in recognition strategies needs to be evaluated relative to the costs of doing nothing.

To do nothing in the final analysis is an invitation to bring on litigation and to allow the judiciary to be the government's agent of recognition, because in countries where the judiciary is independent, all citizens have recourse to call upon the courts to examine government action. The do-nothing option is conceivably the choice for a patient state, since the option is a de facto delegation of executive the decision-making power to the judiciary, where the judiciary and all parties to a legal action control the pace of the proceedings.

The cost of the do-nothing option to government is a function of at least five things, in my view. The first is the probability that Indigenous people can mount a credible strategy of litigation, with all its attendant financial costs and delays. The second is the likelihood that, if such a strategy is mounted, the courts will find against the Crown in the cases that come before these courts. The third is the ability of the court to impose fiscal costs on governments, should their actions be found wanting. The fourth is the government's calculation of the costs of delay, such as rising economic costs linked to uncertainty in the property rights regime. And the fifth is the ability of Indigenous people to impose upon governments significant electoral or fiscal costs for that inaction. These five factors determine for the most part a government's patience profile. The relative weighting of the fiscal, economic and ideological factors in determining a government's patience is conceivably dependent on its partisan identity and such things as the current state of the economy.

This do-nothing option casts the predominant relationship between the government and Indigenous applicant, two legal disputants – a relationship like any other which can be held between a government and any of its citizens. The relationship, or the procedural aspect of recognition as I have termed it, is ordinary – that between government and culturally undifferentiated citizen.

My characterisation of the do-nothing option gives analytic support to why courts are such important players in this public policy realm, rather than others where governments need no urging from courts in order to act within their prescribed jurisdictions. Without

the likelihood that courts will impose costs on governments for their inaction, it is up to Indigenous peoples to rely on their own, court – unassisted electoral, fiscal and ideological leverage.

Option two is to initiate legislation. In a federal system this means that the federal government intrudes on state authority to manage lands, and thus the federal government is likely to incur costs of intergovernmental retaliation over and above any costs or benefits incurred as a result of the policy itself. For instance, if legislation is imposed without approval by sub-national governments, the federal government can face compensation costs as a direct result of the policy they wish to impose.

The point I wish to make here is that, insofar as a choice to legislate is a choice to encroach on the jurisdiction of other governments, federal governments must take into account what costs they are prepared to pay to ensure cooperation, versus the costs of going ahead without state approval. The model of state – society relations which underpins this choice option is pluralist, where recognition of Indigenous peoples is bestowed insofar as their legal or political role as holders of sui generis property rights but where the role of consultation afforded to them in the legislation process is no different from that accorded to other, particularly interested policy stakeholders.

The third option is to negotiate directly with Indigenous peoples as the response to their claims. The negotiation option is analytically distinct from the legislation option in that the Indigenous party is a veto player. A signature is required and without it no settlement of the underlying grievance can be reached. The accordance of veto status to Indigenous actors in this choice option renders it the highest on the symbolic recognition scale. There is important potential that, by pursuing a negotiation choice, the recognition which is conferred goes beyond a nod to Indigenous peoples as holding sui generis property rights to implicitly acknowledging them as sovereign actors in their own right. The government must make an assessment of electoral costs this choice may engender, whether it be in terms of support or backlash.

The negotiation option also involves less obvious costs, such as the support required to facilitate the development of negotiation and mediation skills, both within government and in Indigenous communities – skills which are not reducible to the skills honed by hard-headed litigants and litigators in the Crown Solicitor's Office, much though a litigator may disagree.

