

Co-Management: Agreement-Making for Cultural and Economic Sustainability

Symposium on Indigenous Peoples, Economic
Empowerment and Agreements with Extractive
Industries

Lee Godden

Drivers for Agreement-making

- Agreement-making or partnerships between governments and communities is not a new idea in relationships between Aboriginal and non-Aboriginal Australians.
- Since the recognition of native title, there has been a proliferation of agreements between Aboriginal people, governments, non-government organisations, and private entities.
- Agreement making can contribute to cultural and economic sustainability for Aboriginal Peoples.
 - Sustainability also needs to refer, 'to the organic vitality of Aboriginal communities and cultures' (Justice Albie Sachs) not just natural resources.

Native Title as Agreement

Since the inception of the *Native Title Act 1993* (Cth) ('*NTA*') agreement-making has emerged as the preferred method of dealing with native title ('NT') issues (Neate 2004, 179) for reasons such as:

- the *NTA* **formalises** a reliance upon agreement-making via its emphasis on agreement through negotiation (rather than litigation) (Kirby J *Fejo v Northern Territory* (1998) 195 CLR 96 at 139);
- post-*Mabo No 2* High Court litigation has seen a **narrowing of the 'basis of [the] new relationship between indigenous and non indigenous Australians'** (Keating 2001, 10); and
- the **legal complexity** of the *NTA*.

Settling with Indigenous Peoples

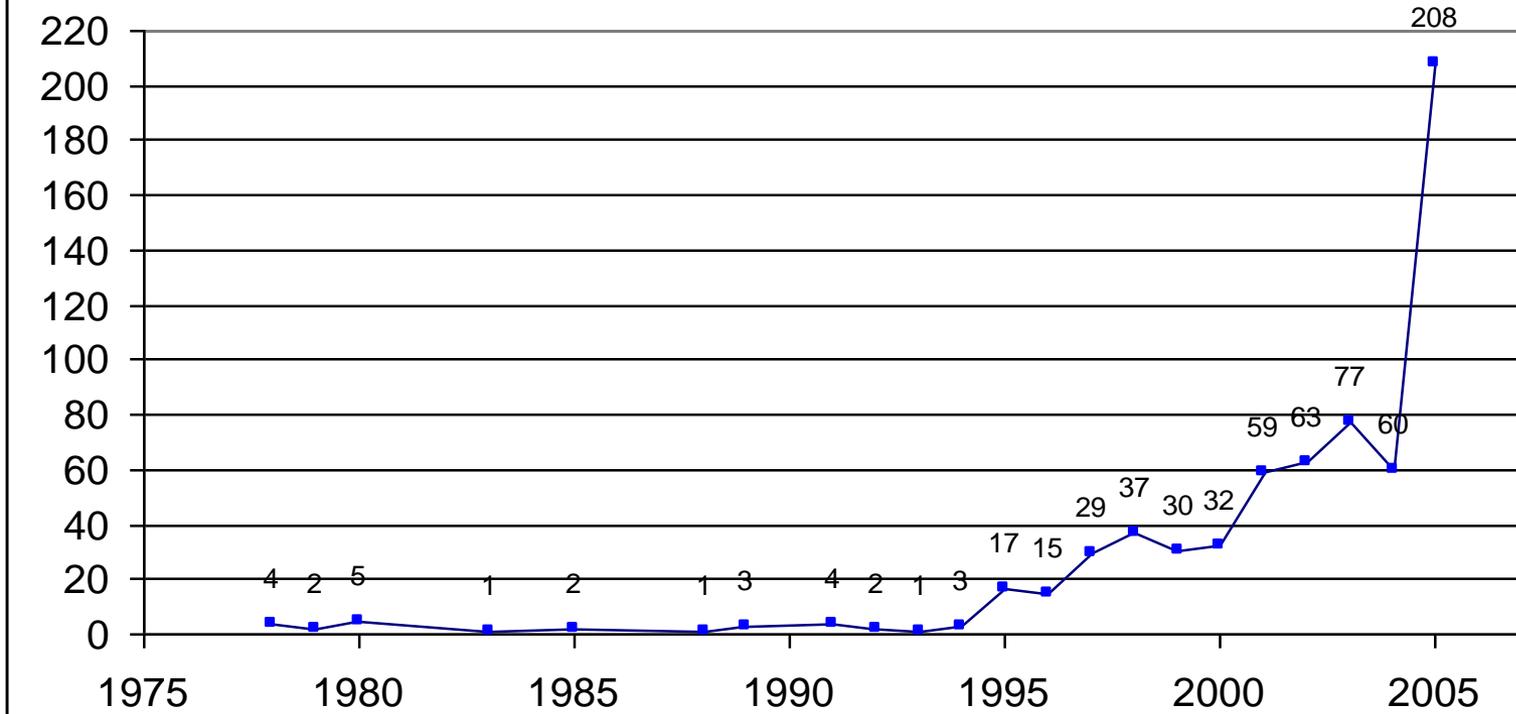
‘There now exists a wide range of agreements between indigenous peoples and public and private sector institutions which are providing indigenous peoples with opportunities to negotiate their way into the nation state, particularly in areas concerning land access, social and environmental management and associated infrastructure development’.

