

The political aspects of creating a treaty

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What is needed is an instrument like the track of a cable railway, which allows movement forward but prevents any movement backward, when the engine of progress becomes too weak for the climb or breaks down. A treaty would be such a track (*Harris 1985: xv*).

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Introduction: two excuses for not having a treaty

The contemporary project of creating a treaty within Australia, yet with international standing, to recognise Indigenous peoples as original owners of this land has grown in significance in the last three decades, since it was raised in a modern political context by Jack Davis, then President of the Western Australian Aboriginal Association. Davis had sent a pamphlet to the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI) which included a new proposal about the need for a treaty to be signed by leaders of European and Aboriginal communities. At that time Jack Horner was the FCAATSI secretary. He wrote to Davis in August 1969, saying his concerns about compensation for the denial of Aboriginal land rights had led to an interesting discussion at the FCAATSI executive meeting the previous month. Then Horner, speaking personally rather than for FCAATSI, suggested that the proposal for a treaty seemed ‘rather unreal at present’, because there was a political weakness in this otherwise good idea. The idea was necessary since it provided a way to establish ‘a legal basis for land ownership’ in Australia. The weakness was raised by Horner in a question: ‘Where are the Aboriginal leaders to come from?’ He wrote that, while ‘leaders are coming forward’, most were ‘hand-picked’, so ‘it will mean hand-picking your treaty signatories’.¹ Yet who would do the picking, and for whom?

Davis continued to raise his treaty proposal in subsequent years. Horner recalls him doing so in 1972 at the FCAATSI conference in Alice Springs.² Around that time, in March 1972, Larrakia people of Darwin sent a petition to then Prime Minister, Billy McMahon, requesting that a treaty process be established. They said the government should appoint ‘a Commission to go around to every tribe and work out a treaty to suit each tribe’. McMahon ignored the petition for months, then he replied that no Australian government would negotiate in this way with its subjects. He also said that treaties were not negotiated in Australia in the past because it had been too hard to find the right people to talk with.³ McMahon used these excuses to avoid talking politically with Aboriginal people, while preparing to use his police to attack the Aboriginal Embassy outside Parliament House.

Those two excuses have been used ever since to keep the idea of a treaty negotiating justice for Indigenous peoples off every government’s political agenda. The idea of a treaty is either dismissed as unthinkable in Australia, because cultural diversity is repressed by what James Tully has called the liberal imposition of uniformity, or else the political process of making a treaty is presented as impossible to create, because of too much division.⁴ Expressed in terms

¹ Horner to Davis, 9 August 1969: 1.

³ Wright 1985: 14–15; Langton 2001: 21. For the political context, see Rowley 1978: 1–19.

² Interview with Jack Horner, 20 January 2005.

⁴ Tully 1995: 55, 198.

of repressing diversity while creating division, McMahon's excuses for not having a treaty are not logically consistent, but the politics of obstruction rarely is. The first excuse was reflected in Prime Minister Howard's comment that 'a nation ... does not make a treaty with itself', made in response to the massive reconciliation march across Sydney Harbour Bridge in May 2000.⁵ This excuse is essentially a nationalist belief, originally expressed in the racist idiom of White Australia, that there is only one nation in Australia, that all Australians should have only the same culture as a result of assimilation. In that view, every Indigenous tribe (or nation) has ceased to exist in any political sense, so no government is obliged to work out what each tribe (or historical group of Aboriginal communities) needs, through a process of genuine negotiation. Government just tries to isolate Indigenous people as individuals, treating them as if they are exactly like other Australians. Yet that means ignoring them as they really are, since politically they are not numerous as individuals, at least in most marginal seats. It also, as Pat Dodson has pointed out, means ignoring the enduring cultural and political reality of Australia, which comprises 'two sovereign people inhabiting one land'.⁶

Behind the pretence that the government cannot negotiate a treaty with only a part of the Australian nation is the real belief that Indigenous peoples politically are not worth negotiating with, since they lack electoral influence. Thus, the first excuse for not creating a treaty is actually about unequal power. The real political claim made by those who dispute the appropriateness of negotiating 'a treaty within Australia, between Australians' (as expressed by the Aboriginal Treaty Committee in the late 1970s),⁷ is that no treaty will occur, because Indigenous peoples cannot force governments to act.

Whether that is an enduring reality is doubtful, despite all the steps backward by Howard in the past decade. His old objective is to impose assimilation, by claiming that all Australians must be treated as having just the same rights and responsibilities. Yet, if the policy choice between Nugget Coombs and Paul Hasluck has 'been settled for the time being in favour of Hasluck', as Pat Dodson worries is the case, this is not because of Howard's rhetoric.⁸ It is just a result of his power. Howard thinks little differently to McMahon, but the connections between Australia and the outside world have changed in the past generation. Simply asserting that the Australian nation cannot negotiate with itself is no longer enough to stop calls for a treaty. More and more people are aware of international parallels, particularly in New Zealand and Canada, which show that such rhetoric is mischievous. Hence the second excuse for avoiding a treaty – that it's too hard to find the right people to talk with – is politically now more significant than the first. This is one reason behind the replacement of an elected Aboriginal representative body with a consultative committee chosen by government. It allows Howard to make the obstacles to a treaty seem insurmountable. Whereas Horner wondered about Aboriginal leaders gaining authority to speak not just for themselves but 'for whole groups', politicians opposed to a treaty have sought to ensure that there will never be such authority.⁹

While the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC) indicates the power that government retains over Aboriginal resources, it does not represent any new excuse for not having a treaty. ATSIC became involved in its last years in promoting the idea of a treaty to many Indigenous peoples across Australia, through workshops, a think tank and a national conference.¹⁰ Its demise does not change the political challenges of creating

⁵ Quoted in Brennan et al 2005: 70.

⁶ P Dodson 2005b: 3.

⁷ Harris 1979: 12; Rowse 1997: 218.

⁸ P Dodson 2005a: 7. Howard's rhetoric asserts assimilation by denying the historical context of the present situation of Aborigines, but it does not focus on the future. See Behrendt 2003a: 3–6.

⁹ Horner to Davis, p 1. See also O'Shane 1991: 148–9.

¹⁰ See ATSIC/AIATSIS 2003.

a treaty, although it poses challenges for Aboriginal peoples.¹¹ Despite reduced access to services for communities, ATSIC's disappearance might even clarify what needs to be done, to gain the political position of authority from which a treaty can be negotiated. When the Larrakia people proposed in 1972 an investigative Commission created by government to formulate suitable treaties to be put to members of each tribe for their consent, they presumed not only authority on the part of the tribes, but a complementary authority and commitment to the process on the part of government. No doubt their experience with elections since then has highlighted the complexities of creating a treaty, particularly in view of 'non-core promises' made by politicians, such as Bob Hawke's 1988 affirmation of a treaty at Barunga.¹² Yet, governments come and go, and social attitudes change. This leads to new opportunities for creating the instrument for real progress towards Indigenous justice. For these to be realised, there must be a growing consensus about what the treaty project seeks to do. The following analysis attempts a summary in broad terms of the key premises, form, purpose, substance and process of a treaty, in order to assess the potential that exists for making a treaty real. The analysis proceeds from the simpler to the more complex issues.

Basic premises: why a treaty is necessary and feasible

There are two key premises on which the need for a treaty is based: 1) an agreement should have been made by the colonisers when they first arrived in other peoples' lands, since they were instructed to do this and this was clearly the proper thing to do according to international law;¹³ and 2) despite centuries of opposition to Aboriginal peoples' autonomy, the Australian state has not eliminated a distinct Indigenous political domain. Both points need to be accepted for negotiating a treaty to make sense, but the second premise is arguably much more important than the first. The first premise is just historical, whereas the second is current. They are connected, and the importance of each is reflected in a reference to ATSIC by the New Zealand scholar Paul McHugh,¹⁴ in his magisterial comparative analysis of legal aspects of the re-emergence of Indigenous self-determination in former British colonies, *Aboriginal Societies and the Common Law*.

