

# Land, Rights, Laws: Issues of Native Title



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

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## Regional Agreements in Australia: An Overview Paper

Patrick Sullivan

**Editor: Anne Pyle**  
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### Editor's introduction

The High Court Mabo decision in 1992 and the passing of the Commonwealth Native Title Act in 1993 mark a fundamental shift in the recognition of indigenous rights in Australia. The Act, like the High Court decision on which it is based, transforms the ways in which indigenous ownership of land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation, however, raises a number of crucial issues of concern to native title claimants and to other interested parties. This series of papers addresses some of these issues.

This paper began as a discussion of issues for a workshop on indigenous regional agreements held in Canberra on February 9th and 10th 1997 as part of an on-going research project of the Australian Institute of

Aboriginal and Torres Strait Islander Studies. It has been revised in the light of discussion at the workshop.

Beginning with an outline of some of the general points raised the paper deals with the pressures producing interest in regionally agreed structures for managing the related interests of indigenous and non-indigenous groups. These include the types of agreements reached, or potentially available, and appropriate terminology to describe them; regularities in the process of negotiating regional agreements and the impact of current government policy.

Patrick Sullivan is an anthropologist who has worked extensively with the Kimberley Land Council and other community and Native Title Representative Bodies. He was until recently a Research Fellow with the North Australia Research Unit in Darwin.

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## **Regional Agreements in Australia: An Overview Paper**

**Patrick Sullivan**

General requirements for a study of regional agreements A study of regional agreements [1] throughout Australia will need to develop a framework that takes into account the particular historical and cultural situations of diverse indigenous regions. In particular it will need to be capable of accommodating both the northern remote areas and the southern more intensively settled regions. The study should not only be concerned with describing outcomes but also the process of beginning agreements. Criteria must be established during the study for identifying key pressure points for stimulating interest in regional solutions to relationship of indigenous and non-indigenous interests, then identifying good procedures of negotiation and establishing benchmarks for acceptable outcomes at various stages of the process. The funding and other resources required for negotiation of regional agreements must be identified. These are not only direct indigenous funding needs but also concern the provision of outside support for the process such as facilitators, and the funding of smaller non-indigenous interests, such as individual pastoralists or prospectors, in order to allow them to join the process equitably. Any framework for a study of regional agreements needs to be able to deal with at least three aspects of regionally negotiated settlements:

- public policy over land management and administration;
- the question of service delivery to both indigenous and non-indigenous people of a region as a result of a regional agreement; and
- the impact of resource development projects.

These are some of the general requirements of an overall framework for developing a consistent approach to the situation in diverse regions of Australia. Clarity is also needed on a number of more particular points.

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## Clarifying the meaning of regional agreements

Clearly, any discussion of regional agreements will be affected by our understanding of the meaning of the term. Peter Jull and Donna Craig have said the only firm requirement for a regional agreement is that there be a region, and have offered the following working definition:

A regional agreement is a way to organise policies, politics, administration, and/or public services for or by an indigenous people in a defined territory of land (or of land and sea). [2]

This paper (which was solicited by the ATSI Social Justice Commissioner) attempted to provide a basic brief for the use of Aboriginal communities, and to avoid any suggestion of a prescriptive model. However, on examination it shows unique emphasis on only one of the two poles of a regional agreement that this discussion paper will go on to identify. That is to say, it concentrates on the public policy/self-government/political realignment pole. Another way of putting this is that the question of equitable and culturally appropriate resource development is subsumed in an agreement over regional land administration. Some parties to regional agreement negotiations may wish, on the other hand, to emphasis only the opposite pole - agreements over resource management and distribution.

Whatever 'regional agreements' may be, at least since the *Mabo* judgement, the term keeps cropping up as if it is a magic formula for a range of needs. Following the Wik decision of the High Court, which determined that native title rights can co-exist with pastoral leasehold rights, the need for regionally negotiated settlements as an alternative to wholesale extinguishment of title has intensified interest in the subject. If we look at the needs that regional agreements are to meet, we may gain a clearer idea of the different types, the problems in achieving them, criteria for discerning the good, the bad and the downright harmful and also the trade-offs that may be required in other areas since these are determined by the pressures for the agreement.