Langton et al, 2006

Environmental Agreement-making

- Perhaps most marked shift in delivering more comprehensive ‘on the ground’ autonomy for indigenous communities has been in areas of environmental governance and management.
 - may reflect a greater convergence of objectives between the partners.
- International trends -greater inclusion of indigenous peoples in the management of ‘protected areas’.
- The extent of ‘partnership’ and the degree of autonomy accorded to indigenous peoples in Australian environmental governance and co-management varies widely.

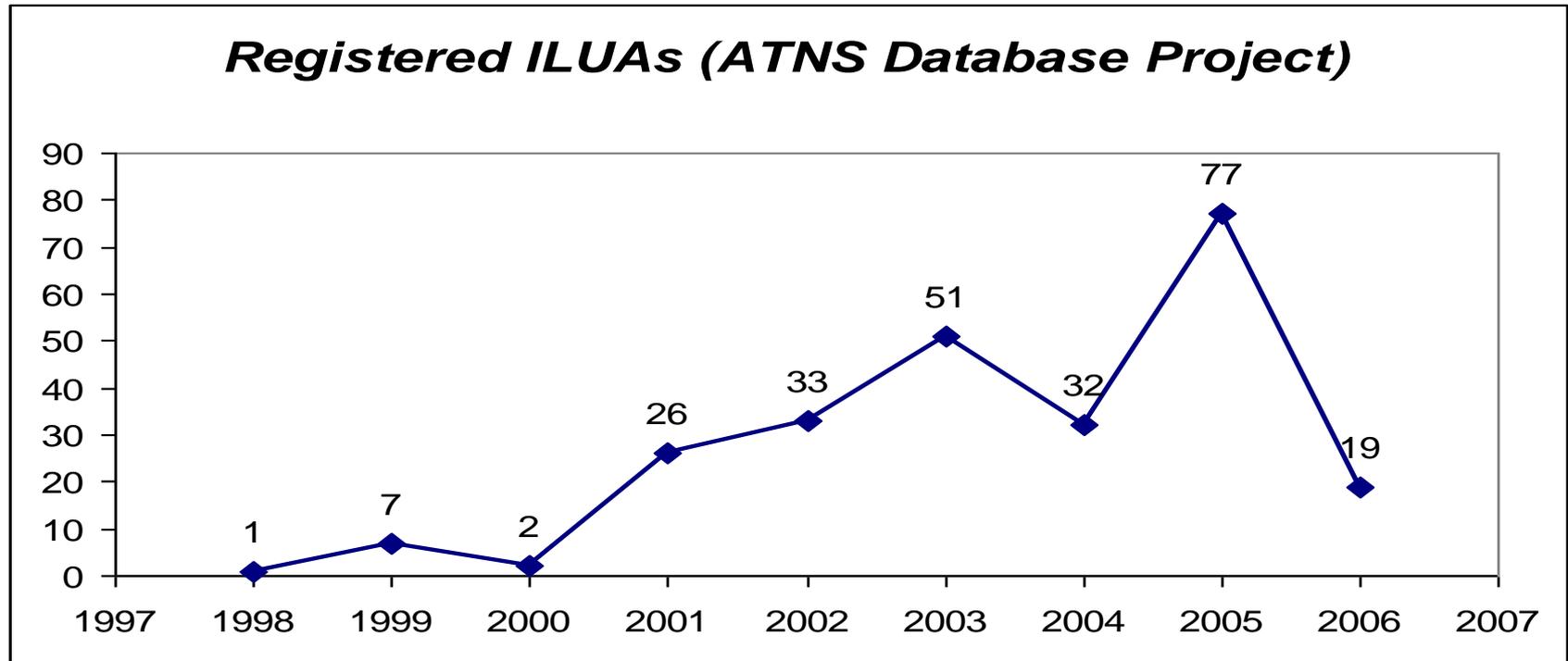
Number of Agreements with Indigenous People in Australia by Year on the ATNS Database*



*This chart details Agreements that have been recorded on the ATNS database as at October 2005 and does not intend to be a comprehensive representation of all the agreements made in Australia between Indigenous people and others.