McHugh says ATSIC's structure did not transcend the 'two fundamental features of Crown sovereignty in Australia'. These, he says, 'were, first, the absence of any formal Aboriginal consent to Crown sovereignty by way of treaty, which related, secondly, to the absence of a history of sustained political relations [with Indigenous peoples] typical of the other jurisdictions', such as New Zealand and North America. He describes the Howard government as having a 'more ruthless approach to Aboriginal relations' than Australian governments since McMahon, but suggests that it has not managed to return to the old denial of the reality of Aboriginal peoples as politically distinct entities within Australia.¹⁵ Thus, an international observer sees the second premise as substantial.

The first premise is beyond dispute. Much has been written about how the English colonisers were told and failed to obtain 'the consent of the natives'. If this tragedy is not yet the key story

¹¹ P Dodson 2005a: 9.

¹² Recorded in *Land Rights News* 1988; see Langton 2001: 23; O'Shane 1991: 153.

¹³ For Governor Phillip's instructions 'to live in amity and kindness' with the natives see McHugh 2004:159, and 111 for the relevant British practice of international law.

¹⁴ McHugh 2004.

¹⁵ McHugh 2004: 343, 365, 504. See also Stanner's 1972 statement (quoted in Barwick 1988: 11) about 'two necessary admissions', that settlers 'injured Aboriginal society and owe just recompense to its living members', and that this must be done by recognising their rights not by acts of charity.

of our school texts, it is well known in the Aboriginal oral history of what ‘Cook’ did not do.¹⁶ Yet, without the second premise, such historical knowledge would lead to regret, not to action and reparation. As Langton and Palmer point out, it is the continued existence of Aboriginal polities that indicates the real potential for a broader and more enduring settlement, which could prevent another government-imposed reversal.¹⁷ The present government is trying hard to eliminate distinctive Aboriginal social and political life by reducing Aborigines to mere dependent and marginalised consumers, but previous governments have failed to attain this ruinous aim, and there is less likelihood now of systemic destruction. A distinct but compressed Aboriginal political arena remains alive, if not well, despite all the pressures of forced ‘political assimilation’ by liberal democracy and punitive paternalism to which Aboriginal peoples remain subject.¹⁸ Consequently, it is feasible and necessary to seek an agreement, that is, a treaty, to respect the integrity of this autonomous Aboriginal life.

There are two important ways in which the strength of the second premise for a treaty has been demonstrated in recent decades, since the idea of a treaty was raised after the 1967 referendum. First, the High Court’s decision in *Mabo v Queensland (No 2)*¹⁹ not only highlighted the historical lack of Indigenous consent but also the continuing need to negotiate that today. This was stressed by Kevin Gilbert in a letter to Prime Minister Keating in 1992. He pointed out that, without a treaty, Australia continues to lack ‘a lawful basis of Sovereignty’, which can be obtained only through a genuine negotiation ‘on Aboriginal terms, with care and respect for the rights and humanity of all in this land, including the land’.²⁰ Ultimately the disappointment of native title cannot be resolved through the courts, but only by a political settlement. The bureaucratic and judicial obstacles to native title have created much conflict. Yet what has emerged from the disappointment is a clearer sense that Aboriginal polities have retained what Lester-Irabinna Rigney has called an ‘inherent jurisdiction’, which ‘is an original source of authority’ not based at all on Australia’s colonial constitution.²¹ The conservative trend of the High Court since *Mabo* highlights the continuing need for a treaty, that is, an agreement which can prevent hard-won Aboriginal land rights from ‘continually being wound back and undermined’.²² While the resistance to attacks on inherent land rights has failed in the courts and parliament, it has shown that Aboriginal leaders continue to demand negotiations, and are wary of being tricked. This creates a basis for going beyond native title, towards a settlement or a treaty framework that depends on political rather than legal decisions.

Second, the significance of Aboriginal negotiating authority has generally become clearer as a result of comparisons with other countries and international treaty-making. Australia is peculiar historically in not having made and broken domestic treaties. Yet because of this survival of an Aboriginal political domain, the core of which has always been the attempt to recreate dimensions of self-determination, it is not really so different from other settler colonies such as New Zealand and Canada.²³ This similarity has become increasingly evident as a result of two decades of international campaigning by Aborigines and Torres Strait Islanders together with other Indigenous Peoples at the UN. What is distinct about Australia is the extreme reluctance of politicians to create a framework for equal negotiations with Indigenous peoples about their future relationship with the Australian state. It is difficult to change such recalcitrance, but

¹⁶ Rose 1984, 1991.

¹⁷ Langton and Palmer 2003: 43; 2004: 43–9.

¹⁸ Stokes 2002: 206–9. For an earlier discussion of the Aboriginal domain see Rowse 1992: 18–43.

¹⁹ (1992) 175 CLR.

²⁰ Gilbert 1995: 372, 374.

²¹ Rigney 2003: 74.

²² Ross 2001: 154.

²³ Stokes 2002: 206.

there are political lessons from recent attitudinal changes among politicians in New Zealand and parts of Canada. As well as particular models of contemporary treaty-making and ways to keep governments accountable which have relevance for Australia,²⁴ the broad lesson is that, eventually, as a result of much agitation and pressure for genuine negotiations, there has been a willingness by some politicians to talk with Indigenous peoples who claim and assert alternative sources of authority, outside the governmental domain. There has also been much reluctance, expressed in New Zealand in attempts by government to limit what can be negotiated through financial pressure, but, despite that, there has been little support for denying Indigenous authority by assimilation.²⁵ It is no wonder that the current Australian government has tried to keep quiet its responses to international criticism by the UN committee which has been looking at compliance with the *Convention on Eliminating Racial Discrimination*, since this interaction raises clear parallels with developments elsewhere.²⁶

Those sceptical about or opposed to creating a treaty in principle either dispute the existence of a distinct Indigenous political domain, or do not believe that creating a treaty will address urgent social problems. The latter objection, raised during the 1980s by Pat O'Shane, now looks less convincing given the worse health of Aborigines compared to Maori in the past generation.²⁷ A direct link has to be made between demands for a treaty and the urgent social needs of Indigenous people, as stressed by Darryl Cronin and also the National Indigenous Youth Movement of Australia.²⁸ This would answer the main real objection raised to creating a treaty, which is that it would not improve Indigenous peoples' lives.²⁹ Yet a treaty/agreement is about establishing a partnership, so the crucial foundation is accepting a partner's independent authority, and essential needs. If the existence of an enduring Indigenous polity is acknowledged, genuine dialogue becomes possible concerning all the complex aspects of creating a treaty and thus meeting these needs through a partnership, not denying them through conflict. This is a political not a judicial matter. In isolation, it has occasionally received an affirmative response even from conservative politicians (for example, statements about the need to accept aspects of continuing customary law to gain the respect of Indigenous youth). Yet the failure of all governments to accept Indigenous self-determination in practice has contributed to the dismal outcome of many official programmes, particularly in health and reducing the incarceration of Indigenous people. So the argument for creating a treaty must contrast the current denial of Aboriginal social justice with an affirmation of the two premises outlined: the colonisers should have made a political agreement with Indigenous peoples, and the continued existence of an Aboriginal polity.

Essential form: coherent and binding clarity

While these historical and contemporary premises mean that creating a treaty is feasible, it does not follow that any conceivable treaty would be an appropriate agreement. Whether a particular treaty that may in future be negotiated is advisable for both parties will depend on the nature and terms characteristic of the specific agreement. During the first phase of widespread discussion about a treaty, in the early 1980s, questions were asked about whether both parties would be interested in creating a treaty. One non-Aboriginal proponent of a treaty, Peter Read, asked directly if Aboriginal peoples would be interested in an agreement that somehow transferred

²⁴ Behrendt 2003b: 22–4; McGlade 2003: 127, 135.

