

## CONTRACT, OPPRESSION AND AGREEMENTS WITH INDIGENOUS PEOPLES

DAVID A WISHART\*

### I PREFACE

‘The road to hell is paved with good intentions.’ This cliché has an obvious and depressing application to the relations between Indigenous peoples and settler communities. There are many examples, from George Augustus Robinson’s well-meaning attempts in the early part of the 19<sup>th</sup> century to ‘protect’ the Aborigines of Tasmania, now viewed by many as the crucial act of genocide, to perhaps even the Canadian *Indian Act* itself, which creates a cultural dependency now too pervasive to repeal. Perhaps the best example is the Maori (or Native) Land Court, set up by the *Native Land Court Act 1880* (NZ) in New Zealand.

In the first half of the 19<sup>th</sup> century, Maori had remarkable economic success.<sup>1</sup> Common property was put to productive use by strong, centrally controlled firms in the form of family units. Competitive processes, even if violent, were well understood. External pressures were able to be resisted yet the challenges of radical technological change could be met. However, none of this withstood the lack of recognition of tribal land ownership in 19<sup>th</sup> century British law. In the middle of that century agricultural developments required the raising of large amounts of capital but this was rendered inaccessible to the Maori because security could not be given over the land: the Maori held land through layered

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\* Senior lecturer, La Trobe University, Australia. This essay has been presented at a number of conferences, mainly of the Law and Society kind (Brisbane, 2000; Harrison Hot Springs, BC, Canada, 2005) but also at REGNET, Canberra, 2004. It also appears in much abbreviated form in the Spring 2003 issue of *La Trobe Forum*. My thanks go to the faculties of and (generous) providers of facilities at the School of Law, Waikato University, Hamilton, New Zealand, the Department of Law, Carlton University, Ottawa, Ontario, Canada, and the Faculty of Law, Monash University, Victoria, Australia. My thanks also to an anonymous reviewer for suggestions that substantially improved this article. This essay has had an extraordinarily long gestation period and many people have donated generously of their time and ideas: many thanks go to all, a few only of whom are acknowledged at specific places in the text. The usual qualification applies: this essay is entirely my own responsibility. Given that on at least two occasions papers based on it have made people very angry, I would emphasise that point.

1 John Owens, ‘New Zealand before Annexation’ in William Hosking Oliver and Bridget Williams (eds), *The Oxford History Of New Zealand* (1981) 28; Anne Parsonen, ‘The Pursuit of Mana’ in William Oliver and Bridget Williams (eds), *The Oxford History Of New Zealand* (1981) 140; Apirana Turupa Ngata, ‘Tribal Organization’ in Ivan Sutherland, *The Maori People Today* (1940) 155.

rights of occupation and use. Furthermore, exploitation of individual opportunism amongst the Maori created division and conflict.<sup>2</sup> A court was set up to decide who owned what land.

The Maori Land Court is now vilified (although not universally) for having facilitated what is seen as a naked grab for land by the settler society.<sup>3</sup> Its task was to identify the owners of land and to confer alienable title on them. We now think of that as forcing ideas of land ownership on systems to which it was inappropriate. Yet adjudication by a court is simply a means to the end of good government. It was thought to give fair and impartial responses to a particular set of issues. Oppression nevertheless resulted.

This story demonstrates that an apparently unambiguous moral right may well become, equally obviously, morally wrong. And that should give pause to consider what we do today. Mostly, we think that what we do is obviously right. But is it?

## II INTRODUCTION

Settler communities have adopted a variety of strategies to seek legitimate occupation of territory or use of resources. They have declared territory vacant, dispossessed prior occupants by force, wiped out the existing possessors, or signed agreements with the present inhabitants, whether or not these are nominated as treaties. Occasionally territory is received by way of gift and, less rarely than one would imagine if time immemorial is sufficient, there is an intermingling such that the communities are not seen as separate. Where there is a distinction between occupation and ownership, legitimate occupation may also be sought through relationships either of conquest or agreement with the owners as such.

Now, warfare, genocide and transfers of ownership *simpliciter* have come to be regarded as illegitimate, leaving us with settlement legitimised by consent. Agreement dominates current discussions of legitimate occupation. It appears to be the most commonly adopted strategy in relations between the settler community and prior occupants.<sup>4</sup> At least, this is so in New Zealand, Canada and

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2 Apirana Turupa Ngata, 'Maori Land Settlement' in Ivan Sutherland, *The Maori People Today* (1940) 96; M P K Sorrenson, 'Maori and Pakeha' in William Hosking Oliver with Bridget Williams (eds) *The Oxford History Of New Zealand* (1981) 168; Stuart Banner, 'Conquest by Contract: Wealth Transfer and Land Market Structure in Colonial New Zealand' (2000) 34 *Law and Society Review* 47; Nan Seuffert, 'Nation as Partnership Law: Law, "Race", and Gender in Aotearoa New Zealand's Treaty Settlements' (2005) 39 *Law and Society Review* 485.

3 See Sir Hugh Kawharu, *Maori Land Tenure: Studies of a Changing Institution* (1977), who said it was a 'veritable engine of destruction': 15.

4 Transfers of ownership between states are most often legitimised by plebiscites of the occupants of the territory transferred. Indonesia's annexation of West Papua and its attempted annexation of East Timor are examples where the legitimising effect has not been convincing. I treat the issues raised by such examples as not to the point of this essay, although there are many connections and similarities with its theme.

Australia, the main sources of material for this study.<sup>5</sup> In New Zealand, agreements are implemented by legislation after a long process under the auspices of the Waitangi tribunal. In Canada, 'First Nations' peoples are negotiating and have made agreements for self-government and the control of resources; treaty-making continues, especially in British Columbia. The Australian *Native Title Act 1993* (Cth) (*'Native Title Act'*) provides for the making and registration of agreements with regard to native title and other matters. Native title claims in the Federal Court can be settled by agreement, and there are a variety of forms of agreement quite outside the *Native Title Act*.

These agreements have historical resonance in all these places and indeed most of the rest of the world. The Treaty of Waitangi in New Zealand and the multiplicity of such treaties in North America, Africa and Asia testify to the power of the idea of agreement through history. Even the agreement known as the 'Batman Treaty' with the Wurundjeri people is remembered as an attempt to create a space for British settlement where Melbourne is now situated, when otherwise the existence of treaties with Indigenous peoples in Australia is denied.

Despite the popularity of agreement-making, there are agreements that are not accepted as legitimate. The Batman Treaty is one. No-one seriously argues that settlement of 1 200 000 acres of present day Melbourne is legitimised by the passing over of blankets, axes, knives, scissors, mirrors, handkerchiefs, flour and shirts. Some writers give reasons for its illegitimacy, usually relying on the refusal of the government of the New South Wales colony to recognise the agreement, but mostly it is thought simply too ridiculous to argue.<sup>6</sup> In New Zealand there are many agreements expressed to be in full and final settlement of the matters they concern, but which are later dismissed as simply not being so. This is quite apart from the point that many were later breached. Anecdotal evidence suggests that 'full and final settlement' is inserted in such agreements merely to appease groups opposed to any settlements.<sup>7</sup>

Hence we come to the question with which this essay is concerned: when and to what extent are agreements with Indigenous people or peoples not legitimate, and therefore when would their formation or implementation represent oppressive action?<sup>8</sup> Perhaps that should be expressed the other way around: oppression delegitimises. In any event, will our present actions be seen by future generations to be wrong? If so, what can and should we do about it?

My approach to these questions is this: first I describe the general context, features and trends of agreements with Indigenous peoples in New Zealand, Canada and Australia. This provides the source material for the discussion to follow. Second, I investigate what visions of agreement permit the discussion of

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5 On the commonalities and differences between these three places, see Paul Havemann, *Indigenous Peoples Rights in Australia, Canada and New Zealand* (1999) 4–10.

6 See the discussion in M P Ellinghaus, 'An Australian Contract Law?' (1989–90) 2 *Journal of Contract Law* 13, 20–1.

7 An experience echoed in Paul McHugh, 'Crown-Tribe Relations: Contractualism and Coexistence in an Intercultural Context' in Glyn David, Barbara Sullivan and Anna Yeatman (eds), *The New Contractualism* (1997) 203.

8 Cf *ibid* 214.

the possibility of oppression by consent. Finding that none currently do so, in the third section I develop an approach that might. I tease the notion of agreement out into its necessary elements, and ask when the conditions for agreement-making might not be met when they are assumed to be. This analysis is applied to the source material. Finally, by way of conclusion I extract my answer to the question, and extrapolate what such an answer might imply for agreements past, present and future.

My answer to the question of the legitimacy of agreements with Indigenous peoples is that, to some extent, agreements in New Zealand, Canada and Australia necessarily do oppress, but that those involved are often aware of the ways in which this happens. Nonetheless, agreements, when selectively deployed, appear to be the best we can do at the moment in many areas and for various purposes; the task is to become more comprehensively aware of the ways in which agreements work in society. Reflexively, this essay purports to raise this awareness.

A caution: this exercise is about the way notions of agreement, perhaps even contract, have been deployed in this society – it is not about Indigenous society itself. It does not try to say what Indigenous societies are, or how they do or should work. It merely suggests they may be other than particular ways of thinking assume. Further, just as travel teaches the traveller more about themselves than about the people and places visited, so this exercise is more about agreement in this culture than about Indigenous peoples and cultures.

### III THE AGREEMENTS IN OVERVIEW

Most discussion of agreements with Indigenous peoples is constructed in terms of treaties and international law. Notions of ‘*imperium*’ and ‘*dominium*’ and the state are deployed to categorise and order the analysis.<sup>9</sup> Alternatively, discussion is couched in terms of the rights of Indigenous peoples,<sup>10</sup> although very little, if any, is in terms of the private law of contract. There is substantial discussion within textbooks, typically on ‘Aboriginal Law’, although this is either within the former categories or is very much empirically based, detailing the sorts of agreements that have been made in particular contexts.<sup>11</sup> There would scarcely be a discussion of agreements with Aboriginal peoples that does not predetermine the issue under consideration here. Analysis should start before, and perhaps even encompass, the state, international law, municipal law and rights. At this point, then, the focus in this essay should be on the practical matter of describing

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9 See, eg, *ibid.*

10 See, eg, Ian Brownlie in F M Brookfield (ed), *Treaties and Indigenous Peoples: The Robb Lectures* (1992); James Crawford (ed), *The Rights of Peoples* (1988); Havemann, above n 5.

11 The discussion following draws heavily upon such books, and references can be sought there, as appropriate. There is little comparative material, apart from Havemann, but that does not have a specific piece on agreements, although they appear significantly in Havemann’s chronologies: Havemann, above n 5, 13–64.

in as uncoloured a fashion as possible the context and nature of existing agreements: to gather in the raw material.

In the three countries the subject of this essay, agreements exist with Indigenous peoples where there is a government wrestling with, from the point of view of the government, the 'problem' of support for claims against government.<sup>12</sup> There is, of course, a spectrum of institutional arrangements dealing with this: from the sovereignty of First Nations in the United States of America to the protectorate of the Orang Asli in Malaysia. Other examples include the early form of the Canadian *Indian Act*, and forms of governmental arrangements – from parliamentary representation in New Zealand through representative bodies such as (the now defunct) Aboriginal and Torres Strait Islander Commission ('ATSIC') in Australia – to revolutionary governments in East Timor and South Africa. Here, however, the purpose is to take and examine the notion of agreement as one way in which Indigenous claims have been dealt with and hence those institutional arrangements must, with regret and without diminishing their importance one iota, be ignored for the time being.

A review of the trajectory of agreements with Indigenous peoples points to around 1970 as a turning point. Certainly at that time there was a particular focus on Indigenous peoples.<sup>13</sup> The modern formulation of the concerns of agreements appears to start in Alaska with the *Alaska Native Claims Settlement Act 1971*, of the Congress of the USA, although there are, of course, earlier examples of treaties covering the same ground. Oddly enough for the position it has taken in discussions of agreements with Indigenous peoples, this legislation was not preceded by an agreement, although it was the result of intensive lobbying by Alaskan natives. It is extremely complicated, but at core is a 'real estate transaction between the Natives of Alaska and the US federal government'.<sup>14</sup> In return for clear title, including mineral rights, plus a substantial cash amount, all to flow to regional and village corporations, the Federal Government received overriding title free of all claims based on aboriginal use and occupancy. This last feature, the attempted abrogation in favour of the government of future claims, marks the special nature of the agreements contemplated. The recognition of aboriginal use and occupancy is implicit, but need not be defined. As each of the three countries under consideration here has pursued its own trajectory, the Alaskan precedent has cross-fertilised and taken root. However, each has its own character deriving from the peculiar experiences within each country.

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12 This is to assert that the governments take the stance adopted by Jock Brookfield, that the colonisation process and the imposition of government in even settler communities is a process of revolution, the issue is one of legitimation. Agreements are one form of legitimation: F M Brookfield, *Waitangi and Indigenous Rights. Evolution, Law and Legitimation* (1999).

13 See, eg, the 1967 Constitutional amendments to s 51(xxvi) of the *Australian Constitution*; decisions of Canadian Courts: see, eg, *Calder v Attorney-General of British Columbia* [1973] SCR 313; Havemann's excellent chronologies: Havemann, above n 5, 13–64.

14 Gary Anders, 'The Role of Alaska Native Corporations in the Development of Alaska' (1983) 14 *Development and Change* 555, 556–67.

