

A treaty for whom? Indigenous jurisdictions and the treaty sideshow

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99

My own traditional understanding of ownership is based on more than a symbolic gesture that unfortunately many now use like a cartoon ritual of recognition of country and kin that bears no tangible meaning to how Indigenous people recognise one another. We have always operated out of an understanding of our own and other jurisdictions to land and water. This is what makes us Indigenous people.

My first observation is that I realise that, despite my father's legacy, the legal system of this country remains blind to a concept of a sovereignty enjoyed by Aboriginal and Torres Strait Islander groups prior to European invasion. The evidence that my father and others provided to the courts was recognised as a system of laws and customs relating to land and sea ownership; however, this recognition did not constitute the same rights of ownership and control that one might enjoy if we had been recognised as a nation that had rights to own property outright.

The Australian High Court recognised native title as arising from a prior Aboriginal title to land and waters, but its decision stopped well short of recognising our sovereignty. In fact it stopped well short of recognising the kind of land and sea tenure that is consistent with the concepts of property that we know all too well.

We practise our customs and traditions on a clear presumption of total ownership of our lands and waters, not just on the basis of being like animals that simply used our physical environment as a playground to practise our customs and traditions. They obviously got it wrong: they put the cart before the horse. The kind of title to land that I speak of here must be recognised well before we talk of a treaty. Native title is unfinished business, so a treaty should be a means by which Indigenous people can regroup and understand ourselves as Indigenous peoples and communities. We have to self-determine now if we are to enjoy self-determination in the future!

This is why I find the call for a Treaty by ATSIC and its supporters to be problematic. How can we explore a treaty when our communities are themselves not able to govern themselves efficiently, economically, and politically? While I understand that a treaty may deliver an overarching, more comprehensive mandate for Indigenous peoples and communities to begin developing their communities in ways that are productive and sustainable, I feel we should not be putting all our eggs in one basket.

We should be cautious of the idea that a treaty will represent a 'payload'. This is unrealistic and inherently damaging to the aspirational grassroots people who are struggling on a daily basis to secure the basics of living in this world. The Aboriginal lawyer Noel Pearson believes

that 'passive welfare' can be blamed for its capacity to undermine self-sufficiency and cultural traditions. We should not travel along the treaty road until we are sure that it will not give us a 'passive treaty'. This kind of treaty is what Indigenous people in New Zealand and Canada are fighting against. When we examine our own history and the passive ways in which colonial governments recognised our inherent rights as Indigenous people, I begin to ask, 'So what has changed?' The authoritarian nature of mission or government administrators sapped individual and community initiatives, but these initiatives were also sapped by the absence of an overarching recognition of Aboriginal people to own land and self governance.

100

I am of the opinion that the means by which a treaty is currently being explored is flawed if we do not invest in exploring how we can develop our own jurisdictions and have them recognised first. A diverse range of Indigenous jurisdictions will emerge, a united yet diverse range of jurisdictions which cannot be washed away by any tide of history.

It was one thing for ATSIC to make the strongest possible statements and recommendations about developing a treaty, to hold numerous forums and spend yet more money on educating the great unwashed on the colonial history and genocide of Indigenous people. It is quite another matter as to what the Government and the Parliament will commit themselves to at a negotiating table to discuss a treaty of some kind.

Without doubt Australia needs to complete its constitutional obligations to recognise and protect the rights and interests of the original and continuing owners of this land, but whether constitutional protection can be enjoyed to the extent that Aboriginal and Torres Strait Islander people can assert these rights as part of our everyday citizenship and communal rights is questionable. Why?

I for one believe that our sovereign jurisdiction as Indigenous peoples requires legal structures much more sophisticated than those which serve ordinary Australians. We are after all, not ordinary Australians, and have never been. We continue to be extraordinary Australians.

On a political level, if we are to wait for either the Howard or Beazley government to commit to negotiating a treaty, then we will be waiting a very long time. Their political careers are much more precious to them than fixing up the immorally dispossessed Indigenous people. Bearing this in mind, many of you may agree with me when I say that there has never been a more urgent time to evaluate the political strategies that national leadership are using, especially in terms of how these strategies are perceived to deliver achievable outcomes for Aboriginal and Torres Strait Islander people and communities. There has to be continual reminders that there exists a huge gap between people on the ground and those elitists advocating on our behalf in national forums. Grassroots people in the communities, like myself, live from day to day and in many cases without the time to give a single thought to what their elite leaders are thinking about, writing about, and putting up as a national agenda to governments at all levels.