²⁵ Kawharu 2005: vi; Mutu 2005: 203–4; M Durie 1998a: 132, 190–4, 212; McHugh 1997: 203.

²⁶ Marr 2005.

²⁷ Central Australian Aboriginal Congress 2002: 3; see O'Shane 1991: 147, 155.

²⁸ Cronin 2003: 164; NIYMA 2003: 108–10; Brennan et al 2005:10. For a regional emphasis on this link, see Yu 2001.

²⁹ O'Shane 1991, noted in McGlade 2003: 130. See the diagram in Behrendt 2003a: 124.

sovereignty (or historical legitimacy) from themselves to the Australian government, whatever they get in return. He commented that, ‘it may, indeed, be in the interests of white people to seek a treaty now to legitimise their own place in Australia’, but suggested that ‘at present it does not seem to be in the black interest’, because it is not clear how they will benefit from the deal.³⁰ This was the essential reason for O’Shane’s scepticism about a treaty. The problem was noted by Coombs, one of the leading proponents of a treaty, who acknowledged that Aborigines may ‘refuse to negotiate a settlement which confers legitimacy at any price’ on Australian institutions which in their experience do not deserve this, until there is fundamental change.³¹ The challenge of creating a treaty is to work out a genuine agreement that states clearly what must change for Australian institutions to deserve legitimacy in Aboriginal eyes.

Part of the difficulty in creating a treaty is that a gap often exists in the broad justifications for a treaty as presented by Indigenous peoples and settlers. There is a risk that the different parties to a treaty are ‘talking past each other’, rather than engaging in productive dialogue. This is a major problem that has characterised Indigenous–settler relations in New Zealand as well as Australia.³² One summary of this problem by Rowse (following from McHugh) outlines the stereotypical positions as follows:

Leaders of the settler nation look to their treaty as a contract which *rules off the past* and legitimises the nation. Leaders of the Indigenous people strongly resist closure of the present and future from the past which created them. Leaders of the settler nation find it difficult to entertain signing a treaty which acknowledges and perpetuates Indigenous sovereignty. Leaders of indigenous people may not commit themselves to a strong legal and political notion of sovereignty, but they are keen to reserve a moral notion of sovereignty, a notion which resists codification and finalisation and which assures them a practice of permanent critique (emphasis added).³³

The contrast may be starker than that, because many Indigenous people would reject as second-class a merely ‘moral’ notion of sovereignty, as if they cannot qualify for legal and political respect for their own authority. The extensive debate concerning Article 3 of the UN *Draft Declaration on the Rights of Indigenous Peoples* (affirming self-determination without any qualification) shows that such distinctions are unlikely to be helpful for the task of generating agreement about a treaty. Nevertheless, Rowse warns against accepting the above stereotypes as unchanging positions, since that would obscure the potential for overcoming this cultural gap.³⁴

What is required to bridge that gap is initially an agreement on the essential form of a treaty, which then makes possible further agreement on the more complex issues concerning the purpose and substance of any treaty. The formal aspect of a treaty should not be ignored, just because the issues of purpose and substance are likely to be more contentious and complex. Indeed, it is precisely because of those larger difficulties that an initial agreement about the form is crucial, since it would provide a way of avoiding the stereotypes of cross-cultural misunderstanding. The broad importance of the form of a treaty can be shown with reference

³⁰ Quoted in Rowse 1997: 221.

³¹ Rowse 1997: 222.

³² Metge and Kinloch 1978.

³³ Rowse 1997: 222–3. For an international commentary, see Coates 1998: 45, 74–6.

³⁴ Rowse 1997: 223.

to Kevin Gilbert's poem 'A Question to God', in which a child asks why 'grant a weak man eyes', the magnificent gift of sight, when all they are used for is to 'falsely judge' by prejudice, polluting their potential 'by a lack of love'.³⁵ The form of a treaty must be clear enough to withstand prejudice. While any treaty could be, and probably will be, subjected to much wilful misunderstanding propagated by those opposed to Aboriginal justice, the form of a treaty is vital to its capacity to survive all such political attacks.

The form of a treaty is distinct from its substance or content, that is, the particular rights and responsibilities it affirms, in the sense that many different particular or potential agreements could be made, all of which comprise the same formal structure. Thus the form of a treaty logically needs to be accepted and agreed upon prior to consideration of content and substance. The significance of the crucial formal elements of a treaty is that they mean the agreement has the potential to be enduring, and be relied upon so that any misunderstandings concerning content do not destroy the legitimacy of the agreement as a whole. Thus the form of a treaty is most closely related to its enduring purpose, the objective or broad social aim that it seeks to establish.

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There are at least three vital elements of a properly formed treaty: 1) the commitments must be voluntarily accepted and thereafter upheld; 2) the substantive rights must be clearly expressed and comprehensive; and 3) there must be consistency and complementarity in this expression. Each of the elements is important. Without all of them, a treaty could be vulnerable to abuse, or wilful neglect or misinterpretation. However, it is worth remembering that creating a treaty is a political process, which will be subject to much opposition, particularly by people with resources and power who are opposed to Aboriginal justice. The strength of a properly formed treaty is that it could survive such attacks, because a consensus about the treaty's essential form would make it of enduring significance. In this respect, there are lessons for Australia from New Zealand history concerning how the 1840 Treaty of Waitangi has retained a core meaning despite many attempts since then from settlers (including, in 1877, the highest government-appointed judge in the land) to literally nullify it.³⁶ That treaty was conducted in Maori but the English version contained a fundamental change in meaning, shifting what was a genuine exchange into an apparent act of submission. Yet the original version has survived all attempts at nullification and served as a beacon for attempts to create cross-cultural understanding in New Zealand during the past generation. The significance of that experience for Australia is not that the Treaty of Waitangi has been a solid protection of Maori rights, which many Maori would dispute, but rather that it has provided an enduring focus across the generations for Maori efforts to assert their right to self-determination.

The first crucial aspect of a properly formed treaty is that it is not just a symbolic gesture (such as a token reference in a new preamble to the Australian Constitution, supposedly without any legal consequences). There will of course be much symbolism in a treaty, but it would be misplaced without substantive commitments of a binding nature upon the parties. This key element was highlighted by Coombs and others in the Aboriginal Treaty Committee. They sought a real institutional change in how Australian politicians treat Indigenous peoples, not any tokenism. Thus, 'as Coombs was keen to explain, a treaty would provide *a formal change* in Aboriginal status within the Australian system of government, to the *effect* that any legislation inconsistent with the principles of the treaty could be *challenged*'.³⁷ A genuine treaty must 'give

³⁵ Gilbert 1991: 89.

³⁶ Kawharu 2005: vi.

³⁷ Rowse 1997: 220-1 (emphasis added).

rise to binding obligations' that could not be later renounced by a government at whim.³⁸ This means any treaty would have to have more enduring force than mere Commonwealth legislation (such as the *Racial Discrimination Act*)³⁹ which can be disregarded by subsequent legislation (which occurred with the passage of the *Native Title Act*).⁴⁰ Otherwise a treaty would become easily discredited in Aboriginal eyes and not achieve any substantial effect.