## A New Zealand

The New Zealand experience has the most obvious beginning. The Treaty of Waitangi, in all its versions and ambiguity, overhangs relations between Maori (the Indigenous people) and Pakeha (the settler community). The Treaty has, for a small country, a massive jurisprudence and literature devoted to it.<sup>15</sup> The Treaty was signed in 1840 by William Hobson, Lieutenant-Governor of New Zealand, on behalf of Queen Victoria and over 500 Maori chiefs – 39 signed the English language version and all the others the Maori language version, which ‘failed to convey the meaning of the English version’.<sup>16</sup> The Maori version yielded ‘*kawanatanga*’ to Queen Victoria and reserved ‘*te tino rangatiratanga*’ to the Maori chiefs. These in the English version were ‘sovereignty’ and ‘full exclusive and undisturbed possession of their Lands Estates Forests Fisheries and other properties’ respectively. Translations of the original Maori version prefer ‘government’ and ‘chieftainship’, again respectively. The second Article also gave a right of preemption to the Queen in land purchases and the third Article extended the Queen’s protection to the Maori and promised that Maori would be treated as British subjects. The Treaty was signed by the Maori chiefs in a variety of locations around New Zealand, after the first signing at Waitangi in the north of the North Island.<sup>17</sup>

The ambiguity of the Treaty of Waitangi resonated through the following years. Settlement by the British proceeded through attempted and purported purchase from the Maori tribes, yet the idea of purchase did not fit easily into Maori conceptions of the land. Ownership and agency were not readily discernable. The settlers had a habit of not fulfilling their side of bargains. Disputes over land and resources flared amongst Maori as well as between Maori and Pakeha. Moreover, *te tino rangatiratanga* remained to be asserted, and it was perceived by Maori as something left to the Maori.<sup>18</sup> The upshot was the Maori Wars of the 1860s although hostilities occurred in the whole period between 1845 and 1872. Vast areas of land were subsequently confiscated from the Maori although much was later purchased or returned. The remaining became the ‘*raupatu*’ and the source of substantial grievance.

Meanwhile the British, for their part, perceived that one of the main reasons for conflict was the incommensurability of British and Maori conceptions of the relationship of people with the land. Accordingly the Native Land Court was set up to solve the problem, as recounted in the Preface above. The Native Land Court had the task of deciding who, amongst the Maori, owned unsold Maori

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15 The following account draws upon Claudia Orange, *The Treaty of Waitangi* (1987) 1; Ann Parsonson, ‘The Pursuit of Mana’ in William Oliver and Bridget Williams (eds), *The Oxford History Of New Zealand* (1981)140; Sorrenson, above n 2; M P K Sorrenson, ‘The Settlement of New Zealand from 1835’ in Paul Havemann, *Indigenous Peoples Rights in Australia, Canada and New Zealand* (1999) 162; Ranganui Walker, *Ka Whahwhai Tonu Matou: Struggle Without End* (1990) 78–185; Apirana Turupa Ngata, ‘Maori Land Settlement’ in Ivan Sutherland (ed), *The Maori People Today* (1940) 96.

16 Orange, above n 15, 1: this text represents the most comprehensive account of the signing of the treaty and of its aftermath.

17 The original signed versions of the Treaty, and various translations of both can be found in Orange: *ibid* 257–60, 261–6.

18 Sorrenson, above n 2, 175–6.

land. The Court thus represented an institutional means for mandating the transition from a Maori concept of ownership, to property in the common law sense. The Court was far from perfect, permitting its procedures to be taken over by various groups of Maori and insisting, at least in its early years, on a hierarchical understanding of Maori society.

The raupatu and the activities of the Maori Land Court became a festering source of conflict among the Maori peoples. Attempts were made to reform the Court but none of these were successful – until the creation of the Waitangi Tribunal.

A coalescing series of events led to the establishment of the Waitangi Tribunal in 1975. These included the completion of settlement of New Zealand; continued pressure from Maori over claims, and increasing sophistication in their approaches; the imminent demise of a Labour government committed to Maori interests; and a world-wide resurgence of interest in the claims of Indigenous peoples. At that stage the Tribunal was empowered only to make recommendations in relation to breaches of Treaty principles since its establishment. But in 1984, under pressure relating to the abrogation of many erstwhile government activities to private enterprise, and the consequent danger to the satisfaction of Maori claims, the government substantially increased the Tribunal's powers. Thereafter, the Tribunal had the power to make recommendations in respect of claims in relation to past breaches of Treaty principles. Agreements between government and Maori are now produced through the processes and recommendations of the Tribunal.

Once the Waitangi Tribunal has researched a claim and made recommendations, the Office of Treaty Settlements takes over historical claims – those made in respect of matters occurring before 21 September 1992, the date of the 'Sealord' Fisheries Settlement.<sup>19</sup> Those arising from acts or omissions of the government after that date ('contemporary claims') can be the subject of recommendations of the Waitangi Tribunal, but are not processed through the Office of Treaty Settlements. Indeed, they seem to drop out of the picture.<sup>20</sup>

Historical claims fall into three categories. First, purchases of Maori land before 1865, including private purchases prior to 1840 that were subsequently investigated and validated by the Crown, Crown purchases, and private purchases after 1840 where the Crown waived its pre-emptive right to purchase Maori land under Article 2 of the Treaty of Waitangi. Second, confiscation of Maori land by the Crown under the *New Zealand Settlements Act 1863* (NZ). Third, alienations

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19 The Waitangi Tribunal only has power to make binding recommendations in respect of two matters: Crown forest land that is subject to a Crown forestry licence; and 'memorialised lands' which are lands owned, or formerly owned, by a State-owned enterprise or a tertiary institution, or former New Zealand Railways lands, that have a memorial (or notation) on their certificate of title advising that the Waitangi Tribunal may recommend that the land be returned to Maori ownership: see *Treaty of Waitangi Act 1975* (NZ) ss 8A–8HJ.

20 The focus here and elsewhere on historical claims may not give a true picture. An example of other negotiations and settlements that may be proceeding is the *Tutae-Ka-Wetoweto Forest Act 2001* (NZ) as to conservation of forests on Stewart Island. Apart from as to subject matter, however, that particular settlement (which is appended as a Schedule to the Act) seems to be amenable to the analysis later in this essay.

of land after 1865, including sales after the investigation of customary ownership and individualisation of title under the various Native Land Acts after 1865, and public works takings.

Three very large historical claims have been settled to date: commercial fishing claims in 1992, the *Waikato-Tainui* raupatu claims in 1995, and the *Ngai Tahu* claim covering most of the South Island in 1997. These settlements had a value of NZ\$170 million each, giving a total of NZ\$510 million. Since the settlement of these, there have been a number of further, mainly raupatu, settlements, representing a further NZ\$79 million.<sup>21</sup> There was an attempt in 1994 to constrain the cost to the New Zealand Government of the settlements by means of a 'fiscal envelope' of \$1 billion. This idea was, predictably, rejected by the Maori as itself a breach of the Treaty, by virtue of its derogation from *te tino rangatiratanga*.<sup>22</sup>

The Office of Treaty Settlements advises that a Treaty settlement is usually made up of an historical account, acknowledgements and Crown apology, cultural redress and financial and commercial redress.<sup>23</sup> The settlement is forged out of a process usually commencing with Waitangi Tribunal findings. Even so, the formal start of negotiations towards a settlement is the pursuit of a Deed of Mandate, establishing whom the claimants represent. This is prepared by the claimants and, if it meets the approval of the Office of Treaty Settlements and *Te Puni Kokiri* (the Ministry of Maori Development), it is publicised. Negotiations then begin, and agreement is finally set out in the Deed of Settlement, which then undergoes a process of ratification. If necessary (and it usually is) legislation is passed to give effect to the agreement.<sup>24</sup>

## B Canada

While New Zealand's story begins with a single determinative treaty, Canada's experience is marked by a proliferation of treaties – and on-going treaty-making in British Columbia. This difference may be due to the much earlier onset of European settlement in Canada, or the sheer size of the country, or the complexity of peoples inhabiting Canada prior to European advent. Yet the long history of 'well-established diplomatic processes' of the Aboriginal peoples

21 A full list and details of progress in historical claims to date can be found online: Office of Treaty Settlements (2002) <<http://www.ots.govt.nz/>> at 8 November 2005.

22 Ranginui Walker, 'Maori Sovereignty, Colonial and Post-Colonial Discourses' in Paul Havemann, *Indigenous Peoples Rights in Australia, Canada and New Zealand* (1999)108, 118.

23 Office of Treaty Settlements, *What is a Treaty Settlement* (2002) <<http://www.ots.govt.nz/>> at 8 November 2005. See also Office of Treaty Settlements, *Briefing to the Incoming Minister in Charge of Treaty of Waitangi Negotiations* (2002) 10 <<http://nz01.terabyte.co.nz/ots/DocumentLibrary%5CBriefingfortheIncomingMinister1.pdf>> at 8 November 2005, which states the following:

Within the negotiations phase itself, a key initiative is the ongoing development of a template Deed that contains the main elements of a Deed of Settlement, with common variants. This is continually updated so that it always reflects 'best practice'. It also provides an initial starting point for the development of a draft Deed of Settlement, speeding up this phase of negotiation. Any changes made during settlement negotiations in turn may be incorporated into the template. The template is also a focus for systematically working through the associated policy issues.

24 Again, there is a list of agreements, on-line PDF copies and any implementing legislation online: Office of Treaty Settlements, above n 23.



must also be important.<sup>25</sup> The First Nations had confederacies, alliances and treaties, based on oral agreement and supported by traditions, ceremonies, protocols, customs and laws. This system met and meshed nicely with the similarly long history of treaty-making among European nations, although there were substantial differences in the traditions. These similarities and differences have resonated through the history of treaty making in Canada.<sup>26</sup>

The Canadian Indian treaties comprise a large spectrum of agreements. Elliot divides them into four groups:

1. Early peace treaties in the Maritime provinces in the 18<sup>th</sup> century
2. Land sales in return for cash, concluded in Upper Canada in the late 18<sup>th</sup> and early 19<sup>th</sup> century, and on Vancouver Island in the mid 19<sup>th</sup> century,
3. The two ‘Robinson’ treaties of 1850 and the numbered treaties of 1871 to 1921, in which large land areas were surrendered in return for cash, annuities, reserves, and game rights amongst some other benefits.
4. Modern land claim agreements.<sup>27</sup>

There are, Elliot avers, ‘an unknown number of less formal documents’ which ‘may now have treaty status’.<sup>28</sup>

Many of the treaties were forged in the context of the Royal Proclamation of 1763. This was a command by the British sovereign, King George III, to set aside a huge area of North America as hunting grounds for Indians, requiring a license for purchase or settlement, and setting out a number of other means by which contact between Indians and others was to be regulated. As the Royal Commission puts it:

The Proclamation is a complex legal document with several distinct parts and numerous subdivisions, whose scope differs from provision to provision. It resists easy summary, but it serves two main purposes. The first is to articulate the basic principles governing the Crown’s relations with Indian nations. The second is to lay down the constitutions and boundaries of several new settler colonies, one being the colony of Quebec.<sup>29</sup>

Both the recognition of the Aboriginal people as ‘nations’, and the constitutional structures of the colonies were the subjects of comprehensive reconsideration in the ensuing years. In 1867, the United Kingdom Parliament passed the *British North America Act, 1867*, now known as the *Constitution Act, 1867*. This established a confederal constitutional structure in three British North American colonies (the other Canadian Provinces subscribed later). While never

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25 Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Vol 1, *Looking Forward, Looking Back* (1996) 119.

26 Ibid 119–20. The Canadian Supreme Court considers these treaties to be *sui generis*: neither treaties in the international law sense nor contracts in the domestic law sense, but containing aspects of both. See *Simon v The Queen* [1985] 2 SCR 387, 404; *R v Badger* [1996] 1 SCR 771, 812–13. While this could be seen as simply trying to push them into Western law’s conceptual boxes, in both cases there is a struggle to fit an 18<sup>th</sup> century agreement into the constraints of the language of a statute.

27 David Elliot, *Law and Aboriginal Peoples in Canada* (3<sup>rd</sup> ed, 1997) 40.

28 Ibid. Elliot’s language here resonates with the issue mentioned in n 26. While there is a struggle to fit the agreements into the idea of ‘treaty’ and accordingly that idea is expansively construed, the idea is essentially within established law. In other words, only ascription of treaty status renders the agreement visible.

29 Royal Commission on Aboriginal Peoples, above n 25, 116, 111–19.

doubting that Aboriginal people were subjects of the Crown<sup>30</sup> nor even considering the constitutional status of Aboriginal people to any great extent in any other respect, the *British North America Act, 1867* divided responsibility for Indians and their lands between federal and provincial governments. The core assumption was that the sovereignty of the Crown was not divided other than between provincial and federal government, but this assumption has been regarded as ambiguous in later eras of the assertion of Indian self-government.<sup>31</sup>

The recognition of the Aboriginal people of North America as ‘nations’ is also implicit in the Royal Proclamation. It was made in a context of confederations of aboriginal nations, notably of the Iroquois in the 15<sup>th</sup> and 16<sup>th</sup> centuries. Various of these Indian nations and confederacies usefully supported one or other sides in the then colonial struggles between France and England, and between England and its erstwhile American colonies. There were, of course, agreements between the colonial powers and the Indian nations as to the conduct of the wars and these agreements helped to establish the procedures and discourse of settler–First Nation relations. The various treaties governing later relations were also a response to the settlement pressures produced by the movements of settlers following the war.

The recognition of the Aboriginal peoples as definable nations with concomitant self-government procedures, the double-edged use of reserved territory as protection and incarceration for Aboriginal peoples,<sup>32</sup> social theory and various constitutional imperatives lead to the passing of the *Indian Act, 1868* (*‘Indian Act’*). In Elliot’s words:

This [*Indian Act*] was a cradle-to-grave regime that governed – and in some ways, still governs – the lives of aboriginal people identified as Indians. The Act defined Indians, and affirmed their entitlement to live on reserves set aside for them. It gave – and continues to give – certain tax exemptions for Indians residing on reserves. It imposed many restrictions on Indians. At different times these included alcohol prohibitions, claims restrictions, bans on traditional cultural and religious ceremonies such as the potlach and the sun dance, and limits to the very rudimentary form of local government permitted under the Act. The general idea was to set Indians aside from non-aboriginal society so they could be exposed to European religion and customs and gradually ‘civilised’. Despite later reforms, and recent efforts to dismantle it, the *Indian Act* is still in place today.<sup>33</sup>

The *Indian Act* is often harshly criticised, yet Indian people are often also extremely reluctant to see it repealed or even amended. It confers protection and rights as well as impeding progress in self-government and retarding social and economic development.<sup>34</sup>

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30 This assumption would be correct at common law: *Calvin’s Case* (1608) 7 Co Rep 1a, 77 ER 377. Nevertheless, the extension of the ‘protection’ of the Crown was a useful bargaining chip in treaty-making.