These options may overlap, and in practice the differences between them may not be so stark – for instance, negotiated settlements such as Nunavut, Nisga'a, Waikato/Tainui and Ngai Tahu. Those settlement agreements are passed as legislation and must become the body of the statutory law and, in Canada, the constitutional law. In Australia, the *Native Title Act 1993* is legislation which in some quarters is seen as a negotiated agreement between Prime Minister Keating and Indigenous negotiators. Also, it is not true that by legislating or negotiating on land rights issues that the litigation option is forgone. Indeed, a critical aspect of this policy field is that Indigenous people always have recourse to this outside option. However, as I have shown, analytic distinctions between the choices can be made, because each choice is fundamentally about choosing the primary forum where

land rights claims will be dealt with, and about the role in which Indigenous peoples are constituted within each forum.

The options that I have outlined are not exclusive. You can think of other choices available to executive governments – the intergovernmental agreement, for instance, in the hallowed practice of executive federalism. But I would argue that the three choices that I have outlined fairly characterise the government response set when confronted with land claims from Indigenous peoples.

The next questions for me become the following: Why choose the negotiate option? Why bargain? Why create extra-judicial and extra-legislative bargaining fora? And what supports governments to make this choice over the others?

Modern land claim negotiations, in my view, are caught between two competing government objectives. This tension is present in all negotiations, but some have managed this tension better than others. The government is caught in its need to end the uncertainty created by the Indigenous land rights issue – a perceived uncertainty in terms of economic development and the international investment climate as well as its own fiscal position, thus the need to end this uncertainty – as well as the need to build a new relationship with Indigenous peoples. The need to build a new relationship has been highlighted by the consequences, and high costs, of assimilation policies pursued in all of the countries I studied.

How policy makers define this new relationship is sometimes very fuzzy and often inarticulate. Land claim negotiations are thus caught between ending uncertainty through ‘full and final’ settlements and establishing bases for a more positive ongoing future relationship between Indigenous peoples and the state. These competing objectives create a fundamental ambivalence in these negotiations, because the push to ensure finality can undermine the basis of this new future relationship.

The Canadian comprehensive claims policy is particularly fraught with this dilemma. The purpose of the policy at the time of its inception in 1973 was simple, as far as the Canadian federal government was concerned: to achieve economic certainty by extinguishing native rights in return for compensation. This basic contract of extinguishment for compensation also serves the purpose of removing the threat to the Crown of continued litigation on the underlying claim. Despite strong objections of Indigenous peoples, independent reviewers and scholars, the federal and provincial governments insist on the extinguishment part of the bargain.

Of course, the critical distinction between Canada and the other cases that I take a look at is that the rights and obligations included within a settlement agreement are protected under section 35 of the Constitution. The constitutional entrenchment option makes it possible for Indigenous negotiators to argue that the exchange is a good one, worthy of their community support – that is, the exchange of constitutionally protected, yet undefined, rights subject only to judicial definition for defined rights arising from their own agency in a negotiation framework with the Crown.

The New Zealand policy of direct negotiations is not as fraught with this tension as is the Canadian case, but it still remains. In New Zealand, extinguishment is not part of the language of negotiations, but I argue that this is less a result of enlightened thinking on the part of policy makers than of the lower degree of risk the land claims question poses for the Crown generally. In New Zealand the Crown's opinion that native title was extinguished over the two islands rests on a firmer legal basis than in Canada, and so the New Zealand government can afford in some way to drop the language of extinguishment while ensuring that the settlement removes the possibility of future judicial action.

Australia is particularly interesting in this regard because the Native Title Act is premised on the philosophy that Indigenous rights are to be recognised and not extinguished, and that the model of coexistence enshrined in the legislation, at least theoretically, presumes a continuity of legally enforceable rights, where extinguishment is no part of the negotiation landscape. This is a very important change internationally and is arguably the most important gain Australian Indigenous peoples have managed to achieve, compared most illustratively with the American case. The changing mores of the last 50 years have meant that Australian Indigenous peoples have had more success in thwarting the erosion of their legal rights in the political sphere than their counterparts in the US.