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There are other implications from this aspect of the binding nature of commitments created by treaty. Coombs explored some of these in arguing for an essential international dimension of a treaty, which he said could usefully be seen as an 'act of self-determination' supervised by the UN.⁴¹ This raises issues of process, which will be discussed further later. Here it is worth emphasising the importance of the voluntary nature of the commitments made in a treaty. This issue was raised in the Aboriginal Treaty Committee's newsletter in the early 1980s by H Sculthorpe, an Indigenous Tasmanian, who commented that any acknowledgement of white property rights by Aborigines in a treaty would be 'made under duress and for the lack of a viable alternative'.⁴² A broadly similar issue has arisen in New Zealand, concerning Maori responses to government efforts to impose a fiscal cap on compensation for historical breaches of the Treaty of Waitangi by the Crown. The overwhelming Maori response to this government policy has been to point out that any agreements made under such duress can not be considered 'full and final' and might well lead to subsequent Maori claims in the future.⁴³ This is not necessarily a problem for Maori who traditionally take the past with them into their future, but it does pose a challenge for any government pretending that a treaty will finally resolve the historical legacy of past dispossession. If a government is genuinely interested in negotiating a treaty, it should be concerned to ensure that the agreement is entered into voluntarily by both parties, since otherwise there is unlikely to be any transformation in the status of Indigenous peoples, and the conflict that the treaty was to resolve would be perpetuated into future generations rather than reduced.

The second essential formal element of a treaty is that it contain a very clear expression of the rights and responsibilities that both parties have agreed to respect. This requirement is connected logically with the previous one, since without clarity in the expression of a treaty then the commitments that it is meant to enshrine could be readily avoided. Thus there is a crucial need for honesty in what is being sought and obtained through a treaty. While this point was emphasised by the Chief Justice of Western Australia, David Malcolm (see this volume), it does not follow that lawyers, or the legal form of expression, is something that no treaty can do without. This may sound strange, because international treaties are professionally the creation of lawyers, for whom they often have more significance than for politicians. Yet the most enduring and significant of international treaties, such as international human rights conventions, are not merely the creation of lawyers. Furthermore, any international treaties which have a double-standard embedded in them – or, more accurately, which are often misinterpreted in a hypocritical way by the powerful to force others to change – are at risk of losing their binding nature, because the original bargain is no longer being respected (as is occurring with the Nuclear Non-Proliferation Treaty, with potentially catastrophic consequences). Because the political process of reaching and maintaining a treaty will be subject to misunderstanding and much opposition, it is important that these risks be reduced through clear and concise commitments.

³⁸ Barwick 1988: 9.

⁴⁰ 1993 (Cth).

⁴² Rowse 1997: 221.

³⁹ 1975 (Cth).

⁴¹ Coombs 1994: 208, 210, 226–9.

⁴³ Mutu 2005: 203–4; see also M Durie 1998a: 132.

The third essential aspect of a successfully formed treaty is that all the commitments by the respective parties are consistent and complementary. The coherence of a treaty is a vital element of its form, so that all the parts of the treaty work together and are not contradictory. This requirement means it that is very important that any compromises or concessions judged necessary to achieve a treaty politically are not made at the expense of diminishing the treaty's integrity and dynamic capacity. In other words, the different commitments made by government and by Indigenous peoples in a treaty must be mutually reinforcing, and not oppositional.

This crucial element of coherence is closely related to the previous two aspects of a treaty's form. This can be seen in the Treaty of Waitangi, which contains three basic articles. These guarantee, in the succinct paraphrase of Eddie Durie, a senior Maori judge and head of the Waitangi Tribunal for two decades, 'governorship for the Crown, autonomy for Maori, and citizenship for all'. Durie, a lawyer, stressed the importance of the concise phrasing of the articles and their coherence for the Treaty of Waitangi's endurance as a 'living document', despite a long history of neglect by government of its responsibilities under the Treaty.⁴⁴

There is another, unwritten fourth article affirming respect for Indigenous as well as non-Indigenous religion.⁴⁵ This highlights two crucial aspects of the Treaty of Waitangi: first, that each article only makes sense as part of a genuine partnership between settlers and Maori, and secondly, that the treaty is 'authority for the proposition that the law of the country would have its source in two streams'.⁴⁶ What the Treaty of Waitangi established was a basis for a bicultural political relationship, albeit one dominated by the pressures and legacies of colonisation. The relationship emerges from 'the reconciliation of two potentially conflicting sets of expectations, not the imposition of the norms of one party upon the other', because the treaty's fundamental principle is to ensure 'a flexible partnership'.⁴⁷

Enduring purpose: renewing self-determination

In order for a treaty to provide a framework for such an enduring partnership, it must be capable of appropriate reinterpretation in terms of common values or a joint purpose, which the parties to the treaty share. Yet, because of the influence of stereotypical perspectives about 'moving on' from the past noted above, such a common purpose will be difficult to create in Australia. It has to be created politically and cannot be presumed to exist, as the rejection by McMahon of the Larrakia petition (and the later failure of Labor governments to conclude any alternative agreement) demonstrate. Whereas a consensus about the premises of a treaty should be achievable without much difficulty, and an understanding of the importance of the essential formal aspects of a treaty might be reached quickly, questions of a common purpose or vision pose direct challenges. This is because state (as well as federal) governments have continued to operate pragmatically, with little vision of a cooperative and inspiring future. Again, the lesson from New Zealand is that the purpose of a treaty is 'about the future more than the past', which means that it is not mainly about ensuring adequate compensation for colonial wrongs (which is impossible), but 'planning a future' together based on creating new living relationships in this land.⁴⁸

This potential purpose of a treaty has at least two crucial elements: 1) enabling a new partnership by sharing power with Indigenous peoples; and 2) valuing Indigenous heritage

⁴⁴ E Durie 1991: 156, 165.

⁴⁵ E Durie 1996: 460.

⁴⁶ E Durie 1996: 460–1; see the discussion in D Williams 2005: 375–83.

⁴⁷ J Williams 1991: 192; Coombs 1994: 147, noted in Rowse 1997: 223.

⁴⁸ M Durie 1998b: 190, 193; see also Jones 2005.

dynamically through cultural renewal. In some respects, much of what the Council for Aboriginal Reconciliation tried to achieve from 1991 to 2000 relates to these points, although critics who thought that the issue of a treaty deserved more explicit attention earlier in the process of public education and community outreach have now been vindicated.⁴⁹ Public opinion is notoriously difficult to estimate accurately concerning such a complex political matter, but one fact that appears clear is a large generational difference in the attitudes of non-Indigenous Australians to a treaty. A telephone opinion poll in August 2001 found overall support for a treaty at 52%, but a higher percentage of those aged 25–39 years (59%), and a much higher percentage of those under 25 years (74%), in contrast to about a third (35%) of those aged 55 years and above.⁵⁰ Those figures are the result of a general opinion survey, reflecting little exposure to the issues involved in a treaty, with the government trying to dismiss it from the political agenda using the old epithet, ‘separatism’.⁵¹ While only broadly indicative, those figures suggest that an orientation to the future is an essential dimension of creating a politically viable treaty.

The first crucial element of a future oriented perspective is the need for power-sharing between government and Indigenous peoples. This is at the heart of the difficult political process of creating a treaty, as Michael Mansell has made clear. Reviewing various statements from two inquiries in the early 1990s about the need to empower Aboriginal people, he says:

These [inquiries] point out that taking decision making away from Indigenous peoples is a major part of the problem. The logic is that a treaty must look at political self-rule. If there are to be limits of self-rule, those limits should be negotiated, not imposed.⁵²

Further, Mansell highlights the paradigm shift that needs to occur in relations between governments and Indigenous peoples by claiming that a treaty worth having would involve a new dimension of equality in Australia. This is because, in his view, a treaty must be a political (not a welfare or social service) compromise, and ‘a political settlement recognises that Indigenous peoples are not coming to the negotiating table as defeated people but as sovereigns: emphasising *equality of scale with government*, not with other individuals’.⁵³ Like Maori intellectuals in New Zealand, Mansell argues that, while issues of ‘restitution for the original owners’ are crucial to a treaty, any compensation or reparation in a treaty must be seen, not as closing off the past, but as part of ‘a focus on the future’.⁵⁴ Without a shift to a paradigm of negotiating self-determination equally with governments, Mansell argues that a treaty could not be justifiable.