31 Elliot, above n 27, 130–1.

32 The Canadian reservations policy probably began with the efforts of 17<sup>th</sup> century missionaries in New France. Tracts of land were acquired by religious orders to provide a place for Indians to live apart and be ‘civilised’. See George Stanley, ‘The First Indian “Reserves” in Canada’ (1950) 4 *Revue d’histoire de l’Amérique française* 178.

33 Elliot, above n 27, 5.

34 Royal Commission on Aboriginal Peoples, above n 25, 258–9

The modern form of land claim agreements (type four above) began with the James Bay agreement in 1975. Modern agreements tend to deal with very large land areas and provide for complex governance arrangements, social and economic guarantees, title confirmation on both sides, game rights and so forth. A special feature of the Canadian agreements is the emphasis, at least in the literature, on self-government. This may tie into the *Indian Act*, but may also relate to two other matters. The first of these is the change in Canada's constitutional arrangements represented by the *Constitution Act, 1982*. This Act patriated Canada's Constitution from the United Kingdom, and simultaneously moved its jurisprudence towards a rights-based conception. A Charter of Fundamental Rights and Freedoms and other constitutional guarantees were included, and Aboriginal and treaty rights were among them. Procedures for constitutional change provided for representation of Aboriginal groups, including the Metis, and thus represented the first recognition of the Metis as a distinct Aboriginal group. Further protections were provided in constitutional changes in 1984, and a procedure was set up to move the Canadian Constitution towards recognising Aboriginal self-government. The political momentum towards further constitutional recognition of Aboriginal rights was lost over the ensuing years, although the new constitutional arrangements and the existing recognition of Aboriginal rights referred the definition of Aboriginal rights, both in origin and extent, to the judiciary.

The second matter impinging on later Canadian agreements was a changing understanding of the basis for recognising Aboriginal rights. While originally a matter of recognition in the Royal Proclamation of 1763,<sup>35</sup> gradually the legal foundation has shifted to incorporate Aboriginal use and occupation.<sup>36</sup> This provided the material for claims beyond treaty breaches. Moreover the Canadian Supreme Court developed a doctrine concerning the fiduciary duty between the Crown and Aboriginal peoples, and this impacted on the manner in which the Crown deals with Aboriginal land and interests<sup>37</sup> and on the manner in which the constitutionally enshrined Aboriginal rights and protections are to be interpreted.<sup>38</sup>

The conjunction of the long history of treaty-making, the emphasis in the *Indian Act* on government of Indian peoples (divided into 'bands'), the constitutionalisation of aboriginal rights and the shifting grounds of those rights has impacted strongly on agreements with the Indian peoples. They deal with the settlement of claims and self-government.<sup>39</sup> As to claims, the agreements that

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35 *St Catherine's Milling and Lumber Co v The Queen* (1889) 14 App Cas 46.

36 *Calder v Attorney-General for British Columbia* [1973] SCR 313; *Guerin v The Queen* [1984] 2 SCR 535.

37 *Guerin v The Queen* [1984] 2 SCR 535. These ideas were further developed in the recent landmark case *Haïda Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511.

38 *R v Sparrow* [1990] 1 SCR 1075.

39 The account that follows draws strongly upon Elliot, above n 27, 126–30. The text of most of the agreements and, working backwards, agreements in principle, framework agreements memoranda of understanding, 'backgrounders' and reports pursuant to reporting requirements can be found online: Indian and Northern Affairs Canada, *Agreements* (2005) <[http://www.ainc-inac.gc.ca/pr/agr/index\\_e.html](http://www.ainc-inac.gc.ca/pr/agr/index_e.html)> at 8 November 2005.

have been finalised deal with lands and wildlife harvesting rights and compensation for takings and breaches of treaties, resource revenue-sharing participation in land, water, wildlife and environmental management specific measures to stimulate economic development, and a role in the management of heritage resources and park. In respect of self-government, agreements are only one of a number of strategies that have been adopted. They operate within a wider context of traditional self-government, *Indian Act* structures and participation as citizens of Canada. To the extent that political representation is territorial, boundaries can be determined to provide enhanced political representation at various levels in government, which can be a matter for agreement. Agreements can also include provisions about direct participation in government, either as a local administration within the existing provincial or territorial governmental structure, or governmental structures exercising provincial or territorial governmental powers. And there are a variety of other agreements entered into at a less visible level, such as consultation agreements, local service agreements and so forth.<sup>40</sup>

The agreement-making process is lengthy and tortuous, so much so that continuity of negotiators is a real problem. The Canadian Federal Government has been subjected to scathing criticism in many fora for its approach and dilatory decision-making.<sup>41</sup> The process of negotiation, settlement and implementation is managed within the Department of Indian and Northern Affairs, although British Columbia has is an independent Treaty Commission, with representatives from the first Nations of the province and the federal and provincial governments to facilitate and co-ordinate the negotiation process. There have been a number of attempts to establish a framework around the process, the latest being a response to the Royal Commission on Aboriginal Peoples.<sup>42</sup> In a counterpoint to the New Zealand 'fiscal envelope', a theme of the action plan is to 'develop a new fiscal relationship' of 'financially viable Aboriginal governments able to generate their own revenues and able to operate with secure, predictable government transfers'.<sup>43</sup>

### C Australia

Australia has no recognised foundation treaty, no *Indian Act*, no visible history of treaty making, and little rights-based jurisprudence in the constitutional

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40 Marcia Langton and Lisa Palmer, 'Modern Agreement Making and Indigenous People in Australia: Issues and Trends' (Paper presented at the 13th Commonwealth Law Conference, Melbourne, 13–17 April 2003) 42.

41 See especially Royal Commission on Aboriginal Peoples, above n 25, Part 2: *Restructuring the Relationship*, ch 4.

42 Indian and Northern Affairs Canada, *Gathering Strength – Canada's Aboriginal Action Plan: A Progress Report* (2000) <[http://www.ainc-inac.gc.ca/gs/pdf/progr\\_e.html](http://www.ainc-inac.gc.ca/gs/pdf/progr_e.html)> at 9 November 2005.

43 Ibid.

sphere. Prior to 1992 there was no recognition of aboriginal property in land,<sup>44</sup> apart from that created by a parliament. What, then, was there?

Apart from the odd early deviation,<sup>45</sup> the radical title of the Crown was assumed at settlement by Governor Phillips' assertion of sovereignty.<sup>46</sup> From that time on, and despite somewhat futile urgings of the British Colonial Office and the mentality evidenced by the Batman Treaty, the relationship of the settler community with the Aboriginal people is best described, if not in terms of war and genocide, then in the words of Havemann as marked by 'paternalism and ... coercion, segregation and protection'.<sup>47</sup> Protectorates were established regulating residence and movement, employment, and the care, custody and education of children, as well as liquor and drug consumption prohibitions and other aspects of public and private life. It was an era of reservations and missions and the institutionalisation of stolen generations of children. This is not to deny agitation for the recognition of civil, political and social rights throughout the period. This agitation began to bear fruit in the 1960s, with progressive extension of the franchise and constitutional changes recognising aboriginality in 1967. Equal pay, especially in the pastoral industry, became a real issue and land claims began to receive social, if not legal, recognition.

At about this time, Australian Parliaments used trusts and corporations to represent groups of Aboriginal people as owners of land.<sup>48</sup> In South Australia, provision was made in the *Aboriginal Land Trusts Act 1966* (SA) for the transfer of title to Crown land to Aboriginal Land trusts. Similar provision was later made

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44 The word 'property' here is chosen to reflect the decision of Blackburn J that the concept of property to be inferred from the Torrens system of land title did not include aboriginal ways or any common law recognition of native title, nor was there any inherent sovereignty in the aboriginal people at common law: *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

45 See, eg, *R v Bonjon* (1841) United Kingdom, Papers Relative to the Aborigines, Australian Colonies, British Parl Papers (1844) 146 ff, vol 8; Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law*, Report No 31 (1986) [45], where the reference is to Port Phillip Gazette (18 September 1841); State Library of Victoria, Crown Law Section, *R v Bon Jon*.

46 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 242–52. In this passage Blackburn J sets out at length the relation between the assertion of sovereignty and doctrines of common law about the nature of property in colonies (in particular, the doctrine of *res nullius* and its formative principle from *Campbell v Hall* (1774) St Trials 239; Loft 655; 98 ER 1045 as to the law in settled colonies). As Blackburn J puts it when speaking of the decisions which bound him (*Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 245):

They all affirm the principle, fundamental to the English law of real property, that the Crown is the source of title to all land; that no subject can own land allodially, but only an estate or interest in it which he holds mediately or immediately of the Crown. On the foundation of New South Wales, therefore, and of South Australia, every square inch of territory in the colony became the property of the Crown. All titles, rights, and interests whatever in land which existed thereafter in subjects of the Crown were the direct consequence of some grant from the Crown.

To be sure and as we shall see, in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo*'), much of Justice Blackburn's finding in this respect was overruled, yet that is not to deny that prior to *Mabo* the context of relations between aboriginal and the settler society from the point of view of the latter was of the denial of aboriginal property in land arising from Aboriginal society and, indeed, many, if not most, other rights and liberties.

47 Havemann, above n 5, 28.

48 See generally Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (2000).

in Victoria and Western Australia. The *Aboriginal Councils and Associations Act 1976* (Cth) provided for a specific form of corporation to hold property. Flowing from these Acts was the development of governance bodies at the local level in the form of councils, and in a more general sense by a succession of bodies culminating in the former Aboriginal and Torres Strait Islander Commission. The form of these bodies and the position and extent of self-government within their purposes were, and remain, contentious issues.

There was no recognition of Aboriginal title until agitation for land rights led to legislative action in the 1970s. There was some early state legislation, but the most notable statute is the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) providing statutory recognition of land rights in the Northern Territory, with an access regime for governments and resource firms. There was subsequent similar state legislation in South Australia, New South Wales and Queensland.

By the end of 1978 two significant agreements were signed between the holders of land in the Northern Territory, the Aboriginal lands trusts, and bodies interested in dealing with that land.<sup>49</sup> While these were signed on behalf of the Federal Government, many later agreements were not. The representatives of groups of Aboriginal peoples have signed agreements with resource extraction companies, infrastructure builders, governments of all complexions and level, farming and grazing bodies, universities, publishers, arts bodies and so on.<sup>50</sup> This agreement-making has continued under later legislation dealing with aboriginal peoples and their land and other rights, particularly, as we shall see, the *Native Title Act 1993* (Cth) ('*Native Title Act*').

Meanwhile, there was considerable discussion over the possibility of a treaty between the Commonwealth and Aboriginal and Torres Strait Islander peoples. There are records of calls for Aboriginal sovereignty from the 19<sup>th</sup> century,<sup>51</sup> coalescing in the 1970s in the formation of the Aboriginal Treaty Committee in 1979.<sup>52</sup> Prime Ministers Hawke and Keating both called for a treaty, now called a 'makarata', but no progress stalled with the election of a conservative government in 1996. The agreement-making that has been undertaken has drawn on legislation. *Mabo v Queensland (No 2)*<sup>53</sup> ('*Mabo*') might have changed that.

In *Mabo*, the High Court of Australia heroically (at least in its own opinion) decided that there was a concept of Aboriginal title that could be recognised in the common law. The extraordinarily polemical judgments<sup>54</sup> in that case left a number of points undecided, including: how the concept of Aboriginal title articulated with the radical title of the Crown; what Aboriginal title meant for the

49 The Ranger Uranium Mining Project Agreement and the Kakadu National Park Lease Agreement: Langton and Palmer, above n 40, 4.

50 Ibid. A database of such agreements is also provided online: Indigenous Studies Program, University of Melbourne, *Agreements, Treaties and Negotiated Settlements Project* (2004) <<http://www.atns.net.au>> at 9 November 2005.

51 *R v Cobby* (1883) IV NSW 355. See also *Coe v Commonwealth* (1979) 53 ALJR 403, rejecting inherent aboriginal sovereignty on the US model.

52 Havemann, above n 5, 25–62.

53 (1992) 175 CLR 1.

54 See especially the *apologia* in the joint judgment of Deane and Gaudron JJ: *Mabo* (1992) 175 CLR 1, 120.

notion of sovereignty; what was required to establish Aboriginal title; whether it extended beyond the gardens of the Meriam peoples of the Torres Strait Islands; who held it and how it was held (if that is the correct word); what Aboriginal title meant in terms of interests, rights and duties (again, if it is appropriate to use terms out of the common law of property); if, how and to whom it was transferable, whether in whole or part and as to particular use or not. The flurry of legislative and judicial activity that followed attempted to settle as many of these issues, notably excluding the larger constitutional questions,<sup>55</sup> in as short a time as possible. This is in contrast to the stately, if not glacial, progress of the Canadian or New Zealand legal institutions in dealing with many of the same concerns. Of most note were the judicial decisions extending native title to the mainland of Australia,<sup>56</sup> dealing with whether native title survived leases granted over pastoral land by the Crown<sup>57</sup> and teasing out the implications of the *Native Title Act*. The latter has itself spawned an enormous amount of litigation although, paradoxically, agreement-making was one of the principles upon which it was founded. This principle is supposed to have become more explicit since the 1998 amendments.<sup>58</sup>

The *Native Title Act* now sits firmly at the centre of agreement-making in Australia. Extremely long and complex in the Australian tradition, it deals with determining whether native title exists, the validity and effect of acts (particularly extinguishment) affecting native title, and compensation for such acts, both before and after the commencement of the Act.<sup>59</sup> Agreements may be involved in many ways in the processes of determination and decision set out in the Act, particularly in the form of settlements in the determination of the existence of native title by the Federal Court, and similarly in the determination for compensation for acts affecting native title. Agreements are explicitly provided for in the Act as Indigenous Land Use Agreements over specific areas of land and waters where native title has been determined to exist, where there are registered native title claimants or where persons are claiming to hold native title. There are three types<sup>60</sup> of these agreements, which can deal with the effect of native title, including changing it for the future; future acts in relation to native title; compensation for past or future acts affecting native title; the relationship

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55 Notably the articulation of native title and sovereignty by Mason CJ: *Coe v Commonwealth (No 2)* (1993) 118 ALR 193, 199–200; *Walker v NSW* (1994) 182 CLR 45, 48–51. For a sophisticated review, see Scott Grattan and Luke McNamara, ‘The Common Law Construct of Native Title: A “Re-Feudalisation” of Australian Land Law’ (1999) 8 *Griffith Law Review* 50.