The primary stimulus for current interest in regional agreements in Australia is the recognition of native title. The *Native Title Act 1993*, section 21(1) states: Native title holders may, under an agreement with the Commonwealth, the State or the Territory: (a) by surrendering their native title rights and interests in relation to land or waters of the Commonwealth, the State or the Territory (as the case may be), extinguish those rights and interests; or (b) authorise any future act that will affect their native title.

This clause was included on the insistence of the Aboriginal negotiators in order to allow for the replication of what they felt may be beneficial outcomes achieved elsewhere in the world, notably Canada. In Canada, regional agreements have been pursued by indigenous peoples, according to Richardson, Craig and Boer, in order to:

- define a new legal and political relationship between themselves and Canadian governments (the federal government and the relevant provincial governments);
- establish a clear framework concerning access to and use of land

and resources that accommodates the needs of indigenous peoples and other interests;

- preserve and enhance the cultural and social well-being of indigenous societies; and
- enable indigenous societies to develop self-governing institutions and an economic base which will assist them to participate effectively in decisions which affect their interests. [3]

The same authors, however, also suggest that interest in regional agreements should not be confined to agreements between actual or putative native title holders. [4] Although native title is a significant catalyst for regional agreements, interest in negotiated settlements is stimulated in Australia by other factors than the desire on the part of developers and governments to recognise or extinguish title. There is also the widespread view that greater autonomy and indigenous community control is not only desirable in itself for reasons of human rights, but should also lead to better administration of the land and more efficient service delivery.

The possibility of community self-government has been mooted at least since the Woodward report in 1974, and various measures have been implemented in the States and the Northern Territory, albeit with considerable ambivalence on the part of the governments involved. Concern for the recognition of Aboriginal customary law is growing although the Australian Law Reform Commission's 1986 recommendations on customary law remain largely unimplemented. The *Native Title Act* requires the Federal Court to take account of the 'cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders' and some State and Territory laws provide for consideration of customary law, in relation to sentencing matters for example. All Australian governments have said they will not countenance the recognition of two parallel systems of law, these may be a *de facto* outcome of the development of recognition. Research into regional agreements needs to be founded on an understanding of the range of requirements to be met by negotiated settlements. These have as one facet administrative changes for increased indigenous autonomy and as another control over indigenous resources. Both of these can be negotiated at the exclusion of the other. Community local government arrangements generally ignore the question of resource control over wider land, and resource agreements tend to ignore the need for an ongoing role for indigenous people in management of the land and the project. Any research into these issues should be clear at the outset whether, or to what extent, purely political and administrative arrangements that advance Aboriginal autonomy and control over their territory, meet the criteria for regional agreements; or whether, on the other hand, some element of joint resource control and management is a necessary part of the agreements process under study. We could ask about future Australian regional agreements:

- are they to be purely about public policy and the administration of Aboriginal lands, and therefore defining a new functional relationship between Aborigines and non-Aboriginal Australia?
- are they to be simply multi-party agreements over resource extraction on, and use and benefit of, Aboriginal lands, in which case they provide a new distributive process between Aborigines and other interests?
- are they necessarily both of these? In this case either purely resource-oriented agreements or purely local government

arrangements do not come within our study, and the question of mix and balance between these two poles comes to the fore.

The present study is needed in order to bring together these diverse strands of approaches to coordinated multi-factor arrangements with indigenous groups. It should also develop an understanding of positive agendas for change which include, but are not limited to, dealing with problems produced by the fact of native title.

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## **Pressures for regionally negotiated settlements**

There is a significant difference of emphasis between Canadian factors leading to agreements and those in Australia. In Canada primary concern has been protection and regulation of the northern environment, in Australia it is mainly regulation of resource extraction and commercial use of the land. Conservation values are a latecomer to the equation, but of increasing influence and importance. Efficient exploitation and management of resources is one of the principal factors that has led to the need for comprehensive negotiated settlements whether native title is recognised or not. New approaches are required due to widespread dissatisfaction with the old ones on all sides.