The difficulty of achieving this paradigm shift and empowerment is partly a result of the influence of the stereotypical perspectives about the past, present and future sources of legitimacy noted above. Sovereignty is presumed by governments (and by even the more radical of judges on the High Court, such as Kirby J) as indivisibly belonging to the Crown. Yet, as Coombs emphasised, since governmental authority in Australia has long been divided federally, it is not conceptually difficult to imagine a negotiated sovereignty with Indigenous peoples deriving from a treaty.⁵⁵ It is obviously difficult to get governments to treat with Indigenous peoples on an equal constitutional basis, given how Australian governments negotiate among themselves.⁵⁶

⁴⁹ For a review of the council's outcomes, see Brennan et al 2005: 18–22.

⁵⁰ Snapshot of a Nation, *Age*, 8 October 2001: 11 (reporting an opinion poll of 9 and 15 August.)

⁵¹ Metherell and Peatling 2001.

⁵² Mansell 2003: 11.

⁵³ Mansell 2003: 15 (emphasis added). See also Ross 2001: 154, 157, and Behrendt 2003a: 54–5.

⁵⁴ Mansell 2003: 16, 17; compare M Durie 2005 and Jones 2005.

⁵⁵ Coombs 1994: 150, 206–9; see also J Williams 1991: 195; Renwick 1991: 209–18; Brennan et al 2005: 74.

⁵⁶ See Brennan et al 2005: 31–2, 45–6.

But the metaphor of ‘two streams’ joining to form a flowing river, used by Durie J in New Zealand and Pat Dodson in Australia, conveys that such power-sharing involves not the threat of separatism but a promise of coexistence and partnership in the future.⁵⁷

Achieving progress in the central agenda of power-sharing is likely to depend on a related shift in attitudes by governments on the issue of Indigenous cultural *revival*. Unfortunately, the way in which native title has been dealt with in Australia, through narrowly-based litigation in the courts, has compounded rather than reduced the obstacles to such a shift. This can be seen most clearly in Justice Kirby’s judgement in the *Fejo* case.⁵⁸ This involved a claim by Larrakia people for a restoration of traditional title over lands around Darwin which were, in part, granted to a settler in 1882 then resumed by the Crown in 1928 and used first as a quarantine station, then as a leprosarium until 1980. Justice Kirby agreed with the rest of the High Court in ruling that, once ‘extinguished’, native title over what was then unused Crown land could not be revived, even though he accepted that the Aboriginal custom on which the traditional title would be based ‘may still’ exist. His reason was that, otherwise, there would be ‘a serious element of uncertainty’ introduced into Australian land law. Thus the Larrakia people, who petitioned government for a treaty several years before that land became vacant, could not get their traditional land rights recognised after *Mabo* because this potentially challenges too many non-Indigenous interests. This example shows clearly why a treaty that establishes a new political relationship of equality between governments and Indigenous peoples is essential. Without it, Indigenous peoples are at risk of having their cultures defined in the same way as the High Court defined native title, as a ‘fragile’ thing that one old, exhausted grant to a long gone settler necessarily ‘blows away’ from existing ‘forever’.⁵⁹

There is a world of difference between the findings of the High Court in a particular case and the existence of cultural diversity, as the *Yorta Yorta* case demonstrated most disappointingly.⁶⁰ One tragic irony of that case is that a Labor government in Victoria disputed the real process of Indigenous cultural survival and customary renewal two decades after conservative historians and politicians such as Geoffrey Blainey and Jeffrey Kennett had accepted a dynamic view of Indigenous culture (in submissions to the Law Reform Commission’s inquiry into Aboriginal customary law).⁶¹ Thus the contested and fraught character of native title litigation has contributed to a conflation of two very different things: the continued renewal of Indigenous custom (which Kirby did not doubt in the Larrakia case), and the ability of governments to negotiate politically with those renewing custom. A treaty is needed to remove that conflation, by recognising that Indigenous self-determination should keep on being renewed. Guidance about that purpose should be sought not from any Australian courts, but rather from the revival of Indigenous culture in art.

Principles of substance: recognising Indigenous rights

A political acknowledgement by government of the survival of dynamic and evolving Indigenous traditions is a crucial foundation for adequately defining the substantive content of a treaty. Issues of content are often discussed under the heading ‘unfinished business’, particularly as

⁵⁷ E Durie 1996: 461; P Dodson 1996; Behrendt 2003a: 107–8. Dodson’s metaphor, deriving from a traditional meeting of fresh and salt water, is powerful given the massive need to revive river flows.

⁵⁸ (1998) 156 ALR 721.

⁵⁹ (1998) 156 ALR 721 at 757–60.

⁶⁰ (2003) 214 CLR.

⁶¹ Pitty 1999: 49–52; For *Yorta Yorta* perspectives on the renewal of tradition, see Harvey 2003.

a result of the inconclusive nature of the 1990s reconciliation period.⁶² This phrase is meant to convey the difficulty in getting the government to negotiate about the content of a treaty, rather than a difficulty in broadly identifying the main issues that must be negotiated. Mick Dodson has observed that ‘identifying what we are talking about so far as unfinished business is concerned is not going to be too difficult because most of the work has already been done’, but ‘generating national collective political will to implement the agenda is the real difficulty’.⁶³ This suggests that there are two complementary aspects to defining the content of a treaty: 1) recognition of Indigenous peoples as first peoples with distinct rights; and 2) agreement on how governments must act to respect those rights.⁶⁴ Both aspects are equally important and would need to be specified when the content of a treaty is being formulated. Dodson also emphasises the need for the negotiation process to ‘have the flexibility to allow for new or more specific issues to be identified for negotiation in the future’.⁶⁵ Flexibility is important but it needs to be clearly defined. What is being sought is not any kind of flexibility, but rather only the flexibility that would enable an existing partnership, created by a treaty, to be further developed and extended into new areas. This is very different from the flexibility that many governments are used to, that is expediency. The challenge in identifying the principles of substance to be included in a treaty is that of creating an instrument for flexible progress, not regress, as suggested in Stewart Harris’s image of a device for climbing up hills.

There have been several historic attempts by Aboriginal peoples, such as the 1988 Barunga statement, to outline to government the range of core issues that would need to be included in a treaty. Larissa Behrendt has analysed these and summarised the key Indigenous demands thus:

- Recognition of past injustices
- Autonomy and decision-making
- Property rights and compensation
- Protection of cultural practices and customary laws
- Equal protection of rights.⁶⁶

She comments about the Barunga statement that it ‘is a combination of claims for special treatment and equal rights, underlined by a strong demand for control of decision-making processes’.⁶⁷ Essentially those demands have been repeated in various formulations for twenty years. Behrendt shows that they substantially overlap with what Indigenous people in Australia understand by asserting Indigenous sovereignty. She also emphasises that the demands are interdependent, so that a treaty would not be adequate without including all of them outlined in substance.⁶⁸

Behrendt’s analysis demonstrates that there is a strong basis for consensus amongst Indigenous peoples within Australia about the essential, necessary components of a worthwhile treaty. Particularly because of how the promises concerning native title in the early 1990s (such as substantial compensation and an effective social justice package) subsequently evaporated in the hot air of non-Aboriginal recalcitrance, it is unlikely that future aspirants for national

⁶² See M Dodson 2003: 30–2;
P Dodson 2000: 12–19.

⁶³ M Dodson 2003: 31.

⁶⁴ M Dodson 2003: 32.

⁶⁵ M Dodson 2003: 39.

⁶⁶ Behrendt 2003a: 123; see her discussion in chapter 4. Compare P Dodson 2000: 17–18; see also Brennan et al 2005: 131–4.

⁶⁷ Behrendt 2003a: 89.

⁶⁸ Behrendt 2003a: 115–6.