56 *Coe v Commonwealth* (1993) 118 ALR 193; *Mason v Tritton* (1994) 34 NSWLR 572; *Western Australia v Commonwealth* (1995) 183 CLR 373.

57 *The Wik People v Queensland* (1996) 141 ALR 129. On extinguishment, see also *Ward v Western Australia* (2002) 191 ALR 1.

58 Graham Neate, ‘Agreement-Making and the Native Title Act’ (Paper presented at *Negotiating Settlements: Indigenous Peoples, Settler States and the Significance of Treaties and Agreements*, Seminar Series, Melbourne, 2 May 2002) <<http://www.atns.net.au/papers/Neate.doc>> at 9 November 2005.

59 Acts between the commencement of the *Native Title Act 1993* (Cth) and the *Wik* decision (*Wik Peoples v Queensland* (1996) 141 ALR 129) are specifically dealt with as many of such acts were not supposed to affect native title: see *Native Title Act 1993* (Cth) ss 4(5)–(6).

60 See *Native Title Act 1993* (Cth) s 24BB (Body Corporate Agreements), s 24CB (Area Agreements), s 24DB (Alternative Procedure Agreements).

between native title and other rights or interests in relation to the area or the way either is exercised; procedures for making future agreements (Alternative Procedure Agreements only); and any other matters concerning native title in relation to the area.<sup>61</sup>

This is not to say that agreements entirely outside the Indigenous Land Use Agreement ('ILUA') provisions of the *Native Title Act* do not take place, although ILUAs are increasingly common. As discussed earlier, agreements outside those provisions became notable after the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Prior to the 1998 amendments to the *Native Title Act* there was a strong, but highly differentiated, national movement towards regional agreements,<sup>62</sup> and this continues both within and encompassing the *Native Title Act* frameworks. In addition to native title, the right to negotiate future acts affecting native title framed by ss 25-44 of the *Native Title Act*, and state and territory heritage and land rights legislation, the exigencies of service delivery involving the Aboriginal and Torres Strait Islander Commission and its regional structures, and local and regional Indigenous service delivery and consultative organisations, create an environment in which agreements can proliferate.

Comprehensive agreement-making is pursued in which the Indigenous jurisdiction implied by these situations – even to the extent of self-government – would be recognised. On the other hand, the thrust of ILUAs is to localise, and this is supported by research into what makes a regional agreement 'successful', whatever that might mean.<sup>63</sup> Thus much agreement-making in Australia is project-specific, whether it is large infrastructure developments such as the Alice Springs to Darwin Railway or Telstra communications towers, resource exploration, development or mining, tourism, farming, National Parks or the Commonwealth Indigenous Protected Area Program. Needless to say, service delivery is also the subject of much agreement-making at a local level.<sup>64</sup>

In recent months the trend towards local service delivery agreements has been highlighted by their submersion in the policy making process under the epithet 'mutual obligation'. Government grants to communities will be conditional upon 'shared responsibility agreements', which impose obligations on communities with unprecedented level of specificity. The first information on these agreements was the result of leaked policy documents, which raised some controversy in December 2004.<sup>65</sup> There is now more detailed information available, although hard information on the content of agreements is scarce.<sup>66</sup>

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61 The website of the National Native Title Tribunal sets out the procedures and a wealth of other information about Indigenous Land Use Agreements: see National Native Title Tribunal (2005) <<http://www.nntt.gov.au/>> at 9 November 2005.

62 See generally Mary Edmunds (ed), *Regional Agreements: Key Issues in Australia* (1998).

63 Ibid 7.

64 For a comprehensive review of the matters discussed in this paragraph, see Langton and Palmer, above n 40, 24–42.

65 See, eg, Michelle Grattan, 'Howard's Quiet Revolution', *The Age* (Melbourne), 24 November 2004, 19.

66 See, eg, *Shared Responsibility Agreements – A Critique* (2005) Australians for Native Title and Reconciliation <[http://www.antar.org.au/shared\\_resp\\_agreemts.html](http://www.antar.org.au/shared_resp_agreemts.html)> at 13 November 2005.



## D Summary

This discussion of agreement-making with Indigenous peoples in Canada, New Zealand and Australia reveals great diversity within the loose category of 'agreements'. Canada's *Indian Act* contrasts strongly with Australia's coy approach, whereas in New Zealand the issue is mired in the history of the Treaty of Waitangi. The Canadian process emphasises government responsibility for negotiation whereas in New Zealand there is constitutional confusion at the same time as reasonable legislative clarity. In Australia agreement-making is essentially a private matter, either of settlement of disputed claims or bargaining within a legally defined context of property rights and frequent institutional recognition (but little more) of agreements, and with the government often a party.

All these approaches to agreement-making attempt to ameliorate claims by Indigenous peoples, some extra-legal and some legal. Raupatu claims in New Zealand are an obvious example. Native title claims are central in Canada and Australia, although what is being settled is more often the possibility of native title than the claim itself. The settlement of claims and the solving of the political problem presented by Indigenous peoples appears at the heart of the Canadian process, as well as in New Zealand, where the raupatu grievance combines with considerable demographic and consequent political pressure. In Australia, the position is reversed, the agreements are increasingly specific – with infrastructure projects, mining, welfare payment and service delivery at their heart.

Strong contrasts also exist in the processes consequent to the initial (perhaps most recent) raising of the issue of relations with Indigenous communities in the minds of settler societies – although awareness was raised at a remarkably similar point in time in all three countries. But in Canada the process took place within an established government structure, in New Zealand the Waitangi Tribunal plays a central role, and in Australia the process mostly takes place within an explicit legislative framework.

There are, of course, many other contrasts. The more the agreements are studied, the less the observable similarities, although that may be an artefact of studying rather than a characteristic of that studied. Certainly the essential common characteristic of being about Indigenous people and their claims and affairs should not be lost, nor should their representation as agreements. And that focuses attention on the question of what it means to agree.

The analysis that follows demonstrates that agreement is generally accepted unquestioningly as a 'Good Thing', but that such acceptance is predicated on strong forms of individualism. Agreement is taken to be synonymous with consent and consent to be an expression of freedom. If, on the other hand, we accept that agreement is just one form of governance amongst a panoply deployed, the issue becomes one of the choice between governance techniques. Choosing between these techniques inevitably involves reflection on the things between which we are deciding and of the criteria by which we decide. This discussion is completely absent in the adoption of agreements as a governance technique in relation Indigenous peoples.

## IV THE NATURE OF AGREEMENT

‘Agreement’ is a remarkably difficult concept to pin down. As we shall see, there are conceptions of what promises are binding encapsulated in the doctrines of law; there are economic visions of transactions both assumed and more descriptive; ideas of treaties abound; politics can found its field of study on an original agreement; there are descriptions and taxonomies in sociology and anthropology, and ethical visions of why promises should be binding and the limits of consent. Some of these visions are deployed to recommend for society and some are metaphors of society. Some merely purport to describe. Any mention of agreement resonates with some or all of these thoughts and ways of thinking.

In the current context, ideas of a legal framework for decisions and decision-making, and of political engagement, treaty-making, welfare enhancement and consent are particularly apparent. The task at hand is to fix on some way of thinking that reflects them all and yet also enables an exploration of how agreements with Indigenous peoples impact on those involved. Let us now examine these visions of agreement with this object in mind. As will be apparent, the notion of agreement as such is not subject to analysis in any of them, although aspects of the notion are discussed, and thus each provides useful insights into agreements with Indigenous peoples.

### A The Social Contract

Agreement has long founded notions of the polity, although not exclusively. Three great political philosophers of the 18<sup>th</sup> century, Rousseau, Locke and Hobbes, talked of the ‘social contract’ between the state and its citizens as a partial explanation for the authority of the Sovereign.<sup>67</sup> The concept is notional and universal, given as the justification for a decision-making apparatus rather than specific decisions: in return for surrendering in-born rights and obligations and accepting the obligation to obey the state, the citizen is incorporated indivisibly into the state and receives protection and security. Law-making power is thus conferred on the state.<sup>68</sup>

Agreements with Indigenous people resonate with the language of the social contract but can hardly be said to exemplify any aspect of such a contract. Pluralism is the enemy of the social contract because the latter’s constitutive aspect is founded on the abandonment of the individual’s natural rights and freedoms. The idea of an agreement with Indigenous people is that those people are treated as a group with varying levels of autonomy and thus, to some extent, their recognition implies a pluralist state. Further, there is no constitutive sense at all in the way the agreements are deployed – in all three jurisdictions citizenship pre-exists any agreement.<sup>69</sup> Nor do the agreements represent some form of

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67 McHugh, above n 7, 198–200.

68 David A Wishart, ‘Allegiance and Citizenship as Concepts in Constitutional Law’ (1986) 15 *Melbourne University Law Review* 662, 665–73.

69 Albeit only since 1967 in Australia, by virtue of the 1967 amendments to the *Australian Constitution*.

accession to the province of the state, although New Zealand's Treaty of Waitangi may represent this. Some of the more recent Canadian agreements, famously the *Nunuvut Agreement*,<sup>70</sup> do precisely the reverse by carving out law-making power. And, finally, not all the agreements, especially in Australia, are about what the state will do: many are about the exchange of Indigenous peoples' more or less defined rights within the state for something else – usually money.

More recently, with diminishing confidence in the capabilities of the welfare-stretched state, agreement between the components of the state and its citizens has complemented notions of the 'already-there state'. New contractualism is rampant: the contract state has been postulated<sup>71</sup> and mutual obligation between state and citizen replaces welfare as Government policy.<sup>72</sup> Agreement with Indigenous peoples also resonates both implicitly and explicitly with these newer ways of conceptualising relations between citizens and their states.<sup>73</sup>

Agreement in the sense of ordering political dealings has its detractors. While mutual obligation can be viewed as deploying an empowering strategy, whereby the citizenship of the welfare recipient is acknowledged in ways not accommodated by the welfare state, equally it can be understood as the naked exercise of coercive power.<sup>74</sup> More theoretically, contractualism generally, as much as its sibling liberalism, presupposes the individual as some sort of ontological essence, an essence readily denied in the post-modern era – as discussed below. At a practical level, this plays out as contractualism's insistence on the exercise of citizenship only through transactions and its corresponding difficulty with those who do not fit into the realm of reasonable, evaluating maximisers of personal utility. Thus, for example, the intellectually disabled are treated as deemed contractors by virtue of some form of agency, yet this clearly is as problematic as the consent of the citizens in Rousseau's republic as

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70 Signed on 25 May 1993, implemented by the *Nunuvut Land Claims Agreement*, SC 1993, c 29.

71 See, generally, Glyn Davis, Barbara Sullivan and Anna Yeatman (eds), *The New Contractualism* (1997).

72 As mentioned above, this is explicitly recognised in recent Australian policy as enunciated on the Office of Indigenous Policy Coordination: 'Shared responsibility – Both governments and Indigenous people have rights and obligations and all must share responsibility, because governments alone cannot fix Indigenous problems': Office of Indigenous Policy Coordination, *Improving Indigenous Services: A New Way of Doing Indigenous Business* (2004) <[http://www.oipc.gov.au/About\\_OIPC/Indigenous\\_Affairs\\_Arrangements/ImprovingIndigenousServices.asp](http://www.oipc.gov.au/About_OIPC/Indigenous_Affairs_Arrangements/ImprovingIndigenousServices.asp)> at 10 November 2005.

73 McHugh argues that although agreement thinking comes out of Western tradition, there is no need for it to be a 'tool of domination', rather it should be 'a method of regulated coexistence' or 'a means of formalised dialogue': McHugh, above n 7, 200. I would not be so sanguine, nor do I see the political ideas of agreement as the only ones in play.

74 This debate is well illustrated by the various articles in Terry Carney, Gaby Ramia and Anna Yeatman (eds), *Law in Context (Special Edition): Contractualism and Citizenship* (2001).

contract.<sup>75</sup> Further, people are presumed to choose in all spheres of their life no matter that many matters are about the process of choosing ('I choose to have that decision made by my partner/the state/my tribe') or that in their milieu some spheres are not governed in that way: do we choose with whom to fall in love? Contractualism also refuses any idea of a group as contracting party,<sup>76</sup> making its application to agreements with the mobs, tribes, bands and *iwi* of Indigenous peoples decidedly problematic.<sup>77</sup> It also assumes that the state has something to offer, that it is the state that owns the welfare (or native title) that is handed over; behind this is a complex of intersecting ideas of the government and of the nature of income streams. These include that the government is separate from society<sup>78</sup> and that the state is free to arrogate to itself from property.<sup>79</sup>

The complex of ideas described immediately above has come to be known as neo-liberalism. Where extreme forms of neo-liberalism are softened into Giddens' 'Third Way',<sup>80</sup> the individual mutates into a responsible risk-taker, for whom obligations to society are the *quid pro quo* of the possibility of welfare. Mutual obligation in this sense leaves out the content of the reciprocal obligations, especially the nature of risks that the individual cannot choose to take and bear responsibility for themselves.<sup>81</sup> Yet this is to derogate little from neo-liberalism's defects when it comes to presumptions about agreement. Neo-liberalism still views the state as separate from society and the owner of the resources of welfare and original property (including native title), the individual as the contracting unit, the primacy of the transaction as a governing technique and so forth.