Indigenous land use agreements (‘ILUAs’) (1)

- In 2006, approx. 250 ILUAs, a number which increases frequently with new registrations.



Please note that these numbers were current as of July 2006.

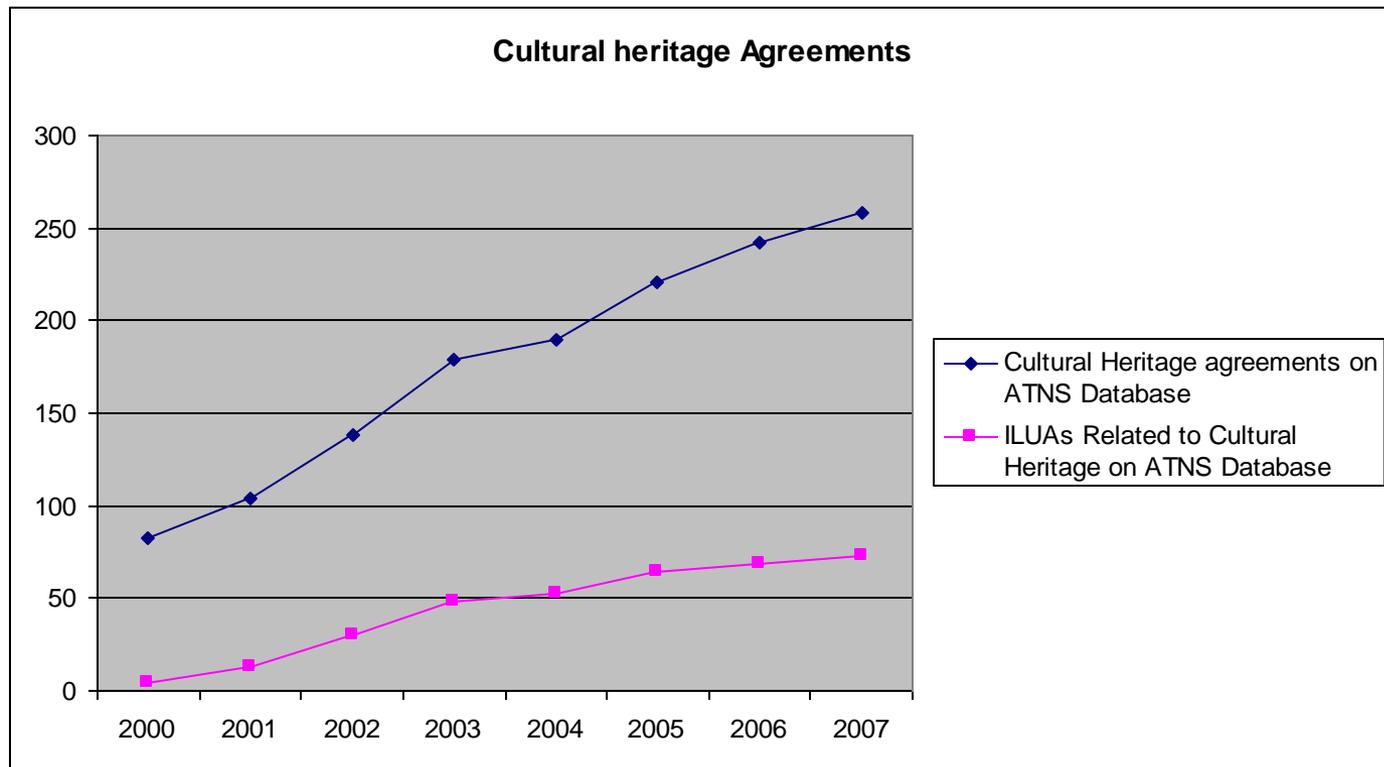
Meaningful Engagement?

- Indigenous peoples relationships with, and care for, country continues apart from formal agreement structures, but must interface with non-Indigenous systems.
- Settler institutions for environmental protection built upon an ecological or managerial perspective,
 - these structures and values systems are being substantially reworked through the increasing influence of market environmentalism – and indigenous engagement – FPIC is an example.
- Historically, settler models for environmental management have struggled to provide meaningful and effective participation by Indigenous peoples (Hill and Williams, 2009: 161).