I want to make what I'm saying here clearer. The leadership and structures which Aboriginal and Torres Strait Islander have created have repeatedly disenfranchised those that they meant to represent. Since the 1970s the experience in Aboriginal affairs has been to gradually maximise the participation of Aboriginal peoples into mainstream administrative structures. We have for too long been the moralising political fodder for the Left and a convenient punching bag for the Right. We've won more political elections for political parties than any other social group in this country's colonial history, but have gained nothing but contempt. We will continue to

inhabit and shape the racist fears of white Australians for some years to come and no amount of public education and campaigning for a better understanding of the past is going to wash away a deep fear and loathing for Indigenous people. Unfortunately we live in world where political views are not mobilised amongst ourselves at the grassroots, but is driven by questions created about us by government and those they pay to represent us.

How then can talk of developing a treaty born out of a system that has developed around processes that contain the very jurisdictions and rights that we as Indigenous people should enjoy as Indigenous peoples? *How can we talk of treaty when we have yet to throw off the administrative colonial blankets that they have covered us with for so long?*

While the official message from ATSIC emphasised that ATSIC saw this process as inclusive and not restricted to ATSIC Commissioners and the Regional Councillors there appeared to be no detail on how this process of including all Aboriginal and Torres Strait Islander people came about. On one hand their facilitation of a discussion of a treaty was based admirably on the need for recognising Indigenous Australian sovereignty. Yet we continue to see statements calling for governments to heed messages, borne out in statistical reports for the Federal, State and Territory governments and their agencies, to better target policies and programs to close yawning service gaps between Indigenous and non-Indigenous Australians.

101

Let me explain this further. If we are calling for discussions and a need to explore a treaty, something that may deliver *optimal self-determination*, how is this related to how we talk to governments about how they can better deliver services to our communities? It just doesn't make sense. If ATSIC were calling on governments and territories to fulfil their legal, political and moral obligations to deliver better services for our people to bring us up to the standards of living and outcomes enjoyed by other Australians, are we calling on them to assimilate us? If the basis of these calls to obligation are based on us being the same, and not on the basis of being Indigenous people whose legal rights are based on platforms of prior occupation and ownership of land, then we contradict the central arguments within the calls for a treaty.

This brings me to important questions. If we are calling for a treaty, whom will this treaty be for? Is the political framework that currently exists to represent Aboriginal and Torres Strait Islander interests in the discussion and advocacy of a Treaty adequate? How can we continue to ignore that we are captives of a colonising government and delude ourselves and pretend to take up a position outside the barbed wire fences of government legislation and policy and call for our own release? The mind boggles.

My father Koiki Mabo had a clear understanding of where he stood in terms of questioning the so-called rights of a colonial government to make decisions about his land and his people. This clarity of perspective seems to have been eroded over the years and it certainly is not evident in the current political leadership (both black and white) that Indigenous people are relying on to represent their interests. My fathers' clarity of perspective did not come from working inside the bowels of government. It came from a desire to determine his own destiny. These perspectives exist in Indigenous communities across this nation and they need to be heard and they need to be politically supported.

I was heartened by a call by the former co-chair of Reconciliation Australia, Fred Chaney, for Indigenous groups to act as nations now that native title has delivered a new order. But what exactly is the nature of the new order? Whatever it may be, it is easier said by people who have

good intentions but don't understand the realities of being an Indigenous person in a colonial country. Yes, I applaud how groups such as ANTaR are highly supportive of our cause and go to great lengths in organising public awareness events right across this nation. However, it's often forgotten that this is not a new struggle but a struggle that was initiated by Indigenous people and that the emphasis and focus must shift back to our hands for better or worse.

A reconciled Australia will arrive the day when Indigenous people are in charge of defining who white Australians are, not the other way round. If we are an ethnic group, so too are white people, but as we all know, they live in a privileged world where they can pretend not to be an ethnic group. This raises an important question. If white people are an ethnic group, can we begin to audit our contribution to their wealth?

