

'Treaty': what's in a name?

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Introduction

In the lead-up to the Bicentennial celebrations of the British settlement of Eastern Australia, the conclusion of a treaty between Indigenous Australians and other Australians was given active and serious consideration. The proposal was given life by the National Aboriginal Conference of 1979 that called for a treaty to harmonise relations between Aboriginal and other Australians.¹

Among those arguing in the affirmative in the debate 20 years ago were a number of prominent non-Aboriginal Australians, including the late Dr HC (Nugget) Coombs a former Governor of the Reserve Bank of Australia, who constituted the Aboriginal Treaty Committee. These people represented a significant section of the broader Australian community who believed a rapprochement between Indigenous and other Australians was long overdue and should be concluded before the Bicentenary. It was contended then that a national treaty could settle wide-ranging historical, political, economic, social and 'land rights' grievances while charting a new course for the future.² At the time, the call was for a '*Makarrata*', or 'compact', to be recognised as part of Australia's constitutional arrangements and enshrining the right of Australia's Indigenous peoples to self-determination through such measures as a national land rights scheme, a say in natural resource development on Indigenous lands, compensation for the historic expropriation of Indigenous lands and governmental rights over Indigenous affairs.³ As in most things, we today have much to learn from history. In particular, discussion of the prospects of making a treaty in the first part of the twenty-first century can benefit from the 1980s Treaty debate. The lessons learned then remain relevant. Indeed, much of the rhetoric and the detail remain similar. This paper considers the history of the treaty debate, the potential need and constitutional arrangements for a modern treaty, and its potential relationship to native title rights.

The Treaty debate: history and constitutional considerations

The National Aboriginal Conference, which promoted the treaty proposal, believed that there should be a two-stage negotiation process: first the negotiation of a national 'Agreement in Principle' preferably entrenched in the Constitution, and secondly, the negotiation of more detailed regional agreements.⁴

¹ Keon-Cohen and Morse, 1984, provide a reasonably contemporary account of the genesis of the Treaty proposal.

² Keon-Cohen and Morse 1984: 87.

³ See eg, Harris 1979, Keon-Cohen 1981.

⁴ NAC Submission 1983.

Twenty years ago, the treaty debate occurred in the pre-Mabo/native title era, though the Australian community was then familiar with the availability of statutory Aboriginal land rights in the Northern Territory and growing acceptance of the idea in the Australian States.

Following its election in 1983, the Commonwealth (Hawke) Government raised the possibility of a national land rights scheme to overcome the lethargy of state governments in introducing regional schemes, although it lost much of its political enthusiasm for the idea when the Western Australian (Burke) Labor Government in 1984, in the face of opposition from the powerful resource industry lobby, backed down from its commitment to introduce a State scheme. The Commonwealth suggested nothing could be achieved in the areas of education, health, housing and land rights without the involvement of the States and Territories.

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The Senate Legal and Constitutional Affairs Committee report 'Two Hundred Years Later ...', which dealt with the feasibility of a *Makarrata*, perceived there were a number of basic problems in negotiating a treaty, not the least of which were the selection of negotiators to represent the Indigenous interests and the lack of resources available to negotiate with the Commonwealth Government on anything approaching equal terms.

The 1980s Treaty debate recognised that many Indigenous groups might not qualify for land grants under a 'traditional owner' formula like that employed in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and would need to be given direct land grants or the financial means to acquire land to meet Indigenous needs. The *Aboriginal Land Fund Act 1974* (Cth) was enacted in recognition of this and set up the Aboriginal Land Fund Commission, a forerunner of the Indigenous Land Corporation that operates today, to ensure Aboriginal people had access to funds to acquire land.

This approach was anticipated by the *Aboriginal Land Rights Act 1983* of New South Wales which enshrined a proposal that a sum equivalent to 7.5% of annual State land tax receipts be paid to the New South Wales Aboriginal Land Council for a period of 15 years to be applied at least in part towards the acquisition of land by land councils. These ideas reflected the Aboriginal Treaty Committee's proposal, taken up by the National Aboriginal Conference in 1982, that there should be a payment of 5% of the Gross National Product (GNP) per annum for a period of 195 years to Aboriginal peoples.⁵ Similarly in the early 1980s, various attempts were made or proposed in a number of Australian States to grant land directly to Aborigines by means other than the use of a 'Traditional Owner' formula.⁶ In the early 1980s it was considered that a Treaty might be given constitutional recognition and the force of law in a number of ways. Constitutional entrenchment of principles concerning Indigenous peoples was considered the best way to guarantee recognition of the place of Indigenous peoples in Australian society and the best means of providing a platform for the negotiation of substantive rights and interests. Canada's experience suggested constitutional amendment and regional agreements enshrined in legislation were appropriate and achievable to reflect an historic compact.⁷

In Australia, the Constitution may be amended in accordance with the rules laid down in s.128, that is, by a majority of Australian electors and a majority of Australian States agreeing to the amendment. Constitutional experience suggested then, as it does now, that securing an amendment to the Constitution to incorporate a treaty would be an extremely difficult, if not

⁵ NAC Newsletter 1982: 3, cll 1 and 4.