For Indigenous peoples the risks and rewards of the negotiation option are not inconsiderable. Engaging with governments to discuss and redefine mutual rights and obligations requires Indigenous negotiators to build support for the option within their own communities. The difficulties of creating and building and maintaining a pro-negotiation position during long stretches of time are serious. These difficulties are greater to the extent that Indigenous communities are internally fragmented, where the negotiators must contend with divisions in the political leadership and where resources available to meet the financial and human costs of a negotiation are finite. It is no coincidence that the Nisga'a, the Tainui and the Ngai Tahu have reached settlements, while progress on negotiations in New Zealand's Taranaki region or in Canada's Labrador or in Western Australia's south west have yet to reach a final hurdle.

Part – and only part – of the explanation for which settlements have been reached, and which have not lies in the degree to which negotiations pose a threat to internal consensus building in Indigenous communities. The level of intra-Indigenous consensus and coalition – building required to support a negotiation position is much higher than that required to pursue litigation.

I am going to turn now a little bit to take a look at the contemporary impact of the historical practice of negotiating treaties to see how that policy legacy has shaped the current negotiation environments in these countries.

One important effect of this historical practice has been to identify, at least for the state, an appropriate Aboriginal negotiating party. Treaties identified a historically defined Indigenous claimant group, with the leadership structure having an established representative mandate to negotiate on behalf on its people. The paradox of land claims negotiations is that, for the first time in the history of Indigenous – government relations, the government has a self interest in whether the Indigenous negotiating team does, in

fact, have an accepted mandate to act on behalf of a majority of its group members. This self interest occurs because the durability of a negotiated settlement is directly related to the level of support evidenced within the Indigenous community for the settlement agreement. Without a reasonable expectation that a sufficient Indigenous consensus can be reached, the government itself must waiver utility of negotiation over litigation. This is precisely the strategic choice made by the Court government in Western Australia after the passing of the NTA.

One other important legacy of the treaty history is the acceptance among the non-Indigenous community of Indigenous rights as emanating from a basis in contract. This provides Indigenous peoples with a powerful discursive tool in liberal – democratic polities, where the language of contract is ideologically attractive to conservative thinkers who would remain unmoved when presented with arguments based on the inherent sovereignty of Indigenous peoples.

The historical practice of treaty signing has also identified the Crown itself as a party to the negotiations. This might be a simple point, but treaties established a privileged bargaining relationship between Indigenous peoples and the Crown. The result is that the Crown itself accepts that land claims discussions are appropriately between itself and Indigenous people. Australia provides the counter example. The federal government here has created a land rights regime which provides for negotiated agreements under its auspices between competing land rights holders, but where the federal government is not a party to such an agreement unless it itself has property interests at stake. The legislation establishes a negotiating environment where the predominant relationship ordering the parties to each other is that of a property right holder, rather than as historically defined political representative entities with conflicting property interests. The difference I think is an important one.

The lack of a treaty history has created also a lack of a culture of negotiated agreement which underpins contemporary negotiation options, but this is not to say that treaty-like negotiation structures are not arising in Australia as a result of the land rights regime of the NTA. In South Australia, the state initiative on a statewide ILUA discussion is a good case in point, as is the current proposal in Western Australia for a statewide framework agreement. These are Australian innovations in a current policy context where the word ‘treaty’ could be considered a controversial word.

A few more words about federalism at this point. The assignment of jurisdictional responsibilities in federal states in the area of Aboriginal affairs is a direct result of historical treaty making. In Canada, jurisdiction over Indians and lands reserved for Indians is federal, reflecting this bargaining position between the two parties. However, land management and its use, aside from these Indian reserves and limited federal lands, are assigned to the provinces. In Australia, Aboriginal affairs is assigned to the states, and only in 1967 through the constitutional referendum was the Commonwealth given concurrent jurisdiction. Land management and its use is, as in the Canadian case, vested in the states. In the context of modern land claim negotiations, this assignment of jurisdictions between federal and sub-national governments means that, in order to

negotiate a land claim settlement that involves more than just strictly cash compensation, sub-national governments are necessary parties to the agreement and as such are veto players.