The one element that all potential parties to an agreement have in common is a desire to control and benefit from the use of resources of the land and sea. Until recently, indigenous control has largely been limited to payment for use of resources on Aboriginal held land, and in some cases on non-Aboriginal held land if the affected groups are sufficiently organised to exert political and moral pressure. There are a number of drawbacks to this current common procedure for all sides:

- it is very divisive, pitting developers and governments against indigenous interests;
- it is too crude to be well adapted to the complexity of indigenous needs;
- it tends to produce win/lose outcomes and does not distribute benefits fairly or in a culturally appropriate manner across a range of communities, or to different groups, genders, or ages within a community;
- it does not lend itself to continuing indigenous involvement in management of land and sea resources;
- it fosters inappropriate skills in indigenous communities rather than encouraging education for management and control;
- from the start of a legal claim to the signing of a resource agreement it is costly for all sides to implement; and
- it introduces considerable uncertainty on all sides and results in piecemeal arrangements.

The attraction of regional agreements that may recommend them in principle to the parties involved in competition over indigenous resources is that each side feels it stands to gain more in the long run than by pursuing strictly legal solutions or relying on acts of government. These gains are potentially:

- avoiding the costs of mounting native title or compensation claims

or, for the developer and for government, the cost of opposing them;

- as a result progress may be achieved in a shorter time;
- both sides gain political credibility by showing their ability to put aside ideological oppositions for the sake of co-existence;
- certain outcomes that it is difficult to put a value on or legislate for, such as complex conservation and hunting access arrangements, may be more easily negotiated than litigated;
- the uncertainty about the extent of rights and their implementation that prevents all sides from considered planning can be reduced; and
- the potential for building into agreements continuing indigenous control may be better than winning judicial title but lacking planning, environmental and resource decision-making power.

Taken together these pressures account for the attractiveness of the concept. One important factor to be borne in mind is that the potential for regional agreements to offer more productive relationships between indigenous people and settlers depends on preserving the beneficial aspects from all sides. Of course, negotiators tend to focus on what they require to gain from negotiations and lose sight of the fact that a bad agreement for one side is a bad agreement for all sides - it does not meet the needs for which the process was initiated, and the problem it has been designed to address will re-surface.

This begins to provide some criteria for assessing the value of particular agreements according to how many of the above gains are achieved and acts as a starting point for examining variations in types of agreements.

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## **Types of regional agreements**

It may be useful to consider the range of potential regional agreements according to:

- the identity of the parties to it;
- the nature of the region covered; and
- the benefits shared among the parties.

The parties will always include an indigenous group, but how it is constituted and represented is very important. Is the agreement among all members of the group, for instance the Jawoyn, or just a few, for example those Walbiri with spiritual connection to an area including the Granites gold mine? How is membership determined, what kind of differential access to benefits may there be, what is the institutional structure through which membership rights are carried out? Answers to these questions will be important for finding common lessons among the varied case histories as well as determining the types of agreements we are dealing with.

The parties will also include non-indigenous interest groups or stakeholders with a need for indigenous resources or access to areas of indigenous interest. These are as diverse as the pearlers of the north-west, the cattlemen of Cape York, and the miners and prospectors of the West Australian goldfields. Conservation and bio-diversity interest groups are equally important in this category. The wider the geographic region the

more likely it is that there will be a diverse range of parties, indigenous and non-indigenous. How these parties interact with each other will be a useful focus of study.

The question of indigenous representativeness will arise continually. The need for security of tenure of their mineral or pastoral leases, and consequent control over management, will lead miners and pastoralists to focus on the issue of confidence in their ability to bind signatories to agreements. Problems will certainly arise if consideration is not given to the internal structure of indigenous signatory organisations such that they can be said to be internally self-governing and given statutory status to bind their members. In this way they should enter into negotiations with Commonwealth, State and local governments as a fourth tier. At present the potential for dissident indigenous groups to disrupt agreements is very great. The corollary of greater indigenous statutory powers to enter binding agreements, perhaps by amendment of s.21 of the Native Title Act, must be greater guarantees that ordinary common law native title holders will be able to assert their rights through their statutory organisations. If not, changes will amount to disinheritance and will no doubt be challenged through the courts, adding to, rather than reducing, uncertainty over tenure.