From this we can gather that agreement, in its former guise of a theory of the foundation of political ordering, is quite problematic. It leaves both the individual and the state ill-defined, and the substance of the obligations vague. Its core

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- 75 See Anna Yeatman, 'Contract, Status and Personhood' in Glyn Davis, Barbara Sullivan and Anna Yeatman (eds), *The New Contractualism* (1997) 39; Judy Cashmore, 'Children: Contractual Non-persons?' in Glyn Davis, Barbara Sullivan and Anna Yeatman (eds), *The New Contractualism* (1997) 57. Yeatman and Cashmore accept that the contract state assumes the capacity to choose, but argue that the state, in so doing, empowers persons to act within the state, and that a task of the state is to enhance this. My answer, coming partially out of the experience of parenthood, would be that there are limits to such enhancement, that such enhancement falls into the realm of wishful thinking and even more so in fields other than welfare, and that liberal individual empowerment implies expanded self-interest and this works more detrimentally in the necessary partial empowerment suggested by 'enhancement'.
- 76 See David A Wishart, 'Arguing Against the Economics of (Say) Corporations Law' (2003) 26 *University of New South Wales Law Journal* 540 for a critique of the attempt to include even the corporation within neo-liberal theory.
- 77 The organisational flow chart for the Office of Indigenous Policy Coordination refers to agreements with 'Communities, Clans and Families': Office of Indigenous Policy Coordination, *New Arrangements in Indigenous Affairs* (2004) 3 <[http://www.oipc.gov.au/About\\_OIPC/new\\_arrangements.pdf](http://www.oipc.gov.au/About_OIPC/new_arrangements.pdf)> at 9 November 2005.
- 78 Mitchell Dean and Barry Hindess, 'Introduction: Government, Liberalism, Society' in Mitchell Dean and Barry Hindess (eds), *Governing Australia: Studies in Contemporary Rationalities of Government* (1998) 1, 5–6.
- 79 Crawford Macpherson, 'Capitalism and the Changing Concept of Property' in Eugene Kamenka and Ronald Neale (eds), *Feudalism, Capitalism and Beyond* (1975), 104, 120–4.
- 80 Anthony Giddens, *The Third Way* (1998).
- 81 Cathy Lowy, 'Is There a Third Way?' in Christopher Arup and David A Wishart (eds), *Law in Context (Special Edition): Competition Policy with Legal Form* (2002) 172, 176–9.

function appears to be rhetorical to illustrate some form of consent of the governed to the sovereign will. In its second formulation of a technique of governing in the form of reciprocal obligation for welfare services, it is inextricably tied into quite contingent theories of government and consequently makes substantial assumptions as to the nature of the individuals involved (let alone that they are individuals), and as to the initial distribution of property rights. In as much as agreements by and with Indigenous peoples resonate with the ideas of consent in the political sphere, so also they imply all these practices and ways of thinking associated with the exercise of authority in the form of government.

These practices and ways of thinking lose much of their coherence in respect of Indigenous peoples and the agreements that have been made with them. Further, such agreements cannot be about the relation of the Indigenous people with the state: they assume legitimate occupation by the settler community rather than being called upon, other than rhetorically, to legitimise it. Most agreements are about native title in some way, the claim of native title being the process by which prior occupation by the Indigenous people is recognised. Hence the agreement presumes that which is claimed to legitimise the occupation.

Moreover and more radically, these practices and ways of thinking construct the self-perception of the individual. Thus agreement itself works not only to legitimate what is performed by the agreement, but also extends the realm of government to construct the individuals associated with it in terms of modern government.<sup>82</sup> This is particularly apparent in the application of mutual obligation principles. Mutual obligation has had its most obvious application in the provision of unemployment benefits where the unemployed are required to undergo job-seeking training as the price for the benefit. The unemployed are thus constructed to be better job-seekers: they are reformed to meet the government expectations of participants in the labour market.<sup>83</sup>

The contractualisation of government also works more subtly. It recasts relationships into a transaction mode, with the individuals making those transactions best conceived as rational evaluating choosers of what is best for them. This way of thinking is criticised for permeating its purported boundaries and constructing a more general view of the world.<sup>84</sup> Many relationships do not fit the mould of rationality: warmth and love, for example, are rendered invisible.

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82 Barbara Cruikshank, 'Revolutions Within: Self-Government and Self-esteem' in Andrew Barry, Thomas Osborne and Nikolas Rose (eds), *Foucault and Political Reason: Liberalism, Neo-liberalism and Rationalities of Government* (1996) 231.

83 In the recent controversy over the application of mutual obligation principles to aboriginal communities in Australia much was made of the exchange of requirements to adhere to normal parenting responsibilities (keeping children's faces clean for school) for the provision of petrol bowsers: see Grattan, above n 65. The agreement in question clearly implied that the aboriginal community did not adhere to what the government takes to be normal parenting practice and endeavours to normalise the existing practices.

84 This argument is more generally applied in feminist arguments: Gillian Hewitson, *Feminist Economics: Interrogating the Masculinity of Rational Economic Man* (1999) 212; Robin West, 'Economic Man and Literary Woman: One Contrast' (1988) 39 *Mercer Law Review* 867. The argument has also been applied to the theory of the firm and executive behaviours: William Bratton Jr, 'The "Nexus of Contracts" Corporation: A Critical Appraisal' (1989) 74 *Cornell Law Review* 407, 464.

Many of the features of culture disappear in this view – if they are no longer thought, they disappear entirely. Even if the effect is not more general, the relationship of Indigenous societies to the settler society is confined to the model of agreement represented by the contracting state.

## B Treaty

Insofar as the social contract and the contract state are about relations within the state, agreements with Indigenous peoples also refer to the idea of treaties between peoples, especially when they are characterised as nation states within international law. As described above, initial relations between Indigenous peoples and settler communities were often conceptualised by the settler communities as ‘treaties’. In Canada the treaty-making process continues to some extent, particularly in British Columbia. New Zealand’s Treaty of Waitangi best exemplifies this thinking, as Australia’s Batman Treaty demonstrates its limitations. There is also some semantic reference to Chief Justice Marshall’s characterisation of North American Indian peoples as ‘domestic dependent nations’ by the US Supreme Court in the mid 19<sup>th</sup> century<sup>85</sup> and the current terminology of ‘First Nations’ for the Indigenous tribes and confederations of North America.

This characterisation of agreements with Indigenous peoples highlights issues about self-government and sovereignty. It involves terminological debate over what constitutes a nation or state capable of making that special species of agreement known as ‘treaty’.<sup>86</sup> It does not purport to penetrate beyond the particular form and ask about agreement as such.

The ironic feature of treaty talk is that the more the status of Indigenous peoples as nations or states is recognised, the more the agreements must be about stripping away sovereignty.<sup>87</sup> Of course, recognition of nationhood implies self-government of an order that might not otherwise be achievable. The matter is strategic, especially in view of the relationship with a supra-national legal order implied by ‘treaty’, but denied by Chief Justice Marshall’s clever aphorism. A good illustration of how this plays out lies in the ‘Treaty’ debate in Australia.<sup>88</sup>

## C Law

Before consideration of legal visions of agreement lies the issue of whether legal visions mean much at all. Law may be marginal to society.<sup>89</sup> Macaulay investigated how business in Wisconsin was done, concluding that formal law is,

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85 See especially *Worcester v State of Georgia* 31 US 350; 6 Pet 515 (1832).

86 S James Anaya, *Indigenous Peoples in International Law* (1996) 15.

87 With respect to the US, see David Getches, ‘Beyond Indian Law: the Rhenquist Court’s Pursuit of States’ Rights, Colour-blind Justice and Mainstream Values’ (2001) 86 *Minnesota Law Review* 267.

88 Midnight Oil’s appearance at the opening ceremony of the 2000 Olympics in Sydney is a graphic illustration of the resonance of the ‘Treaty’ debate. Beyond polemic, see Heather McRae et al, *Indigenous Legal Issues; Commentary and Materials* (3<sup>rd</sup> ed, 2003) 658–63.

89 ‘Marginality’ is a term taken from David Trubek, ‘Where the Legal Action Is: Critical Legal Studies and Empiricism’ (1981) 36 *Stanford Law Review* 576.

indeed, only marginal to transacting in that milieu.<sup>90</sup> Relationships were all-important in the Macaulay study, with much left within relationships to be decided on an on-going basis. Agreements were signed, but there was seldom recourse to law. This sounds a caution on over-enthusiastic adoption of legal models or perspectives. Later research paradoxically testifies to the ongoing reorganisation of business on transacting lines, although formal law is still not in full bloom.<sup>91</sup>

In terms of agreements with Indigenous peoples this implies, first, that there is a clear distinction between an agreement or relationship and descriptions emanating from the law of the relationship or the obligations comprising it. Second, nominating a relationship as an agreement or even as comprising enforceable obligations does not necessarily mean much, as parties may see it otherwise or ignore legal enforceability. Third, the relationship of agreements with law can change over time and according to the will (even if unilateral) of the parties. It could well be that the terminology of agreement is deployed for the purpose of shifting perspectives to legal models. Hence marginality does not preclude consideration of legal models; in fact, it implicates them.

In common law, despite the Macaulay study, agreement and contract are so intertwined that one is often mistaken for the other. The difference between them is that 'contract' is a legal notion while 'agreement' is more general. Agreement in law is mostly subsumed under the notion of contract.<sup>92</sup> Hence a set of legal doctrines, such as offer, acceptance, consideration and intention to enter into legal relations, exist to define when what otherwise might be called an 'agreement' exists as a 'contract'. If it does, it comprises terms of various sorts, and binds no one other than its parties, although it may affect others.<sup>93</sup> Resort can be made to the legal system to enforce contracts and there are defences to such claims. These are all doctrines explaining how the law deals with agreements that are framed as contracts.

Civil law<sup>94</sup> places rather less emphasis on identifying the existence of the relationship nominated as 'contract', and more on whether a particular promise binds the promisor, in what way and to what extent. Privity and consideration wither away, although doctrine continues to emphasise *causa obligationis*, the distinction between a naked agreement and one comprising obligations enforceable at law. Obligations enforceable by the state thus flow from promises in ways articulated in the various Codes. Which promises should be enforceable remains a live issue. *Pacta nuda*,<sup>95</sup> for example, are not considered enforceable,

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90 Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' [1963] 28 *American Sociological Review* 55.

91 See Vivien Goldwasser and Tony Ciro, 'Standards of Behaviour in Commercial Contracting' (2002) *Australian Business Law Review* 369.

92 Morris Cohen, 'The Basis of Contract' (1933) 46 *Harvard Law Review* 553, 571-4.

93 In some jurisdictions those who take benefits under contracts can enforce the promise: see, eg, *Contracts (Privity) Act 1982* (NZ).

94 I am grateful to Martin Chanock for bringing to my attention the common law focus of a previous draft.

95 'Nude pacts', that is, agreements made without the passing of consideration between the parties.

which emphasises the distinction between agreement and contract.<sup>96</sup> Yet in both the common law and civil law systems it is axiomatic that there are promises, whether mutual or not, which are enforceable with the assistance of the state, the only question theorised is, which ones?<sup>97</sup>

The only conclusion that seems to come out of the quest for an answer to the question of why does the law enforce some promises and not others is that no unified theory can ‘explain the rules of positive law or the results most people would regard as fair’.<sup>98</sup> Even refusals to enforce agreements that, according to the criteria of law, should otherwise be contracts, are not grounded on anything more than an appreciation of some anti-social effect of the putative contract. Of course there are many attempts at such theories, but as Macaulay’s work implies, such theories explain doctrines of law, and so are of little use here. However, I will return to these theories below as justifications of the use of promises or mutual agreements, rather than other forms of commitments, as ways of governing the future.

Once the need for a single theory is abandoned, law about promising can be seen to be situated in a contest between competing distributive schemes of society’s wealth, although these still rest within the liberal ideal of individual liberty.<sup>99</sup> The ‘ought’ of theory is displaced by ‘is’, and in the gap lies claims by individual, groups and classes for law in their own interest.

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96 From the common law point of view this issue appears differently: contract as enforceable obligations or as a relation to be identified is accepted to present a narrow vision of agreement, thus it is sometimes broadened in law for specific purposes; for example, the definition of collusive conduct in competition law. Casting the net of contract wider in this way is designed to capture the nods and winks of mutually beneficial but socially reprehensible business conduct and is therefore entirely off the point here, but it is instructive to see legislative recognition of the need for a larger vision of the concept. A judicial recognition may be found in the development of promissory estoppel, starting with *Central London Property Trust v High Trees House Ltd* [1947] KB 130. Thus in *Waltons Stores v Maher* (1988) 164 CLR 387 a contract was relied upon even when all parties knew a contract did not exist. Exactly which doctrine of law is at issue in the case is problematic (see Peter Drahos and Stephen Parker, ‘Critical Contract Law in Australia’ (1990) 3 *Journal of Contract Law* 30, 42–8), but the case again demonstrates a consciousness of the limitations of contract in dealing with agreement. In both situations, what justifies the broadening of the notion is unclear and is certainly only doctrinally theorised.

97 David Hume famously asks this question: see David Hume, ‘Of the Obligation of Promises’ in David Hume, *A Treatise of Human Nature* (first published 1739–40, 2003 ed) 367.

98 James Gordley, *The Philosophical Origins of Modern Contract Law* (1991) 231. Michael Trebilcock comes to much the same conclusion, resorting to Posner’s ‘practical reasoning’ or ‘pragmatism’ to choose among the ‘array of instruments and institutions available to a community’ to ‘vindicate’ the ‘values’ of ‘autonomy and welfare’: Michael Trebilcock, *The Limits of Freedom of Contract* (1993) 248. See also the discussion of the possibility of Grand Theory in Thomas Wilhelmsson, ‘Questions for a Critical Contract Law – and a Contradictory Answer: Contract as Social Cooperation’ in Thomas Wilhelmsson, *Perspectives of Critical Contract Law* (1993) 9. In a well-known article, Richard Craswell comes to much the same conclusion: that philosophical enquiry into the question of why promises ought to be binding is in the main simply irrelevant to contract law’s choice of background rules. These choices can only be made on the basis of some other value, such as efficiency, or ethical theory: Richard Craswell, ‘Contract Law, Default Rules, and the Philosophy of Promising’ (1989–90) 88 *Michigan Law Review* 489, 528–9.

99 Hugh Collins, ‘Contract and Legal Theory’ in William Twining (ed), *Legal Theory and Common Law* (1986) 136, 136. One can see the tension played out in Grant Gilmore’s ‘death of contract’ hypothesis: Grant Gilmore, *The Death of Contract* (1974); see also Atiyah’s inconsistent ruminations: Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (1979); cf, Patrick Atiyah, *The Damages Lottery* (1997).