Three phases of agreement-making and co-management

- 1. Pre-native title era, which was characterised by the ascendancy of natural balance concepts largely precluded Indigenous participation apart from designated statutory schemes.
 - eg *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)
- 2. The second phase the 'Recognition and Litigation' phase of native title.
 - emphasis upon defining and shaping the parameters of native title, (see, Strelein, 2006: Chs 1–3, 6).
 - Courts predominately favoured a view of native title as embodying non-commercial interests and uses (Strelein, 2001: 95),

ATNS Agreements data base



Agreement-making: Third Phase

diverse levels and scope

- This phase operates within the broader moves to encapsulate Indigenous peoples' relationships with country within an agreement framework:
 - the subject of agreement either explicitly eg in co-management terms for identified areas of land and waters (see Szabo and Smyth, 2003),
 - or more diffusely; general stewardship accorded to native title holders, for example as access rights over a pastoral lease (see, for example, *Western Australia v Ward*, 2002).

Environmental Governance – Wet Tropics Regional Agreement (29 April 2005)

This joint-management Agreement:

- covers the Wet Tropics Heritage Area (North Queensland);
- involves 18 Aboriginal Rainforest Peoples and both the State and Federal Governments;
- recognises the traditional owners' relationships with the land and supports World Heritage listing for both cultural and natural values;
- makes provision for increasing Aboriginal Rainforest Peoples' participation and representation in management on various levels:
 - representation on the Wet Tropics Management Authority (WTMA) the principal decision-making body on matters affecting the WT;
 - establishment of an Aboriginal Rainforest Council (ARC) to represent all Aboriginal peoples concerned in dealings with the World Heritage management agencies of the WTWHA;
 - participation in policy, planning, permission and management through agreement to guiding principles/guidelines and protocols; and
 - involvement in education, training and employment
 - is supported by the *Wet Tropics Aboriginal Cultural and Natural Resource Management Plan*.

This information is available in more detail online at <http://www.atns.net.au/biogs/A002934b.htm> .

TOSA: new form of co-management in Victoria

- *Traditional Owner Settlement Act 2010 (Vic)* ('*TOS Act*') provides a State-based statutory regime as an alternative to the resolution of native title claims.
- A suite of agreements is provided for, through which the State acknowledges and confers rights upon Traditional owner groups.
- Traditional Owner group rights to land are contained in the Land Agreement and take effect as either: an estate in fee simple where the land is unreserved public land; an estate in fee simple over any public land, with conditions including the entering into a land management, co-operative agreement.

From Public to Private

- To date, model of co-management principally built on public law and public lands framework.
 - Iterates with national government's international 'obligations'?
- What is the role of the private sector in environmental management?
- Market environmentalism, denoting a complex of regulatory, structural economic social, cultural and institutional changes has assumed an increasing role in natural resource management and environmental protection in over the last decade.

Market Environmentalism

- Schemes in many countries have created markets for the provision of 'services' commencing with clean air and water and the avoidance of land degradation. Some schemes were developed expressly by governments and others by private entities.
- There are strong advocates of the benefits of such markets, '[t]hese experiences have demonstrated that investing in natural capital rather than built capital can make both economic and policy sense' (Salzman, 2005: 870).
- From an Indigenous perspective, it is important that these schemes are seen as more than investments in 'natural capital' but instead extend to long term community sustainability.

Hybrid governance

- Suggestions for a local hybrid economy on aboriginal land eg in the tropical savannah of the Northern Territory (Garnett and Woinarski, 2007: 38; Gerritsen, 2007: 79),
- Argues can achieve both sustainability and Indigenous economic empowerment goals.
- Such twining of objectives, in turn, requires new forms of interaction between Indigenous peoples, scientists and government organisations with institutional innovation and purpose-built arrangements and the devolution to Indigenous community based organisations.

Market Environmentalism

- Strong potential exists for market environmentalism to offer avenues for robust participation for Indigenous peoples.
- Yet to be effectively realised in many areas of environmental management and NRM.
 - proliferation of schemes in last few years
 - challenge of monitoring and evaluating outcomes
 - potential for policy and legal ‘transplants’ internationally

Findings from the ATNS project

- ‘[t]he insertion of customary institutions and jurisdictions into the market place through agreement making, ... is not mere syncretisation of tradition and modernity, but the transformation of relationships. These postcolonial forms of policy engagement are underwritten by both customary exchange and market considerations.’
- (Langton and Palmer, 2004: 47).

Agreements, Treaties and Negotiated Settlements Project