I argue that this division of government power into two levels works against Indigenous peoples at the bargaining table. In the first instance, this gives third party economic interests more leverage in the negotiations. The importance of land and resource management to sub-national governments is such that they will jealously guard their power in this jurisdiction and are more disinclined to imposing costs on large economic actors when facing interstate economic competition.<sup>3</sup>

In the second instance, having both federal and sub-national governments at the bargaining table necessarily means that a settlement requires the two governments to cooperate. A difficulty is that while two government players can cooperate to share costs of settlement between them, the benefits of the settlement are also diffused. This can dilute the urgency and commitment of either government player to the negotiations and in effect creates incentives for either party to stall. If sub-national cooperation is not forthcoming, to what degree is a federal government willing to coerce cooperation? Federal governments usually have the means to ensure sub-national cooperation through the cash carrot which underwrites the sub-national governments' negotiation and compensation costs. However, especially when the number of sub-national governments is large, the bribery strategy on the part of the federal government can prove increasingly expensive. The federal government's willingness to use coercion by withholding fiscal transfers is also limited by the need for sub-national cooperation in other policy areas.

I am going to turn quickly to the courts and then wind up to my conclusion.

While courts are not parties to land claims negotiations, through the development of the Aboriginal rights jurisprudence they have had a huge role to play in how risky the policy choice of negotiation is for governments. This happens in at least two ways. First, the recognition of a native title as a property interest creates uncertainty for other economic actors, especially in those areas where no historical arrangements exist to extinguish those rights. The other aspect of risk is the sheer cost involved to the state itself when pursuing a litigation strategy. As the cost of litigation rises in conjunction with an increasing probability of Crown losses in the courts, the benefit of pursuing a negotiations policy increases. There is no surprise there, really. In a policy area where there would be unclear or little electoral benefit to pursuing a negotiations policy, the increasing risk of fiscal punishment should be the main force behind securing a government decision to negotiate.

My interviews show that while attitudinal change and increasing acceptance of Aboriginal rights among policy makers is important to a negotiations policy, achieving behavioural change is primarily a result of the increasing fiscal risks associated with economic uncertainty and continuing legal action. What is also evident from the

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<sup>3</sup> see Kathryn Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy*; Vancouver: University of British Columbia Press, 1996

interviews is that, while court action is important to getting states to the bargaining table, it is less important in achieving a settlement outcome. Because of this, the marginal utility of legal action in cementing a negotiation choice is decreasing in time. Also, once a government commits itself to a negotiations process, other mechanisms come to play to keep the government at the bargaining table. The creation of a negotiations policy leads to the development of administrative mechanisms within the government's bureaucracy. This creates within the state itself communities of interest which, as time goes on, become invested in the negotiation process itself. As such, the longer land claim negotiations continue, the less important the litigation card becomes, relative to these bureaucratic factors, in making sure that the state does not change its mind.

While my comments today have not strayed in any serious way into the issues of Indigenous sovereignty, one needs to be reminded that land claims negotiations are not the final expression or ultimate policy goal of Indigenous people. The ultimate success of land claims negotiation policies will be measured against how they contribute to a larger relationship between Indigenous peoples and the national societies in which they find themselves and to which they may consider themselves to belong.

The issue of Indigenous rights to land is inseparable, in the final analysis, from the issue of sovereignty. The key issues associated with Indigenous cultural survival are separate political jurisdiction and the establishment of a land base. The first step in regaining lost sovereignty is reclaiming traditional lands.

Because Indigenous land rights and the legitimacy of sovereign power are intertwined, the choice of governments to negotiate these claims is fundamentally different from a choice by a government to recognise and respond to claims brought by other social groups. As a result, getting purchase on when a government will actually negotiate Indigenous land claims, how it chooses to do so, and the consequences – intended or otherwise – of these choices is an important contribution to central questions in political science.