Aboriginal leadership would propose a framework for resolving unfinished business with government that is less demanding than the above summary. Indeed, scepticism about any government's capacity to deliver on all of these demands is strong. The historian and poet Tony Birch expresses such scepticism directly:

I couldn't imagine any Aboriginal person sitting at a table and signing a document with a non-Aboriginal government, at the moment, and see it as having any realistic basis, *no matter what it says* ... I would rather see something happen first before I saw any signing of documents (emphasis added).⁶⁹

This comment reflects the lack of trust at a political, rather than a social, level that has resulted from three decades of broken promises. However, it is significant that Birch's reason for critical caution relates not to any doubt about the content of what should be agreed, but rather to whether any government could be trusted with an agreement. Yet ironically, that is a crucial reason for obtaining a treaty, so that promises are no longer broken with the arrogance of power. While Birch comments that 'Maori people have suffered a lot' since the Treaty of Waitangi was signed, which is true, there is a strong Maori consensus about the need in New Zealand to 'affirm the constitutional inviolability of the Treaty'.⁷⁰

There is no such consensus in Australia, and that remains the basic reason for the comparatively much worse position of Indigenous peoples here (in terms of rights and social conditions) than in other settler states. In specific situations, such as the hostility of state governments to native title, there is clearly a large gap between the basic Aboriginal demands for justice and the current policies of those governments. That is a major reason why, for all the difficulty of reaching a national treaty agreement, it is essential. Regional and local initiatives are vital. They can fit within what Mick Dodson has called 'a national treaty framework model, which allows for treaty-making on a national, state-wide or local basis'.⁷¹ Yet it must by now be clear that national leadership is required to initiate a shift towards power-sharing with Indigenous peoples. Otherwise, as Mansell points out, all that will be negotiated is the delivery of services. Further, without a national Indigenous agenda of renewing self-determination, any failure of negotiations would mean 'the government gets what it wants, with or without a treaty'.⁷² Indeed, as Behrendt and others insist, it is the 'inherent power imbalance between the parties' that is the major obstacle to successfully negotiating a treaty.⁷³ This is why negotiations about the substantive principles of a treaty must occur at a national level, with no veto exercised by state governments, although specific agreements could be made regionally or about specific issues while negotiations proceed.⁷⁴

In 2005 the main problem with creating a treaty in Australia seems to be a reverse of the problem that Jack Horner wondered about in 1969. The question that Horner asked was 'where are the Aboriginal leaders to come from?' That may still be asked, and answered by Aboriginal people as they struggle to create a more representative replacement for ATSIC.⁷⁵ The question now could be phrased as 'where are the European leaders to come from?' In the public arena of the past decade, only on one occasion has a non-Aboriginal leader (albeit not a

⁶⁹ Quoted (from interview on 23 January 2003) in Behrendt 2003a: 108.

⁷⁰ Behrendt 2003a: 108; M Durie 1998a: 213.

⁷¹ M Dodson 2003: 32.

⁷² Mansell 2003: 14. See also Cronin 2003: 164.

⁷³ Behrendt 2003b: 27; Rigney 2003: 86; NIYMA 2003: 113.

⁷⁴ Behrendt 2003b: 26, 28.

⁷⁵ See the diagram of a possible Sovereign Aboriginal Congress inside the cover of Gilbert 1993.

party political one) ever outlined a response to the common Aboriginal demands summarised above. This was done in August 1996 by Sir William Deane, as Governor-General, in his inaugural Lingiari lecture, 'Some Signposts from Daguragu'. These signposts were marked out to draw some broader lessons from the return of land to the Gurindji after a long struggle. Deane emphasised the need to acknowledge past injustice, linking this to current inequality, and the need for reparations and respect for the developing Indigenous cultures. He called for 'a partnership between the nation as a whole and the Aboriginal and Torres Strait Islander peoples' in which they 'play a major active role'. He also noted that only a demonstrated commitment by government to resolving all 'the terrible problems oppressing' these peoples today could create 'the mutual trust necessary for true consensus about the future'.⁷⁶ Deane noted that areas of disagreement would arise about when such a consensus might be reached. Yet, for all the obstacles that might emerge on the road to a treaty, he argued that it was apparent that this road 'is not impassable'.⁷⁷ Because of his stature and the extent to which the signposts that he envisioned corresponded significantly with Aboriginal demands, events since then have not changed that judgement.

Creating a process: inclusive and open negotiations

The validity of Deane's judgement will be tested when a number of non-Aboriginal politicians venture to use his signposts and see the future to which they may lead. Then a genuine dialogue might develop between them and Indigenous peoples about creating a future partnership. At present, it is significant that discussion about the process of creating a treaty is essentially occurring mainly amongst Indigenous political actors. Their concern with the key elements of this process suggests that they see clearly why a treaty of settlement is required, and are exploring in depth how the process towards it can be negotiated successfully. Fortunately, there are too many specific proposals to be summarised in a few points. Yet, in the spirit of Kevin Gilbert's memorable ode to Jimmy Barker, the following might become essential elements of an effective treaty process: 1) the negotiations must be properly resourced with a technology transfer; 2) the negotiations should encompass international perspectives; and 3) the timetable for negotiations must be open, dynamic and urgent.⁷⁸ Each point deserves further consideration and extensive debate, because this is ultimately the most difficult political aspect of creating a treaty. Even with positive assessments of the previous nine points in the sections above, efforts towards creating a treaty could be obstructed or delayed if the process does not receive enough critical attention. That is impossible here, but it is worth remembering, by analogy, that Maori are still fighting against government recalcitrance for an adequate political process to be created to recognise the constitutional status of the Treaty of Waitangi.⁷⁹

Many issues are raised by the need for a properly resourced process of treaty negotiations. What needs to be avoided is the cheap and nasty native title mediation experience, in which Indigenous claimants have had to respond to a multitude of antagonistic opponents, with governments essentially representing the opponents not committed to mediation at all.⁸⁰ The basic conditions for an effective political process are that it is open and inclusive of all peoples who are directly affected by the decisions to be made. This must be demonstrated institutionally, as well as by active measures to overcome the Aboriginal scepticism expressed by Birch. A commitment to an independent and ongoing Treaty Commission, such as proposed

⁷⁶ Deane 1996: 10–15.

⁷⁸ See Gilbert 1991: 101 ('Jim B').

⁸⁰ See Atkinson 2002.

⁷⁷ Deane 1996: 10.

⁷⁹ See M Durie 2005, Jones 2005, Kelsey 2005, McHugh 2005, Sharp 2005 and D Williams 2005.

by Pat Dodson, would constitute such a measure. It would be bicultural and include various Indigenous perspectives.⁸¹ This might be paralleled by roving bodies inquiring into urgent issues, such as health, so that the Treaty Commission is fully informed about social needs. In the spirit of a true partnership, such bodies might put pressure on governments to respond adequately to Indigenous needs even before a treaty is agreed.⁸²

It is possible that, even if effective institutions within Australia are created to encourage and facilitate treaty-making, major problems will arise, and conflict within the treaty process will be resolved only through a mutual capacity to seek broader perspectives. Such perspectives are a crucial aspect of building what Deane called the 'mutual trust' that can develop into a consensus of support for a treaty. Although Australia is a diverse country, it cannot be presumed that all of the useful perspectives about a treaty process here are contained within this continent. Indeed, it would be a strange and narrow-minded faith in nationalism to think that, particularly when the High Court has noted (albeit by default, in the *Fejo* case) that other former British colonies are more advanced in facing the challenge of creating an enduring partnership with Indigenous peoples. Consequently, it would be sensible, although initially quite challenging, for a parallel international treaty monitoring commission to be created, comprised particularly of Indigenous people from other lands who are able to devote time and energy to the task of facilitating agreement here. An important proposal in this respect has been made by Mary Graham, advocating the use of properly qualified intermediaries and the inclusion of a crucial international dimension in treaty negotiations.⁸³ Graham's idea is to apply the 'Oslo Model' (used to redress longstanding conflicts in the Middle East, Guatemala and Sri Lanka) to help both facilitate and supervise a treaty process in Australia. This proposal extends Behrendt's argument that it is inappropriate to make Indigenous peoples negotiate with two levels of government here, by pointing out, as Whitlam once said, that Australia is answerable to 'the rest of the world' for a treaty.⁸⁴