Two important elements of the identity of the parties will help to determine the type of regional agreement under discussion - the variety of interest groups involved and whether or not one or more of the tiers of government is a party. These elements are related, as the more interests represented the more likely it is that government will be required to seal the agreement in some way. The involvement of government may be used as a critical test of the level of the agreement. No matter how much money or resources change hands, an agreement between indigenous people and a government introduces a political aspect absent from a simple arrangement over a particular development with its proponent.

Recent developments make it particularly important that the role of government is taken into account in at least two of its aspects. One is that government be involved in negotiating the devolution of some kinds of governmental power, at the very least of the sort that local government now controls, and also that government have a continuing role as a party to the agreement to monitor and sanction it. The other aspect is the need to meet the growing suspicion on the part of government of interested parties sitting down to make decisions about land that the government feels are properly reserved to itself. The government, whether local, State or federal, does clearly have the responsibility of seeing that long-term needs and broad social requirements are not sacrificed in order to deal with immediate difficulties. The complicating factor with government left out of the picture, or of developing parallel approaches to a problem, is that uncertainty clouds the consensual negotiations, with significant players feeling they may achieve better results by boycotting proceedings and directly lobbying government for precipitous legislative solutions. Taking all of these influences into account regional agreements will necessarily involve governments both as parties to the negotiations and to any settlement.

The nature of the region will also be a critical determinant of the type of agreement. First of all, is the region defined socially or geographically? An agreement that covers the islands of the Torres Strait, for example, is clearly different to one that covers Torres Strait Islanders. Generally these two categories will overlap and it may be important for the workshop to

discuss how the researchers may disentangle them. Jens Dahl, in discussing the self-government aspect of regional agreements in the Arctic, distinguishes three types - regional self-government, ethno-political self-government and land claims agreements. He makes the important distinction that the first is territory based, the second relates to the special rights of a specific group and may cover diverse regions, while the third simply focuses on the economic aspect of land ownership. [5] The Nunavut agreement is an interesting example as the territory is ethnically defined, but, despite 86% of the population being currently of the defining ethnicity, the agreement is territorial [6] as the administrative arrangements cover all inhabitants of the territory. His examples help to distinguish between regions that are defined socially in terms of a group that receives special benefits as a result of an agreement, and one that is defined geographically where all residents submit to the same regime designed to distribute benefits equitably. A further distinction is then required concerning the degree of indigenous control of the managing regime.

There is a need initially for a profile of the region under study, its geography, demographics, cultural ecology and its interest groups. Consideration needs to be given to how much the region is brought into being by a particular agreement, and how those on the margins where they overlap into different cultural groups and geographic areas, are dealt with. The meshing of local interests with regional interests is a key part of any research project. Can a model be developed in which local area agreements are the building blocks of agreements spanning native title claim areas which themselves build into agreements covering regional administration of a number of claim areas? If this is taken as a starting point for considering the relationship of the local to the regional, clearly considerable attention must be given to local adaptation to imposed regional political structures and the ways that local interests receive expression at the regional level.

Discussing the nature of the region as a determinant of types of regional agreements is also important because it may rule out certain types of agreements as of little interest. An agreement over a single mine, for example, may not be sufficiently regional to have much to contribute to the present study. But if the terms cover people resident throughout a region it may be of interest. The critical point will be the nature of the terms of the agreement. These can be scrutinised in a legal sense, but they will also usefully be examined in a broader sense of the intended distribution of types of benefit and control. Agreements that simply distribute royalty equivalents are very different to those that offer access to land previously unavailable to indigenous people, or that offer management roles or a form of self-government.

The project should be able to offer a typology of categories of agreements according to who benefits and in what manner, with particular emphasis on indigenous benefit and trade-offs. Again, the typology could revolve around the two poles of indigenous administrative autonomy and simple resource benefits. For example, at one end of the scale could be agreements that offer elements of government of a region, particularly setting rules for land access and use. Next to this would be self-government of communities and joint-management of resources with outsiders. Further down would be trades of land and resources and simple joint-management. At the lower end of the scale would be single development agreements with a range of benefits, followed by simple

royalty agreements. The following table illustrates the kind of typology that may be useful. It is indicative rather than prescriptive.