102

More and more we need to explore how supporters can enhance the way Indigenous people and communities participate in all types of debates, not just debates that are obviously ours to have, but ones that many Australians feel we have no interest in. I feel that multicultural policies past and present have not adequately recognised Indigenous peoples as Indigenous peoples. I work in an urban community where there are 161 identifiable ethnic groups of which Aboriginal and Torres Strait Islander people represent two. I know first-hand the diversity of Aboriginality and Islanderness inside my community but legislation and laws define these groups in ways that do not recognise their connection to lands, connections and rights to customary laws and practices.

How will a treaty have an immediate impact on our youth aged 15–19? Only 46% of our young people are at school.

If a treaty contributes to improving the educational outcomes and provides a schooling system that validates their identities as well as prepares them for a future that they can determine, then count me in. But I've seen no evidence to support this notion.

How will constitutional rights change the way that police treat Indigenous children under colonial laws. How will it stop racism? I may sound overly cynical to some but I say these things from a perspective of a grassroots person who knows that even if we had a treaty tomorrow the fundamental social and cultural changes that impede the majority of Indigenous people from enjoying the most basic of human rights would not change. I have also yet to be enlightened on how a treaty will be addressed given that the majority of Indigenous peoples live in settled areas of this nation.

How will those who advocate a treaty deal with this profound contradiction between support for cultural diversity and the way that a treaty will devolve power to this same diversity in Indigenous communities?

Who has the mandate to negotiate a treaty on behalf of all Indigenous people in this country? Was it ATSIC? I think not. Clearly there are Indigenous groups and communities in this country that have no difficulty in garnering the kind of political and geographical identity required to enter into discussions on a treaty on a regional basis.

My father's legacy was not motivated by a need to empower the local CDEP office or a Department of Aboriginal affairs to better broker deals for Aboriginal and Torres Strait Islander people. Quite the opposite. He was motivated by empowering himself and his people to speak for themselves, to speak what they know, and to do this with an understanding that their

right to speak about country and protect their lands and seas, to get employed, to get a good education, to raise a family, was based to a greater extent on their rights as Indigenous people. Not as second-hand white Australians or as part of an ethnic minority. His claim to land and sea was about getting the colonial governments and the laws that guided colonial governments to provide clear and unambiguous recognition that:

- 1) they were in breach of their own laws relating to recognising the original occupants of this country and seas and
- 2) this recognition should provide certainty to real ownership of land and seas as it has been understood by Indigenous people since eternity.

To a greater rather than to a lesser extent, my father equated the exchange with the High Court of this nation-state of his knowledge of customs and traditions, laws and rituals as clear and unambiguous evidence of his and his people's rights to own their land outright. *He was never unclear on this.*

103

Insofar as Indigenous people have concepts of having laws that relate land and water without interference from outside of our societies, my understanding is that this has always been the case. Interference from outside only heightened rather than extinguished this awareness.

But how is the current debate about a treaty allowing this to be acknowledged? It is not. It is for this reason that I oppose the treaty idea and especially the political processes that are driving the treaty sideshow.

Our short-term engagements and objectives with governments cannot be dislocated from the long-term objectives of a treaty, but it seems this is exactly what is happening.

For me there is much to do in developing appropriate Indigenous governance structures at the grassroots in readiness for the complications that will arise when we finally reach a treaty negotiation table. Many of these structures can arise by reclaiming the means by which we choose our leadership structures at a regional and local level. We have never enjoyed the benefits from devising and using of our own system of democracy and representation as colonised people. It's time we gave this serious thought. Only through this will we develop Indigenous jurisdictions that are worthy of negotiating a treaty. The current models are flawed and everyone knows it.

Let me finish by saying that the necessary implication of the decision in the Mabo decision was that *terra nullius* has been abandoned. What was put in its place is the question we are now faced with, another challenge for us to consider. It's time that Indigenous people closed the doors and discussed the matter amongst ourselves. Otherwise we will continue to search for yet more answers to that age-old white colonising question that they know keeps us fighting amongst ourselves: *who are you?*

Before we tell them '*who we are*' (for the millionth time) we have to answer this simple question for ourselves. Then and only then can we talk about a treaty.