The other essential aspect of the process of creating a treaty is that the timetable for negotiations must be open and dynamic, not constrained by any particular date or by vested interests, as occurred with the Native Title Act, which Coombs considered the result of an inadequate process.⁸⁵ If it is going to be successful, the process of creating a treaty must build a dynamic of its own. The ultimate test of that is whether the process can be derailed (to continue with Harris's metaphor) once people are actually in the cable car heading for a better outlook. In that respect there is a real kernel of truth in the provocative suggestion made by Richie Ah Mat to the Treaty Advancing Reconciliation conference, that the conservative forces in Australian politics will have a role in creating a treaty, if it ever eventuates.⁸⁶ Their role will not be as initiators, nor even promoters, but it must be as tolerators of difference, and ultimately opponents of sabotage. Whether they can cope with that challenge remains to be seen. However, that implies that the building of a treaty must appear in some sense, and at a crucial time, as an effective adjustment by Australia to international and historical realities that it can no longer ignore. While various suggestions have been made about how a treaty might be

⁸¹ See P Dodson 2000: 18, and Behrendt 2003b: 27.

⁸² See Behrendt 2003b: 28–9, and NIYMA 2003: 111–12.

⁸³ Graham 2001: 9. For a Maori perspective see Wickliffe 1996.

⁸⁴ Behrendt 2003a: 169; Behrendt 2003b: 26. For Whitlam's 1972 policy speech, see Clark 1973: 203. While Whitlam did not use the word 'treaty' he was responding to demands of the Larrakia and others.

⁸⁵ Coombs 1994: 209–14.

⁸⁶ Ah Mat 2002, cited in Langton et al 2004: 26. See also Langton in Brennan et al 2005.

supported by the existing Australian Constitution (which is a paradox, considering its history), the significance of the international legal constraints upon Australia which followed from the 1967 Referendum (as argued by Kirby J in the *Kartinyeri* case) should not be overlooked, as they may actually be vital.⁸⁷

Conclusion: from premises to process

The creation of a treaty recognising the unique status of Aborigines and Torres Strait Islanders as *first peoples* of Australia has many complex aspects. This analysis has attempted to show that there are more reasons for optimism about the treaty project than might appear to be the case. Whereas in 1969 questions might have been legitimately raised about who could negotiate for the first peoples, now the outstanding obstacle to a treaty is rather, who can face the challenge to negotiate for Australia? The challenge is one of seeking partnership not domination, diversity not uniformity and searching for a common justice rather than an old control. A treaty is possible because old forms of controlling Indigenous peoples in Australia cannot be easily re-instituted, and because there are reasons to believe that Indigenous advocates of a treaty have clarified much of what needs to be done (except, perhaps, where to find a partner). At least, it now appears true that, if the challenge of creating a treaty is accepted in Australia, Indigenous peoples will not be duped by the deceit of power.⁸⁸

⁸⁷ See Kirby 1998a. See also M Dodson 2003: 34–8; McGlade 2003: 134–5.

⁸⁸ See Gilbert 1994: 72.

References

Books, articles and reports

- Atkinson, Wayne 2002, 'Mediating the Mindset of Opposition: the Yorta Yorta case', *Indigenous Law Bulletin*, February–March, 5(15): 8–11.
- ATSIC/AIATSIS 2003, *Treaty: let's get it right!*, Aboriginal Studies Press, Canberra.
- Barwick, Diane 1988, 'Making a Treaty: the North American Experience', *Aboriginal History*, 12(1): 9–26.
- Behrendt, Larissa 2003a, *Achieving Social Justice: Indigenous Rights and Australia's Future*, Federation Press, Sydney.
- 2003b, 'Practical Steps Towards a Treaty: Structures, Challenges and the Need for Flexibility' in ATSIC/AIATSIS 2003, *Treaty: let's get it right!*, Aboriginal Studies Press, Canberra: 18–29.
- Brennan, Sean, Larissa Behrendt, Lisa Strelein and George Williams 2005, *Treaty*, Federation Press, Sydney.
- Central Australian Aboriginal Congress Inc. 2002, Position Paper: *Treaty and Health*, July.
- Clark, Claire (ed) 1973, *Australian Foreign Policy: towards a reassessment*, Cassell, Melbourne.
- Coates, Ken S 1998, 'International Perspectives on Relations with Indigenous Peoples' in Ken S Coates et al *Living Relationships – Kokiri Ngatahi: The Treaty of Waitangi in the New Millenium*, Victoria University Press, Wellington: 19–103.
- Coombs, HC 1994, *Aboriginal Autonomy*, Cambridge University Press, Melbourne.
- Cronin, Darryl 2003, 'Indigenous Disadvantage, Indigenous Governance and the Notion of a Treaty in Australia: An Indigenous Perspective' in ATSIC/AIATSIS 2003, *Treaty: let's get it right!*, Aboriginal Studies Press, Canberra: 151–65.
- Deane, Sir William 1996, Some Signposts from Daguragu: the inaugural Lingiari lecture, delivered in Darwin, 22 August.
- Dodson, Mick 2003, 'Unfinished Business: A Shadow Across Our Relationships' in ATSIC/AIATSIS 2003, *Treaty: let's get it right!*, Aboriginal Studies Press, Canberra: 30–40.
- Dodson, Pat 1996, *Reconciliation at the Crossroads*, address to the National Press Club, May 1996, Australian Government Publishing Service, Canberra.
- 2000, *Beyond the Mourning Gate: dealing with unfinished business*, 2000 Wentworth lecture, 12 May, Australian Institute of Aboriginal and Torres Strait Islander Studies.
- 2005a, 'The Death of ATSIC – So What?', *Australian Options*, 40, Autumn: 6–9.
- 2005b, Speech to Reconciliation Australia's National Convention Workshop, Canberra, 30–31 May, available at <http://www.reconciliationaustralia.org/ipload/Speech%20by%20Patrick%20Dodson.doc>, viewed 12 June 2005.
- Draft Declaration on the Rights of Indigenous Peoples* 1993, UN, Geneva, UN Doc E/CN.4/Sub.2/1993/26, available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.1994.45En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45En?OpenDocument)
- Durie, ETJ 1991, 'The Treaty in Maori History' in William Renwick (ed) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts*, Victoria University Press, Wellington: 156–69.
- 1996, 'Will the Settlers Settle? Cultural Conciliation and Law', *Otago Law Review*, 8(4): 449–65.
- Durie, Mason 1998a, *Te Mana, Te Kawanatanga: the Politics of Maori Self-Determination*, Oxford University Press, Auckland.
- 1998b, 'The Treaty was Always About the Future' in Ken S Coates et al, *Living Relationships – Kokiri Ngatahi: The Treaty of Waitangi in the New Millenium*, Victoria University Press, Wellington: 189–93.
- 2005, 'Tino Rangatiratanga' in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, Oxford University Press, Melbourne: 3–19.
- Gilbert, Kevin 1991, *The Blackside: People Are Legends and other poems*, Hyland House, Melbourne.
- 1993, *Aboriginal Sovereignty, Justice, The Law and Land (includes Draft Treaty)*, 3rd edn, Burrumbinga Books, Canberra.