<b>Type of Agreement</b>	<b>Possible Terminology</b>
Indigenous controlled regional administration	Self-determining regional agreement
Indigenous owned community government with joint ventures and joint management	Self-managing regional land use agreement
Indigenous release of resources with joint management and joint ventures, no further community autonomy	Joint management regional resource agreement
Development with multiple benefit to indigenous communities	Diverse regional resource agreement
Development with simple royalty and up-front payments	Simple regional resource agreement

There is a point of view that such typologies are not useful since there is so much diversity in situations on the ground. Distortions may arise when the data is forced into one or other of the categories. Rather, regional agreements should be considered as occurring wherever there is a region and an agreement. Rigid adherence to a set of criteria is, of course, to be avoided. However, the use of types to give a discursive framework in which local variations can be discussed can be useful, indeed is necessary, if comparisons are to be made across regions. It tends to reduce another serious danger as well. This is the common Australian gambit of appropriating terminology with agreed meanings elsewhere in the world, 'domesticising' it in the Australian context because of our particular history and circumstances, but in the process distorting and reducing it out of recognition. The term 'self-determination' is one example, its meaning in international law and the developing jurisprudence of indigenous collective rights is very far from its meaning in Australian domestic politics. The term regional agreement is in danger of similar redefinition. An indicative typology, therefore, may help to stem this tendency even though it is not capable of precisely informing each and every case study.

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### **Problems in achieving regional agreements**

The research will be particularly useful if it can draw some conclusions not only on differentiating the benefits of various sorts of agreements but also describing regularities in how they may be achieved. Richardson, Craig and Boer describe some factors which needed to be present to achieve Canadian regional agreements - willingness, timing, communication, information/research, bargaining power, and unity. [7] However, the present research team will be in a better position to describe how these and other factors can be put in place, or inhibited, in actual practice in Australia. This may be most usefully analysed as a matter of identifying common obstacles.

The crisis of indigenous unity and authority is certainly an initial stumbling block. It is almost universally difficult to ensure that negotiations proceed with correct representatives who have a common point of view and are capable of guaranteeing the terms of an agreement among their

membership. The problem is both internal and external. Internal divisions which may be a normal part of indigenous life are often exacerbated by expectations of material benefits or disquiet over trading in rights. Externally, the need to devolve power to indigenous structures that have the ability to impose authority upon their members is a delicate issue that governments are uncomfortable with in ideological terms, but are coming to embrace as a matter of practicality. Examples of this are the trends towards conferring powers on native title representative bodies. There is also a current case where, in one framework agreement, the precondition set by government is first that the native title holders establish a legal entity capable of enforcing the agreement among its members. The question of membership of indigenous corporate bodies capable of entering and administering agreements is complicated by the fact of differential Aboriginal rights in the same areas of land. Conflict and competition between different groups of native title holders, and between these and non-title holding Aboriginal residents and users of the land, can be expected as a consequence of the simple fact that the agreements will be regional rather than local. Examples of how these difficulties are met and the legal, political and ethical issues involved will be useful in the case studies.

Related to the question of authority is the need for resources to establish and facilitate both the negotiations and good negotiators. This is required both for normal efficient communication between the parties, but particularly also for the provision of information necessary for understanding options and making decisions. Poorly informed communities and representatives lead to stalled or bad agreements. Yet finding the resources to explore options both with community members and necessary experts can be a major difficulty. Innovative approaches to this, such as business sector funding of one sort or another, will be a useful part of any case study.

The conditions for bona fide negotiation and constructive mediation need to be analysed. This will be just as important where agreements are not proceeding successfully for all sides as in the cases where it is. There may be cases where formal negotiating techniques, such as the Harvard system [8], are applied. More commonly, the process will probably be somewhat haphazard. Discerning a pattern and comparing it to other cases will be useful.

Most regional agreements will involve State powers such as land administration, mineral extraction and environmental protection. It will be important to monitor the role of State and Commonwealth government parties and the relationship between them. The performance of the Queensland government over the Cape York heads of agreement, and the NSW government on the town common issue show that this is not a matter of party politics. Similarly, the progress of the Western Australian government towards agreements while remaining neutral on the question of native title indicates the complexity of the question. Ultimately, State governments may be expected to react pragmatically to the requirements of efficient land management, and where regional agreements offer this, pressure will be on them to enter the process. One factor is the jealous guarding of State responsibilities against Commonwealth encroachment, so federal government policy will be important as either a catalyst or an inhibitor on progress towards agreements.