Agreements with Indigenous peoples are talked of as if they were contracts but I know of no instance where they have been litigated as such. There seems little connection between Indigenous agreement-making and the law of obligations. Certainly there are claims, some well-substantiated, that agreements have not been performed yet these are pursued as political matters rather than matters of breach. There may well have been doctrines of law that foreclosed such claims when one party was the state. As contracts, then, they are either examples of Macaulay's thesis or situations where either contract law is not seen to impinge or where claims by other groups have outweighed the claims on society's wealth by Indigenous groups. There seems little substance to support a view of these agreements as contracts, although the trend in Australia and Canada to agreements outside formal structures may hint at the possibility of the intervention of private law in the future. The question courts will then be faced with is whether, and in what way, the distribution of society's wealth is to impact on Indigenous people. Are they to own in such a way as to be able to alienate? That begs the question this essay attempts to merely introduce.

If the issue of the intervention of law is cast a little wider, the Derridean approach of Dalton<sup>100</sup> becomes relevant. Dalton examines the problematics involved in a legal order dependent on liberal conceptions of individual freedom, separating the questions of power and knowledge and sourcing them in the split between self and other, subject and object. The problem of knowledge is that we cannot each know what others know and think. How do we know whether there is consent, what intentions are and what we know of what others are trying to communicate? Problems of power are located in the desire to be free of the state and also of one person over another. These issues lead to dichotomies of public and private, manifestation and intent, and form and substance organising doctrinal resolutions and policy debates.<sup>101</sup>

Dalton confines her approach to contract law. As we have seen that is to render it marginal to the present exercise. Yet there is nothing in what she says to preclude a broader application to agreement-making. This would be a crucial step here. It can be achieved if we move to a regulatory understanding of the process of governance, a move well articulated by Hunt,<sup>102</sup> although it is a development of Pound's familiar denial of the significance of the boundary between law and non-law. Agreement becomes a descriptor of a particular series of social relationships, in this case between Indigenous groups of people and other institutions.

Hunt would prescribe research into the constitution of the 'object of regulation', the designation of the 'regulatory agents' involved, the production of 'regulatory knowledge' and the formulation of the 'regulatory strategies'.<sup>103</sup> This essay touches on all of these, albeit loosely, but concentrates on identifying the obvious fact of agreements with Indigenous peoples as an example of a process

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100 Clare Dalton, 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94 *Yale Law Journal* 997, 1007–9; Drahos and Parker, above n 96, 34–6.

101 Dalton, above n 100, 1108–10.

102 Alan Hunt, *Explorations in Law and Society: Towards a Constitutive Theory of Law* (1993) ch 13.

103 *Ibid* 319–20.

of governance. Law is a dimension of the complex set of connections between the social agents involved in these agreements. Dalton points the way to identifying a more inclusive way of conceptualising those connections. Moreover, there are other dimensions, notably including economics.

### **D The Transaction in Economics**

It could well be said by an economist that agreements function in society to enhance welfare and hence they are properly deployed as a means of maximising the utility of Indigenous peoples. Such an approach clearly legitimates agreement and consequently deserves exploration.<sup>104</sup>

The welfare adverted to by the economist is efficiency, which is an ideal measuring distributions of the world's limited resources in terms of the expressed preferences of consumers. Perfect markets in equilibrium are the theoretical construct that models the ideal and the way of achieving it. From this point we can draw two lines of enquiry: what part do agreements play in this schema, and what does such an approach mean for the idea of agreement?

Efficiency is achieved in a market in perfect competition. This is a market comprising people who are 'rational' in the sense that their actions express their desires in such a way as to maximise their happiness, dealing with homogenous and indivisible products, with lots of other buyers and sellers so that the action of any one individual has no effect on any one else, who can choose to be part of the market or not without cost, and who have complete information about the products and the market. The dealings on the market are also not affected by any other market, nor do they affect other markets: each market is considered in isolation. Theories of demand and supply are added to this construct, which results in the idea that there is a price where demand and supply are equal; that is, all that everyone wants of the product at a particular price is supplied. No one wants any more at that price and there are none left over. If that is true of all products in the world, then all the resources of the world cannot make us any happier.

The place of agreement in the perfectly competitive market is that it is the primary means by which the desires of individuals are expressed and satisfied. It is thus constrained by the requirements of the perfectly competitive market: it is made by knowledgeable, rational, evaluating maximisers of utility, in an atemporal setting, with nothing but the transfer of ownership of a commodity or service as its object.

This set of ideas, or 'model', is not intended to describe anything in particular, but is a construct of an ideal situation, with which the real world can be compared. It functions to create algorithms, but itself is heuristic. In terms of agreements, then, it tells us that if agreements are like transactions in a perfectly competitive market, 'efficiency' results. The question that then faces the

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104 See generally Paul Burrows and Cento Veljanovski, *The Economic Approach to Law* (1981) Ch 1; Robin Malloy, *Law and Economics* (1990) Part 1; and any number of other introductions to law and economics. Undergraduate texts on price theory are another good source, although they are a little detailed for my points here.

economist is what to do about it. The question that exercises the philosopher is whether it is worthwhile to do anything about it.

The economist who thinks about what to do about making the world efficient is a 'welfare' or 'normative' economist. When one such economist sees a market, they mainly make recommendations about what should be done to make it work better, and if there is no market, they recommend steps to develop a market. Some may also consider government and how it works, either as an alternative to transactions on a market or as itself a market. In all of this there are many currents and views, but the discussions, for present purposes, can be usefully summarised in terms of what is usually recommended for an agreement if it is to function as a transaction in a market. The recommendations are that the transaction should be formed by fully informed, self-interest maximising people; that there should be firm property rights in what is to be transferred; and that there should be a legal system to enforce the transaction without considering its substance. The costs of entering transactions should be minimised and this can impact on the social choices involved in the other recommendations. Hence, if agreements with Indigenous peoples fit the mould, an economist would say that efficiency is enhanced.

But is it worth doing anything about 'efficiency'? In Paretian terms this question has the added element that it is, indeed, almost impossible to do anything about it. Pareto's efficiency criterion states that if a person chooses to do something then it must be taken to improve their happiness or 'utility', that social welfare is the sum of the happiness of individuals in society and that no change improves the welfare of society unless it is preferred by at least one person without diminishing the utility of any one else. Efficiency thus defined is a measure of social welfare, determined by the preferences of individuals. In other words, it converts the preferences of individuals into social welfare. It is thus intimately connected to liberal and utilitarian philosophies. As such it has difficulty with both notions of rights and fairness.<sup>105</sup> More generally, utilitarianism is but a branch of moral philosophy and it would be impossibly naïve to make recommendations on the basis of efficiency without at least noting the qualifications attached to it as an ethic.<sup>106</sup> After all, the founders of modern economics, Mill, Smith and Bentham, all located their economics within moral philosophy.

Close attention to Pareto's efficiency reveals that it makes no judgment on the subjective value of anything. Indeed, it does not even assume that one dollar has the same value for two people. This renders lawmaking impossible because we can never know whether a change in law, by definition not a transaction, did in fact cause some form of loss to someone. Again by definition, a transaction cannot cause a loss because the parties would not have entered into it. Kaldor-Hicks efficiency, the foundation of cost-benefit analysis, allows for that loss, provided that the gain to the winners outweighs the loss to the losers – but of

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105 See Howard Chang, 'A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle' (2000) 110 *Yale Law Journal* 173: this article discusses both and comes to a valiant reconciliation.

106 See generally David Lyons, *Forms and Limits of Utilitarianism* (1965).

course that removes, as the price of practicality, the hermetic, subjective nature of Pareto's version. Kaldor-Hicks efficiency is hence ethically less attractive. And it is frequently forgotten that Kaldor himself required a degree of relative equality in the distribution of wealth to make cost-benefit analysis work.<sup>107</sup>

Economics, then, where it talks of private ordering as the preferable paradigm of economic organisation, to use Trebilcock's alliteration,<sup>108</sup> draws upon a long history of thought intimately tied into notions of the nature and proper role of government, and one in which the notion of the autonomy of the individual is paramount. Transactions function within the theoretical superstructure as the means by which this freedom is expressed<sup>109</sup> and agreement is the version we see of that in daily life.<sup>110</sup>

In as much as agreements with Indigenous peoples resonate with economic ideas of social welfare in the form of 'efficiency', the normative ideal of the transaction is implied, with its conceptions of those agreeing, property rights, knowledge and governmental roles. But the economist forgets that those things are not necessarily naturally there and that to create them in the quest for efficiency may be worse than the benefits of efficiency, if any. We are left with some difficult questions. To what extent do these agreements meet the economic ideal in terms of its several requirements? What was involved in making them meet it both as a matter of lived life and as a means of perceiving that life? Are notions of the nature and proper role of government and the autonomy of the individual appropriately deployed in this context? I approach these questions in the next section, while also bearing in mind other dimensions of the relationships between social agents.

Transaction, in its efficient market sense, is not the only way agreement has been theorised by economists. The concept is usefully expanded by the ideas of Macneil and Williamson.<sup>111</sup> Macneil and Williamson react against the narrow vision of transaction in price theory and attempt to encapsulate legal notions of contract in a theory of institutions. Contract is placed on a spectrum from a 'discrete and presentiated' transaction (sufficient unto itself, dealing with all future contingencies and immediately executed) to an institution comprised of longer term hierarchical relations; intermediate on the scale are tripartite governance mechanisms for mediation and dispute resolution or later settlement of provisions.

The question Macneil and Williamson address is why agreements take one form or another. In tune with their economic leanings, both rely on the idea of opportunity cost: that people can be presumed to be doing things in the least costly way, and that there must therefore be costs involved in agreeing in one

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107 Nicholas Kaldor, 'Welfare Propositions of Economics and Inter-Personal Comparisons of Utility' (1939) 49 *Economic Journal* 549. A relative degree of inequality was also required to make people work.

108 Michael Trebilcock, *The Limits of Freedom of Contract* (1992) 1.

109 Geoffrey Brennan, 'The Economic Concept of Contract' in Glyn David, Barbara Sullivan and Anna Yeatman, *The New Contractualism* (1997) 27, 27.

110 Michael Walzer, 'The Communitarian Critique of Liberalism' (1990) 18 *Political Theory* 6, 21–2.

111 Usefully presented in Burrows and Veljanovski, above n 104, Part 1. See also I R Macneil, *The Many Futures of Contracts* (1974); Oliver E Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (1975).

form as opposed to another. In order to work out what those costs are, both rely on relaxing the assumptions of price theory in relation to individuals; in particular those as to rationality. They talk of 'opportunism' and 'guile' as qualities of individuals which react on the environment of transactions to produce costs. Their taxonomies of costs differ.

These ways of dealing with agreements, as is implied by their sociological origins, are essentially descriptive. It would be difficult to establish that agreements with Indigenous peoples resonate with a description of the form of transactions in general, yet the transaction cost analysis is useful to illustrate the abstract nature of the transaction in price theory and to indicate ways in which the idea of transaction can be broadened, perhaps even to agreement, albeit at the expense of normative value. There is an emphasis on governance, on the manner by which future problems are dealt with, and this also can indicate issues to be observed in existing agreements and help isolate matters for consideration in future agreements. Reflexively, the theoretical work may be seen to have formulated the issues in particular ways.

## E Ethics

As we have seen, ethical considerations of agreement mostly arise in considering the issue of what circumstances should prompt the polity to enforce promises as such or as contracts.<sup>112</sup> That those agreeing have committed themselves to their promises is the formal moral element resonating in agreement, including agreements with Indigenous peoples. That agreement is a good thing in itself may well also resonate, but has little modern formal explication, although Thomistic ethics could well lead to consideration of essences and ends.<sup>113</sup> Consent of itself is little more than the absence of coercion, a promise not to object.

Discussions of promising circulate around autonomy of will, morality, and welfare. Kant relied on his famous categorical imperative to arrive at the proposition that one could not will that promises should be broken, but he did not make the relationship between the promise and agreement explicit.<sup>114</sup> Indeed it seldom is, sitting confused in the relation between contract and agreement. Fried and Rawls ground the binding force of contracts on the convention that promises are binding.<sup>115</sup> It is not that the convention has a particular moral force, but that it is there and a promise is made. Utilitarians go on to justify the convention on welfare grounds, mostly in terms of efficiency.

Such approaches fail to explain why all promises are not binding, or the grounds on which distinctions between promises are made. The moral aspect of

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112 What follows is drawn from: James Gordley, *The Philosophical Origins of modern Contract Doctrine* (1991); Charles Fried, *Contract as Promise* (1981); Michael Trebilcock, *The Limits of Freedom of Contract* (1993).

113 Gordley, above n 112, Ch 2.

114 *Ibid* 233.

115 Brian Coote, asserting that a contract is a reciprocal exchange of assumptions of legal contractual liability, takes a similar approach: Brian Coote, 'The Essence of Contract' (1988) 1 *Journal of Contract Law* 91, 183.

agreements thus cannot come out of the simple proposition of an autonomous will, but must rely on the ultimate ends of action.<sup>116</sup> This applies to agreements with Indigenous peoples: while coercion and imposition is ethically untenable, agreement of itself, whether mere consent or an exchange of promises, and to the extent that people are to be held to their promises, can only be judged by the ends that are served.

Moreover, agreement means more than mere promise, binding or not. To be sure, it involves promises, but they are mutual between the parties to the agreement – the notion of ‘if you promise this, I will promise that’. When agreement is deployed as a way of governing the future, the difference between agreement and, say, legislation, is that legislation is a mere promise (or threat). When mutual promising is held out as a governing strategy, promising is withheld until reciprocal obligations are assumed. This aspect of agreeing seems little considered within the philosophical literature, yet paradoxically, seems embedded in the jurisprudential literature on bargain. Yet bargain never received articulation as an ethic, only as a description of posited law, and thus failed in the quest for an ethical foundation for contract.

Finally, the post-modern turn in many disciplines has challenged the idea of the individual as ‘a pre-social self, a solitary and sometimes heroic individual confronting society, who is fully formed before the confrontation begins’, as Walzer sardonically puts it.<sup>117</sup> This has strong implications for the implicit liberalism of so much of the foregoing theorising and goes beyond even Dalton’s Derridean dichotomies. It challenges the notion of government as separate from society and therefore of agreement as other than government. The identity, capacity, desires and status of individuals in society are shaped by institutions and bodies, themselves the product of practices, techniques and knowledge, not to forget resistance.<sup>118</sup> Agreement becomes a technology of governance,<sup>119</sup> whereby the governed are constituted in certain ways by the practices that they are permitted and encouraged to deploy, within ways of knowing that presume the preconditions of agreeing.