- 1994, *Black from the Edge*, Hyland House, Melbourne (with photography by Eleanor Williams).
- 1995 [1992], 'Mabo Case Necessitates a Treaty: an open letter to the Prime Minister' in Irene Moores (ed) *Voices of Aboriginal Australia: Past, Present, Future*, Butterfly Books, Springwood: 371–4.
- Graham, Mary 2001, *Application of the Oslo Model for Relations Between States and Indigenous Peoples*, Foundation for Aboriginal and Islander Research Action (FAIRA) Aboriginal Corporation, Brisbane.
- Harris, Stewart 1979, 'It's Coming Yet ...': *An Aboriginal Treaty Within Australia Between Australians*, Aboriginal Treaty Committee, Canberra.
- 1985, Introduction to Judith Wright, *We Call for a Treaty*, Aboriginal Treaty Committee, Canberra: xi–xv.
- Harvey, Kate (ed) 2003, with the Aboriginal Community Elders' Service, *Aboriginal Elders' Voices: Stories of the 'tide of history'*, Victorian Indigenous Elders' life stories and oral histories, Aboriginal Community Elders' Service, Melbourne.
- Horner, Jack 1969, letter to Jack Davis, President of the Western Australian Aboriginal Association, 9 August 1969 in Papers of FCAATSI, Series 23 Item 4, AIATSIS Library.
- 2005, Interview, Canberra, 20 January.
- Jones, Shane 2005, 'Cornerstone of the Nation State' in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisted: Perspectives on the Treaty of Waitangi*, Oxford University Press, Melbourne: 20–34.
- Kawharu, IH 2005, 'Foreword' in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisted: Perspectives on the Treaty of Waitangi*, Oxford University Press, Melbourne: v–vi.
- Kelsey, Jane 2005, 'Maori, Te Tiriti, and Globalisation: The Invisible Hand of the Colonial State' in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisted: Perspectives on the Treaty of Waitangi*, Oxford University Press, Melbourne: 81–102.
- Land Rights News* 1988, 2(9) July: 'The Barunga Statement' and related articles.
- Langton, Marcia 2001, 'Dominion and dishonour: a treaty between our nations?', *Postcolonial Studies*, April 4(1): 13–26.
- Langton, Marcia and Palmer, Lisa 2003, 'Negotiating Settlements: Indigenous Peoples, Settler States and the Significance of Treaties and Agreements' in ATSI/AlATSIS, *Treaty: let's get it right!*, Aboriginal Studies Press, Canberra: 41–52.
- 2004, 'Treaties, Agreement Making and the Recognition of Indigenous Customary Polities' in M Langton, M Tehan, L Palmer and K Shain (eds) *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press, Melbourne: 34–49.
- Langton, Marcia, Maureen Tehan and Lisa Palmer 2004, 'Introduction' in M Langton, M Tehan, L Palmer and K Shain (eds) *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press, Melbourne: 1–26.
- Mansell, Michael 2003, 'Citizenship, Assimilation and a Treaty' in ATSI/AlATSIS 2003, *Treaty: let's get it right!*, Aboriginal Studies Press, Canberra: 5–17.
- Marr, David 2005, feature article on the UN Committee on the Elimination of Racial Discrimination and Australia, *Sydney Morning Herald*, 28 March.
- McGlade, Hannah 2003, 'Native Title, "Tides of History" and Our Continuing Claims for Justice – Sovereignty, Self Determination and Treaty' in ATSI/AlATSIS 2003, *Treaty: let's get it right!*, Aboriginal Studies Press, Canberra: 118–36.
- McHugh, Paul 1997, 'Crown-Tribe Relations: Contractualism and Coexistence in an Intercultural Context' in G Davis, B Sullivan and A Yeatman (eds) *The New Contractualism?*, Macmillan, Melbourne: 198–216.
- 2004, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination*, Oxford University Press, Oxford.
- 2005, 'Living With Rights Aboriginally: Constitutionalism and Maori in the 1990s' in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisted: Perspectives on the Treaty of Waitangi*, Oxford University Press, Melbourne: 283–307.
- Metge, Joan and Patricia Kinloch, 1978, *Talking Past Each Other: Problems of Cross-Cultural Communication*, Victoria University Press, Wellington.
- Metherell, Mark and Stephanie Peatling, 2001, 'Don't use treaty vote to push separatism: Ruddock', *Sydney Morning Herald*, 4 January: 2.

- Mutu, Margaret 2005, 'Recovering Fagin's Ill-Gotten Gains: Settling Ngati Kahu's Treaty of Waitangi Claims against the Crown' in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, Oxford University Press, Melbourne: 187–209.
- National Indigenous Youth Movement of Australia (NIYMA) 2003, 'A Story of Emergence – NIYMA's Views on a Treaty' in ATSIC/AIATSIS 2003, *Treaty: let's get it right!*, Aboriginal Studies Press, Canberra: 107–17.
- O'Shane, Pat 1991, 'A Treaty for Australians?' in William Renwick (ed) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts*, Victoria University Press, Wellington.: 147–55.
- Pitty, Roderic 1999, 'A Poverty of Evidence: Abusing Law and History in *Yorta Yorta v Victoria* (1998)', *Australian Journal of Legal History*, 5(1): 41–61.
- Renwick, William 1991, 'A Variation of a Theme' in William Renwick (ed) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts*, Victoria University Press, Wellington: 199–220.
- Rigney Lester-Irabinna 2003, 'Indigenous Education, Languages and Treaty: the Redefinition of a New Relationship with Australia' in ATSIC/AIATSIS, *Treaty: let's get it right!*, Aboriginal Studies Press, Canberra: 72–87.
- Rose, Deborah Bird 1984, 'The Saga of Captain Cook: Morality in Aboriginal and European Law', *Australian Aboriginal Studies*, 2: 24–39.
- 1991, *Hidden Histories*, Aboriginal Studies Press, Canberra.
- Ross, David 2001, 'Why This Country Needs a Treaty' in Martin Nakata (ed) *Indigenous Peoples, Racism and the United Nations*, Common Ground, Sydney: 153–61.
- Rowley, C.D. 1978, *A Matter of Justice*, Australian National University Press, Canberra.
- Rowse, Tim 1992, *Remote Possibilities: the Aboriginal Domain and the Administrative Imagination*, North Australia Research Unit, Darwin.
- 1997, 'Reflections on Contractualism and Coexistence in an Intercultural Context' in G Davis, B Sullivan and A Yeatman (eds) *The New Contractualism?*, Macmillan, Melbourne: 217–23.
- Sharp, Andrew 2005, 'The Treaty in the Real Life of the Constitution' in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, Oxford University Press, Melbourne: 308–29.
- Snapshot of a Nation 2001, *Age*, 8 October, supplement.
- Stokes, Geoffrey 2002, 'Australian Democracy and Indigenous Self-Determination, 1901–2001' in Geoffrey Brennan and Francis Castles (eds) *Australia Reshaped*, Cambridge University Press, Melbourne: 181–219.
- Tully, James 1995, *Strange Multiplicity: Constitutionalism in an age of diversity*, Cambridge University Press, Cambridge.
- Wickliffe, Caren 1996, 'The Waitangi Tribunal: a Critique – the need for a regional human rights mechanism', *New Zealand Law Librarian*, 2(4): 125–30.
- Williams, David V 2005, 'Unique Treaty-Based Relationships Remain Elusive' in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, Oxford University Press, Melbourne: 366–87.
- Williams, Joe 1991, 'Not Ceded But Redistributed' in William Renwick (ed) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts*, Victoria University Press, Wellington: 190–7.
- Wright, Judith 1985, *We Call For A Treaty*, Collins, Sydney.
- Yu, Peter 2001, 'Unfinished Business – National Responsibilities and Local Actions' in Sam Garkawe, Loretta Kelly and Warwick Fisher (eds) *Indigenous Human Rights*, Sydney Institute of Criminology Monograph series No 14, Sydney: 248–57.

Legislation

Native Title Act 1993 (Cth).

Racial Discrimination Act 1975 (Cth).

Case law

Fejo and Another on behalf of the Larrakia People v Northern Territory of Australia (1998) 156 ALR 721.

Kartinyeri v Commonwealth (1998) 195 CLR 337.

Mabo v Queensland (No 2) (1992) 175 CLR.

Members of the Yorta Yorta Aboriginal Community v State of Victoria and Others (2003) 214 CLR.