It is also important to have regard to current Commonwealth policy in order to keep the research project grounded in contemporary possibilities, though it is still a little difficult to discern what these are with the present government. It is known that the government favours empowerment through material advancement for indigenous people, and that it believes in equality of treatment and is opposed to 'separatism'. This is a bit of a mixed bag for expectation of Commonwealth commitment to regional agreements. Nevertheless, the government's search for a new approach in indigenous affairs is a positive factor, and the economic and efficiency arguments for negotiated regional settlements may convince it in the long run to adopt this as policy.

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## Conclusion

Regional agreements are by nature multi-faceted. Concentration on one aspect tends to lead to neglect of another. They can be examined along a projected timeline:

- the identification of a need;
- the seeking out of pressure points to stimulate negotiation;
- the negotiation process itself;
- the need to produce immediate benefits, address immediate problems and still work towards long range structural changes;
- the need to pursue several lines of approach at once, among them service delivery, land access, conservation, land use and management, and resource development; and
- ultimately the signing of an umbrella agreement with government that embraces and guarantees all of the above.

At the start the appropriateness of a regional settlement needs to be clearly identified. Is an agreement across a region necessarily the solution for a particular indigenous land use problem, or could it be better solved in a one-off limited way? If so, could this still be a start in building regional agreements from below? Can these local agreements fit into regional agreements? Clearly there is a role here for Representative Bodies. They need to be involved as facilitators and as monitors of the negotiation and implementation phases of any agreement. There is not yet any agreed standard process for negotiation of agreements, and coordination is often hampered by the secrecy clauses of those arrangements proceeding in an *ad hoc* way across the country. To deliver real benefits agreements need to be grounded in service delivery such as health and housing as well as control of land and benefits from resource development. This will involve Representative Bodies in complex negotiations with other Aboriginal service delivery organisations and various branches of ATSIC as well as the three tiers of government and individual non-indigenous land-use interest groups. The process will be complex and will require considerable time and financial resources. It must address immediate needs for disparate groups with competing priorities as well as build towards long range strategic targets. There are three main outcomes to be worked towards - the implementation of indigenous rights, security of development rights for those with a commercial interest in indigenous land, and sound regional administration. With such complex parameters, and such challenging goals, the process will necessarily be long and arduous. Only with good will on all sides and a substantial commitment of financial resources can it be

achieved.

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## Footnotes

[1] Regional Agreements discussed in this paper are agreements made either under Section 21 (1) of the *Native Title Act 1993* or more broadly outside the *Native Title Act 1993*. They may include or subsume Indigenous Land Use Agreements.

[2] Craig, D. & Jull, P. 'Regional Agreements - Options for Australian Indigenous Peoples', Draft working document produced for Office of ATSI Social Justice Commissioner, 1994, p. 4.

[3] Richardson, B.J., Craig, D., & Boer, B. *Regional Agreements for Indigenous Land and Cultures in Canada*, Discussion paper, Darwin, North Australia Research Unit, Australian National University, 1995, p. 2.

[4] Richardson, B.J., Craig, D., & Boer, B. 'Indigenous Peoples and Environmental Management: a Review of Canadian Regional Agreements and their Potential Application to Australia.' *Environmental and Planning Law Journal*, Vol. 11, no 4, August 1994 and Vol. 11, no. 5, October 1994, p. 377.

[5] Dahl, J. *Indigenous Peoples of the Arctic*. Kobenhavn, 1993, pp. 12, 15.

[6] *Ibid.*, pp. 13-14.

[7] Richardson, B.J., Craig, D., & Boer, B. *Op. Cit.*, 1994, pp. 359-360.

[8] Fisher, R. & Ury, W. *Getting to Yes: Negotiating Agreement Without Giving In*, Boston, Houghton Mifflin, 1981.

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### **Native Title Research Unit**

Australian Institute of Aboriginal and Torres Strait Islander Studies

Acton House, Marcus Clarke Street, Acton

GPO Box 553 Canberra ACT 2601

Telephone 06 246 1153 Fax 06 249 1046

Email [ntru@aiatsis.gov.au](mailto:ntru@aiatsis.gov.au)

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