This rids us of the state as an entity, both in any technical sense, and in Ockham’s sense<sup>120</sup> as a needless universal.<sup>121</sup> Correspondingly, we can cut through notions of consent and promise founded on the nominal individual. We can begin to think about what is necessary for agreement and therefore what is implied when we accept agreements as a way of governing the future. Unfortunately, the word ‘oppression’, with which this essay started, also loses its meaning.<sup>122</sup> There can be no society without formation of subjectivity, hence all

116 Gordley, above n 112, 245. See also Craswell, above n 98.

117 Walzer, above n 110, 20.

118 See Dean and Hindess, above n 78, 2–12.

119 Mitchell Dean, *Governmentality* (1999) Ch 1; Hunt, above n 102.

120 The famous ‘Ockham’s Razor’, which appears as such nowhere in his writing, is often expressed as ‘don’t multiply entities beyond necessity’.

121 The same point is put as ‘cutting off the head of the sovereign’: Michel Foucault, ‘Two Lectures’ in Colin Gordon (ed), *Power/Knowledge: Michel Foucault* (1980) 78.

122 Douglas Litowitz, *Postmodern Philosophy and Law* (1997); Terry Eagleton, *The Illusions of Postmodernism* (1996).

techniques of government oppress in the sense of lacking consent. We can only compare and choose.

## F Conclusion

Agreement, then, is a well accepted notion, but one that is hard to pin down with any exactitude without denuding it of much of its capacity to describe many of the situations where consent is expressed or promises made. The above discussions do not give an unequivocal indication as to the circumstances in which agreement is best deployed, either in ethical or welfare terms. Agreement as a technology of governance and, by implication, contract law, involves a whole mentality, describing and constituting the individual in their relations with others. Within this mentality there are many variations producing irreconcilable differences and issues in the resolutions arrived at on a day-to-day basis in the operation of the society so constructed.

There is no necessity in the existence of a form of society in which agreement plays a particular part as a technique of governance. The three settler societies under consideration here each function differently and agreement works differently in each. Moreover an Indigenous society is different yet again. If Indigenous peoples do indeed partake of a different form of society, or if their practices, techniques and knowledge are not as liberal society presumes, then deploying agreement as such may work to reconstitute Indigenous society into a more liberal form. This operates through the shaping of the individual identity, capacity, desires and status of individuals by those practices, techniques and knowledge. It may work holistically through the very idea of agreement as implied above, or it may work through particular aspects of agreeing. In neither case can there be said to be consent. It is oppression, and there is complicity and resistance.<sup>123</sup>

Yet society comprises techniques of governance that reformulate our subjectivities and therefore to which no one can be said to consent. All that can be done is to choose between techniques, and that can only be done when we know what we are doing. This is what this essay attempts and can only attempt – to inform such choices.<sup>124</sup>

What now follows is an exploration of the ways in which aspects of agreements may reconstitute Indigenous societies. This does not extend to encapsulating the resolution of situations where agreements are not carried out or where, for some reason, their existence is denied. If the agreement is oppressive (unconscionable, unfair) within the notions of the liberal legal order, the question of its legitimacy is easily answered and need not be further considered. Further,

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123 See Pat O'Malley, 'Indigenous Governance' (1996) 25 *Economy and Society* 310, referring to a theory best enunciated in Alan Hunt and Gary Wickham, *Foucault and Law* (1994) 81–7.

124 I am grateful to Francine Rochford for a reference here to Habermas' theory of discourse ethics. A practical example is the choice between representative institutions (albeit set up by settler legislation) like Canadian bands (*Indian Act*, RS 1985, c I-5) or the Australian Aboriginal and Torres Strait Islander Commission ('ATSIC') and agreements. This choice is made quite explicit in discussions in Australia over the abolition of ATSIC and the introduction of mutual obligation principles: see, eg, Grattan, above n 65; Office of Indigenous Policy Coordination, above n 77.

the exploration is not comprehensive, proceeding by way only of examples taken from the discussion of the agreements earlier in this essay.

## V THE ELEMENTS OF AGREEMENT

Fortunately, my purposes here do not require exact definition of agreement, rather an appreciation of its elements. These might best start with the extension of Dalton's simple idea about contract: that agreement presumes a set of answers to questions about the way we think and do things.<sup>125</sup> These are that the future is to be determined by recognising that we all are separate and have differing perceptions of the world, differing interests and different information, that the way to reconcile these differences is by negotiation between them from the standpoint of difference, and, finally, that agreement presumes that the way into the future is by way of joint declaration of future action and restraint to which we will be bound in some way. To pursue this, I formulate a list of essential ingredients to agreement and ask what happens when they are applied to mediate the future.

My list of the essential elements of agreement includes parties, substance, mutuality, and a relationship with the legal system. The list need not be exhaustive, as it is only meant to categorise examples. Moreover, it should be noted that all these elements are heavily interconnected.

### A Parties

Agreement implies individuals with differing interests and information who negotiate and make promises. How then are agreements to be deployed when individual human beings are not the parties? After all, philosophy finds the binding force of agreements difficult enough in the instance of individual human beings as parties.

#### 1 *New Zealand*

Discussions (including mine) of the subject agreements are invariably vague as to what, or with whom, Indigenous people are agreeing. Mostly we think of it as 'the government'. Yet there are substantial differences. In many of the agreements made in Canada and Australia the agreements are between the Indigenous people (howsoever described and nominated) and corporations or other business groups, arms of government, government business organisations, universities and so forth. The identity of the parties tends to depend on the subject matter of the agreement. In New Zealand there is a real dissonance between notions of 'government'. There is a long history of the Maori refusing the separation of the Crown's personal and politic aspects, and holding the Queen (or King) personally responsible for the execution of the Treaty of Waitangi. This ambiguity is still reflected in the wording of the various statutes enacting

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125 Dalton, above n 100, 999.



agreements.<sup>126</sup> It is also reflected in the petitions to the Crown by representatives at various times of the Indigenous peoples in all three jurisdictions. The important issue here is that nominating the other party describes the relationship of the Indigenous people with the other party. When private sector parties or analogous parties are nominated there is an implicit acceptance of the agreement as acting within a framework of property, status and law, and the Indigenous people is thus defined, to the same extent, as the other party. When definitions of government as a party are refused by Indigenous people, even if on historical grounds as is the case of the Maori, location of Indigenous people with respect to the settler notion of government is rendered problematic.

The necessity of having parties to an agreement impacts on the Indigenous peoples' side too. For the sake of argument, it is worth accepting Chief Judge Durie's explanation of the structure of Maori society.<sup>127</sup> There were *hapu* or family units, which were loosely tied into *iwi* or 'tribal' units but such arrangements were rather in the nature of shifting alliances.<sup>128</sup> There were also *waka*, a term of genealogy indicating the canoe in which a person's ancestor arrived on the shores of Aotearoa, or New Zealand, but which also provided a sense of unity among *iwi* and *hapu*. The society so sketched was complex, with power sourced not only in social structure but in individual *mana* and gender. Yet agreements in reparation for what has been done to Maori are with that level of Maori society best described as *iwi*. For obvious reasons of administrative simplicity, there has been a thrust to tribalise Maori society. The failed *Runanga Iwi Act 1990* (NZ) demonstrates this. That Act failed because of resistance to the creation of a Maori *iwi*-based society by legislative fiat. Yet the same end is being achieved piecemeal by agreement.

Tribe creation through agreement worked like this: reparations agreements transfer wealth and other symbols to recipients. There is then an incentive to create an organisation necessary to negotiate and receive those symbols, to be the party to the agreement. This party must be legitimate: to be thought to represent the society or people whose interests are at stake in the agreement. In the case of the Tainui, who received substantial funds and lands by virtue of the *Waikato Raupatu Claims Settlement Act 1995* (NZ), there is a substantial organisational structure for the holding and management of assets, including the vesting of title to property in a symbolic trustee, and for the disbursement of funds. The Tainui

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126 For example, the English text of the apology given under the agreement by the Crown has been enacted: 'The Crown acknowledges that its representatives and advisers acted unjustly and in breach of the Treaty of Waitangi': *Waikato Raupatu Claims Settlement Act 1995* (NZ) s 6. The sense of the 'government' is a personal one, with the capacity to regret and atone. It is centred in 'the Crown' that has representatives, advisers and forces. Yet there is nothing in the apology which could not be accepted within a description of the Westminster system by a 21<sup>st</sup> century constitutional lawyer.

127 Chief Judge Eddie Taihakurie Durie, *Undoing History* (Paper presented at Noumea, October 1993) <<http://www.knowledge-basket.co.nz/oldwaitangi/press/93noumea.HTM>> at 10 November 2005; Chief Judge Eddie Taihakurie Durie, 'Custom Law: Address to the New Zealand Society for Legal and Social Philosophy' (1994) 24 *Victoria University of Wellington Law Review* 328.

128 Most of the signatories to the Treaty of Waitangi denoted themselves as belonging to particular *hapu*: see Orange, above n 15, 257.

Maori Trust Board also invests substantial funds into research aimed at determining who is Tainui, and thus who is eligible for benefits.<sup>129</sup>

The Durie story of Maori social structure may or may not accurately represent the changes that have occurred. The important point is that it is a possible story. We can imagine that it is so. The exigencies of a relationship with the Government are an important part of that story. Those relations are set out, at least in part, in the agreement. The agreement needed parties, and the institution of the Tainui resulted to manage the subject matter of the agreement. However the Tainui might have been constructed, the institution geographically localised at Hopu Hopu near Hamilton on the North Island of New Zealand is to some extent the result of the agreement that was to be made. And that institution is reinforced by the necessity of wealth distribution along the lines that made the institution a legitimate representative in the first place. Accordingly there are continuing strenuous genealogical efforts to determine tribal boundaries among many claims in dispersed communities.

Neo-colonialism subscribes to the Derridean idea of 'the other' as created to define the dominant culture. To a certain extent that is what is being said here. The point is that if agreement is to be deployed as the mode of governing in a field of social relations, parties to the agreement have to be constructed. In the New Zealand case one side is the Government and its other is the *iwi* in its current form. It would be easy to maintain that this is one-sided oppression where there has been interference in social relations of the Indigenous people, yet there is far more at work here. The Tainui are complicit in the reconstruction, as certain people gain power through institutional change. Of course this complicity is itself problematic, as there are substantial accountability problems with the organisational structures, and dissent and conflict in decision-making. Moreover, the place of the parties in relation to each other is redefined in the contracting process, as Government also has to define itself as a party and carefully articulate that position without compromising the New Zealand government's claim to sovereignty. More of that later.<sup>130</sup>

## 2 Canada

These issues are played out quite differently in Canada. The *Indian Act* has defined Indian social structure since 1868. The agreement process accepts such social structures as the recipients of the subject matter of the agreements, rendering the definition of party only problematic in the determination of who may represent the party in the protracted negotiation process. For example, such a definitive approach has difficulties with adoption. Another example is presented by the situation of the Metis people. They are the descendants of

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129 Much of the information set out here is available from the Annual Reports of the Tainui Trust Board. The rest was made available in personal conversations with various officers at Hopu Hopu in August 1997.

130 More also in a penetrating discussion of precisely these issues: Nan Seuffert, 'Nation as Partnership Law: Law, "Race", and Gender in Aotearoa New Zealand's Treaty Settlements' (2005) 39 *Law and Society Review* 485.

intermingled North American Indian and European races and now considered to be distinct from both.<sup>131</sup>

### 3 *Australia*

The situation is considerably more fluid in Australia. Agreements are made much more within the legal and administrative structure of the Australian polity, but by a much more diverse set of actors. Mining companies sign agreements with mobs that are locally defined, native title agreements under the aegis of the *Native Title Act*. The *Native Title Act* nominates a variety of legal forms to be possible recipients of native title, clearly making reference to past techniques for interests being held on behalf of Aboriginal and Torres Strait Islander peoples.<sup>132</sup> The key difference between this picture and practices in both the other jurisdictions, it is that in Australia agreements seem to be far more deeply embedded in the private domain. That is not to say that the definition of party is obvious or unproblematic. The process of negotiation involves the appointment of representatives. The choice of vehicle for receipts must be made. In these there is inevitably a construction of a representation of the social structures of the Aboriginal or Torres Strait Islander peoples and this may involve a reconstruction of those social structures themselves. Deciding who can who can speak for a mob in this type of dealing may be a type of decision-making alien to the nature of the social structure. At the very least, if wealth passes a legal structure set up to receive it, perhaps a trust or a corporation registered under the *Aboriginal Councils and Associations Act 1976* (Cth), the power to manage implicitly conferred under that structure is at best an imperfect representation of social structures.<sup>133</sup>

The deployment of agreement to govern relations appears to require the formation of social structures that allow for parties to the agreement to negotiate, agree and receive. At a theoretical and ethical level, much of the justification of agreement is with respect to the individual. This disappears in the main when dealing with recognised groups, such as companies, and even more so when a group's associative features are imposed. All government documents and officials encountered in the research for this essay expressed considerable sensitivity to the issue. Indigenous peoples can be characterised as complicit in

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131 See Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (1996) Vol 4, Ch 5; Thomas Flanagan, 'The History of Métis Aboriginal Rights: Politics, Principle and Policy' (1990) 5 *Canadian Journal of Law* 71; Joe Sawchuk, *The Dynamics of Native Politics, The Alberta Metis Experience* (1998) 18–27.

132 For an exhaustive discussion of the governance structures available to represent aboriginal groups and manage resources, see Christos Mantziaris and David Martin, *Native Title Corporations* (2000) Chs 3–7.

133 The Australian Government's new policy refers to 'Communities, Clans and Families' in an environment when only the first of those has been heretofore commonly used: see Office of Indigenous Policy Coordination, above n 77.

the process, yet they have little choice, given the lack of alternative conceptions of parties to agreements.<sup>134</sup>

## B Substance

Agreements are always about something. In New Zealand they have been about acknowledging the past, apologies for past action, financial reparations for injustice, the abandonment of claims, symbolic recognition of culture, and mechanisms to govern future relations, such as safeguarding customary food-gathering and the management of places and property of cultural or traditional association. In Canada there has been a greater emphasis on self-government, perhaps as a result of the shadow of the *Indian Act*, and a constitutionalisation of the results of agreement. Settlement of claims to native title has also defined the thrust of many agreements with reparations for past takings in breach of treaties being involved as well. Access to areas or property over which Indigenous people have some sort of control has been the thrust of agreements with non-government agencies. In Australia, self-government is on the agenda, but the pressure is to local issues of settlement of claims, access to and management of welfare services, and access by business and infrastructure agencies to property and land.

Closure is a significant element in all of these situations. One party frequently endeavours to ensure that the settlement of claims is final. In order to shift their position toward this closure, the other side has to consider all possible futures in the agreement and ensure their interests are served by the proposed trade-off in every possible case.<sup>135</sup> An alternative way of viewing this is to ask: by what right may one generation of an Indigenous people bind a future generation?

The process of closure, or binding future generations, is one of rendering the subject matter of the agreement tradeable; to use Marxist terminology, it is commodified, or, in legal language, 'propertised'.<sup>136</sup> This is attractive in terms of economic efficiency. We exchange the property we have for something we value more, so subjectively, community wealth increases. However, it is precisely this process of rendering the subject of the agreement into a form that is tradeable which may change its nature. A personal relationship with a person or with land is individual; if traded it loses this character. The process transcends consent because it is the very conception of being able to agree to give up the claim which propertises. To this extent any particular agreement is less oppressive than

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134 Mantziaris and Martin, above n 132, express confidence in the corporation as able to represent aboriginal groups, especially if attention is placed on the features and form of the corporation. I would dispute that the notion of the corporation is value free: see David A Wishart, 'Theory Politics and the Reform of Corporations Law (or Corporations Law as a Glob)' (2002) 6 *Law Text Culture* 87.

135 Transaction cost economists would analyse the push to closed-endedness as making the transactions more 'discrete', the pressure being to 'presentation' of the future. This represents a move to the neo-classical end of the axis of transactions: see Burrows and Veljanovski, above n 104, Part 1. The analysis becomes problematic if a closed-ended agreement is used to set up a procedure for making decisions in the future. In one sense this is setting up a structure of decision-making and is at the relational end of the axis, but on another is contractual as binding the parties to a particular structure. In the latter sense, forms of decision-making are commodified and hence governed.

136 See Trebilcock, above n 108, Ch 2.

the language of possible agreement. If agreement is deployed as a technology to govern relations, there is no alternative conception of what is to be the subject of the agreement. Alternative possibilities remain invisible, unable to be articulated without being subsumed into property.

This process is particularly observable in Australian native title cases. *Mabo*<sup>137</sup> rendered the relationship of the Torres Strait Islander people to the land understandable in law as a species of property. As a consequence, agreements about that relationship were made possible. Contrast this to Blackburn J in *Milirrpum v Nabalco Pty Ltd*,<sup>138</sup> for whom the relationships were incomprehensible in law. Recognition is double edged, for by rendering the relationship visible and amenable to agreement it was commodified and lost its quality as a relationship. This is precisely what liberal (and settler) society requires. Taken from the very ethics of liberal society, this process is oppression, for not all individuals in Aboriginal society can have consented to that reconceptualisation of their world.

The inevitable commodification of relationships is softened by two possibilities. One is a refutation of the claim that any issue between settler and Indigenous society can be resolved. No agreement is ever full and final. Thus even raupatu agreements do not solve the problem of the dispossession of the Maori; they are merely one generation's expression of the relationship between societies. The well-documented movement in contract law away from the neo-classical transaction and towards good faith (already more or less an attribute of civil law systems) expresses this limitation.

The second possibility follows on: it is that the substance of the agreement may not be of things given and received, it is of the establishment of processes, of means by which the relationship between groups will be constructed and expressed in the future. This can encompass reparations and the satisfaction of claims and self government agreements on the Canadian model. The call for a 'makarata', or treaty, in Australia fits this mould.

### C Mutuality

As I have described, agreement requires parties. In as much as 'parties who can agree' is a construction, so also is that they do agree in circumstances of opposition. A mutuality<sup>139</sup> is implied whereby the interests in relation to the substance of the agreement of each is declared to be satisfied to the greatest possible extent, given the knowledge that each party has about the other. Put this way, it takes little imagination to understand that there may be alternative ways of dealing with the future. We could start from the standpoint of similarity and individually declare our difference. Or we could determine the future by addressing our technologies of governance at eliminating difference in

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137 (1992) 175 CLR 1.

138 (1971) 17 FLR 141.

139 My friend and colleague Rob McQueen made the point that what I call 'mutuality' is, in his terms, 'shared normativity'. A power distribution is implied by the shared normativity. An analysis of this power distribution would lead to the location of the well-known issues of bargaining power and unconscionability within my schema rather than as I have, to exclude it. I agree.

perception. Education is aimed at this end.<sup>140</sup> Or we could use hierarchy or elimination by war. We used to do the latter, and still do as a purported last resort, and the former is the institution of institutional analysis or the firm in economics. To the extent that agreement is contract or mutual obligation in law, hierarchy in law is corporation and law itself.

If there is an exhaustive taxonomy of ways of dealing with the future, each society distributes issues about the future differently among them. To only allow for agreement in defined matters of inter- and sometimes intra-societal dealings is to force technologies of governance or way of dealing with the future upon those societies.<sup>141</sup> The compulsion can be expressed by laws, governmental policy or by the nature of the settler society. In the public sphere of criminal law, this issue arises out of the controversial question of the extent to which ‘tribal’ law, particularly penalties such as spearing, can substitute for the law of the jurisdiction, such as incarceration. Welfare may be provided only on negotiated conditions. This is no less an issue for other aspects of a society and for the choice of governing technology between societies.<sup>142</sup>

#### D Relationship with Governing Institutions

The relationship of an agreement with other societal institutions is complex, especially when there is more than one society involved. In terms of Indigenous peoples, that relationship is considered under the idea of the agreement constructing parties, a substance and a form of mutuality that might not be consistent with what would otherwise obtain. Agreements are also located in a set of relationships with the governing institutions and myths of the settler society.<sup>143</sup> The major issues are the extent to which the agreement deals with sovereignty, the space for agreements allowed by the governing institutions, and the methods of their enforcement.

One of the most striking differences between the agreements in the three jurisdictions under review here is their differing status in relation to the myth of sovereignty. The agreements differ in their location against the public/private

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140 Cruikshank, above n 82.

141 The problematic and sometimes quite surprising way in which communities formulate decision-making is well described in Pat O’Malley, ‘Indigenous Governance’ in Mitchell Dean and Barry Hindess (eds), *Governing Australia. Studies in Contemporary Rationalities of Government* (1998) 156.

142 For example, a firm is frequently a contracting party – sometimes both sides are firms. Despite concepts of ‘corporate culture’ (see Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (1993)), the firm is not capable of determining its worldview in round table discussion with another person. It is a hierarchical organisation, a legal fiction, a nexus of contracts, a set of interests in productive tension, or all of them, and always only partially representing the mentalities of the people involved. Because of the limitations of the organisational form known as the firm, and of its imperfect representation in law as a corporation, the very organisation of the economy into firms is sufficient to force many situations into an agreement model: the contract is the only model of social relations provided for corporations.

143 A more rigorous way of locating agreements would be to deploy Sally Falk Moore’s overlooked analytical technique of the ‘semi-autonomous social field’: Sally Falk Moore, *Law as Process* (1978). This would be to regard what constitutionalism thinks of issues of self-determination and sovereignty as issues of the definition of fields of relations and degrees of autonomy from other regulatory structures: see ‘Introduction’.

dichotomy; alternatively they differ in their expressions of aspirations to self-government. In Canada not only does self-government figure explicitly in many agreements and in discussions about agreements, but there is also a thrust to constitutionalise Indigenous rights. As discussed above the conflation of the two capacities of the Crown in New Zealand implies a co-existence with the settler polity, without a necessary subordination even to Parliament (remembering that New Zealand has formulated itself as subscribing to Parliamentary sovereignty rather than constitutional democracy). Hence statutory declaration of agreements is ambiguous, either as effecting the agreements and thus rendering Maori society as subordinate, or as declaring the settler society alone as bound. By contrast, agreements in Australia are invariably either entirely outside public law or governed by the *Native Title Act*, although one or more governments may frequently be party to the agreement. Resistance to this position is formulated as a call for a treaty by which relations between the settler society and Indigenous peoples might be constitutionalised.<sup>144</sup>

Just as aspirations of self-government are limited by the path being trod by the settler society, spaces for agreement are also limited in relation to matters otherwise conceived. As we have seen, technologies of governance are each deployed in the spaces allowed for them in the way society is conceived. The most extraordinary feature of this point is the ease with which such issues are accepted in the doctrines of conflicts of law between states and in the recognition of alternative ways of governing relationships.<sup>145</sup> The only explanation for the lack of recognition with the instant subject Indigenous peoples is that there remains some criterion of the ‘uncivilised’<sup>146</sup> in the choices that are made to recognise alternative technologies of governance.

The final issue with regard to the relationship of agreement to the governing institutions is as to the means of enforcement of the declarations of intention that comprise the substance of the agreement. There is, of course, no necessity that recourse be made to law even if the agreement is located as entirely within the governing legal system as they normally are in Australia.<sup>147</sup> Further, the more agreements are about the legal system or with the state, howsoever conceived, the less recourse can be made to law to insist on compliance. The New Zealand experience demonstrates this point: New Zealand governments have simply failed to carry out many prior reparations agreements. One of the most ironic contrasts First Nations in Canada make with their cousins who have dealt in and with the US has been that whereas in the US dominance was achieved by recognition of sovereignty, and wars and bloodshed, in Canada the same result was achieved by agreement. Perhaps agreements are located in the governing institutions themselves. If political, recourse is merely political, if within the law system with all that that implies as to subjection to sovereignty and to the implicit value system of law, then enforcement may have the force of law and the backing of the state.

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144 See above McRae et al, above n 88, 568ff.

145 For example, in such places as the once Strait Settlements: see R H Hickling, *Malaysian Law* (1988).

146 See, eg, *R v Cobby* (1883) IV NSW 355, 356.

147 Macaulay, above n 90.

## VI CONCLUSION

This essay started with a simple question: will agreeing with Indigenous peoples be seen by later generations to be oppressive? Answering it has, however, proved tortuous because it raises issues that go to the core of the presuppositions upon which many of our understandings of society are built.

The first step was to set out some material about which to talk. That section compared agreements in three countries: Canada, New Zealand and Australia. That comparison revealed that in each place there are things which are thought to be matters of mutual concern and amenable to joint promising and agreement, and, by implication, others that are not. The distribution of such matters differs between, and even within, each of those societies. Where matters now lie is a function of history. Reparation for the taking of land is not a matter for agreement in Australia but is in New Zealand and to a limited extent in Canada; breaches of prior agreements is in Canada, but not in New Zealand or Australia. Of course in negotiation many of these issues may have been raised and rejected – there is a context in which agreements exist. Others, like prior agreements in Australia, may simply be assumed not to exist. These are matters for a detailed study of what is covered in each agreement, and what was claimed, offered and negotiated.

The use of the terminology of agreement brings into play many ideas which resonate at the deepest level within our knowledge of society. Concepts of the ethical status of consent to imagined futures, efficient transactions, law, foundations of political ordering and treaties between peoples, to name just those that spring to mind, are implicated by ‘agreement’. Yet when discussions of these are examined, there is little to be found which gives any thought to the possibility that agreement may of its nature be oppressive. To be sure, there are discussions of when what passes for agreement is either non-consensual or is unfair in some way, but not about the thing itself. Certainly studies of agreements with Indigenous peoples, as advocated above, ought to be extended to a consideration of the traditional problems with contract: disparities in bargaining power, informational asymmetries and the simple consideration of whether the agreement was substantively fair. But this leaves untouched the issue with which this essay is concerned.

There is, then, a gap. This essay attempts an approach to the issue – a simplistic one, maybe, but it is but a start. The start of the approach, as it were, is to ask what agreeing assumes. The idea of starting here is that if we know what is assumed, we can ask whether application of those assumptions affects any change and whether bringing about those changes is oppressive.

The presumptions of agreement are identified to be parties to the agreement, a substance, mutuality and a relationship with the legal system. The application of these in the agreements is described in the third part of this essay. And so to the answer to the question: do these agreements oppress? When each element of agreement is presumed for the agreements in question, the image of the society



described in that way can and frequently does change. That, then, is my conclusion: these agreements can oppress. Later generations may well see them that way.

The lesson is this: agreements operate within a way of thinking which constructs people in particular ways. The current phase of the trajectory of the liberal democracies with which this essay is concerned emphasises agreement as the means of welfare for both the individual and the community, after a period when the state was thought to provide better means to this end. In this phase, agreements are reified as providing the only way in which individuals relate to the world around them. This construction of the universe presents profound dangers for Indigenous peoples. Not only does it preclude alternative dealings, forcing agreements where there are spaces for their use, it also revises the subjectivity of those within the society in that phase. People increasingly conceive of themselves as contracting units, with preferences to be maximised. This is true also of people in the Indigenous community. To the extent that agreement displaces other cultural forms, those people will be complicit in that loss by encouraging the use of agreements. And that is, of course, why agreement is deployed.

On the other hand, in an imperfect world, how do we deal with the profound difficulties of intercultural clash, especially when one society is dominant, governing and seeking to expand its material wealth? Agreement between parties is one way, albeit as flawed as the rest. The most we can say is that agreement must be deployed with caution, fully comprehending that there are limitations and potentialities for good and evil and that we may not know what these are. Obviously, the more we know the better. Research<sup>148</sup> should be directed at that end.

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148 This research demands strong and rigorous analytical frameworks. Two possibilities mentioned earlier are Hunt's 'regulatory' approach, discussed a little above: see Hunt, above n 102, 103; cf Dean, above n 119; see also Moore, above n 143, for a discussion of the 'semi-autonomous social field'.