⁶ Barker 1984.

⁷ See eg, Keon-Cohen and Morse 1984, and Hanks 1984: 48.

an impossible, task.⁸ However, the fact that Australians voted to amend the Constitution in 1967 to recognise the right of Aborigines to vote and for the Commonwealth Parliament to make laws under s.51(26) for ‘the people of any race for whom it is deemed necessary to make special laws’, may provide heart to those who would otherwise think the task an impossible dream!

Whether or not constitutional entrenchment of the substance of a treaty is achievable, it is a different, and significant, question whether the Commonwealth Parliament has the necessary power to pass a national law to effect a treaty between Indigenous and non-Indigenous Australia. If it has, the Parliament could do what s.128 makes improbable. In the 1980s, s.51(26) of the Constitution was thought by many to provide the necessary power to the Parliament to make the statute that would recognise the Treaty. The so-called ‘race power’ was at that time, as now, largely untested.

The 1980s was a period of constitutional power-testing. In the Tasmanian Dam case, *Commonwealth v Tasmania*,⁹ the High Court of Australia not only recognised the wide scope of the Parliament’s power to make laws implementing international treaties and covenants to which Australia was a party pursuant to the ‘external affairs’ power in s.51(29), but some judges also suggested the Parliament’s so-called ‘race power’ was not limited by subject matter.

The Senate Legal and Constitutional Committee report ‘Two Hundred Years Later...’ expressed the view in the light of the Tasmanian Dam case that, even on ‘the narrowest view of s.51(36) which emerges from these judgements, it would appear that if the Parliament deems that the necessity exists and passes special laws for the benefit of the Aboriginal race, such laws will be valid’.¹⁰ The Committee noted that the scope of the power would enable laws to be made in respect of such matters as the protection of Aboriginal sacred sites, language and culture and also to give effect to Aboriginal law. Academic opinion concurred.¹¹ There is no substantive reason to doubt this opinion today.

It would also have been possible then, as now, to contemplate a ‘co-operative federalism’ solution to implementation of a treaty. The Commonwealth and each State and Territory could agree, as they have done in relation to a number of common interest matters in recent years, including corporations law, to make laws in substantially the same form in their respective jurisdictions by way of implementation of a treaty.

Such an agreement could be encapsulated in an inter-governmental agreement in which the financial obligations required to implement the Treaty are set out and apportioned between the Commonwealth, on the one hand, and States and Territories, on the other. Undoubtedly the Commonwealth’s power to influence a positive treaty outcome through financial incentives would be critical to the successful deployment of such a strategy. But even money may prove insufficient an incentive to move all State and Territory governments to dance to the Commonwealth’s tune.

While each State and Territory Parliament could constitutionally act to bring about the terms of the treaty in its region of influence, unilateral action by some States and Territories would be unlikely to achieve anything but a regional satisfaction of the legal and moral underpinnings of the calls for treaty.

⁸ See history and discussion of s.128 Constitution in Thomson 1983.

⁹ (1983) 158 CLR 1.

¹¹ See eg, Lindell 1984: 248, and Hanks 1984: 28–37.

¹⁰ ‘Two Hundred Years Later’: 92.

Thus, not unlike Reconciliation today, the means of implementation of a Treaty in the 1980s was at the least a difficult practical, legal and constitutional problem. The answers to the questions ‘What is it?’, and ‘How do you bring it about as a matter of Australia law?’, were not easy then, and they are no easier to resolve now.

The Treaty debate in the post-Mabo era and the recognition of native title

The treaty issue has been put on the national agenda again in this new century by the Aboriginal and Torres Strait Islander Commission (ATSIC). At Corroboree 2000, Mr Geoff Clark, Chair of ATSIC, stated:

There (have) been no treaties, no formal agreements and no compact.
There now needs to be.
There is no mention of the first peoples in the Constitution.
There now needs to be.¹²

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In some ways little has happened since the 1980s push for a treaty: the demands that ignited the treaty debate now drive the reconciliation debate, for there truly is much ‘unfinished business’ in relation to Aboriginal dealings in Australia. The music may have changed a little but the words are much the same.

What has happened since the 1980s, however – perhaps because of the moral forces then unleashed – is that native title has arrived on the Australian legal scene. In June 1992, in *Mabo v Queensland (No 2)*,¹³ the High Court of Australia held that the common law of Australia recognised and would enforce rights and interests enjoyed by Indigenous persons under native title. In 1993, the *Native Title Act (1993)* (Cth) was passed by the Commonwealth Parliament to regulate the recognition and enjoyment of native title as defined in s.223 of that Act. In the light of these legal and statutory developments it is reasonable to ask whether the *Native Title Act* has delivered substantively so that no more need be done on the treaty front.

Although seen by some as a giant macropod bounding across the Indigenous Australian landscape and sweeping up and returning to Indigenous peoples their ancient lands, the question remains whether native title does or can achieve what a treaty once promised and reconciliation now demands.

There can be little doubt that native title has fundamentally changed Australian legal theory and practice. In a more symbolic sense it has also changed the way Australians of all ethnic backgrounds see themselves and treat each other. Native title is founded on the notion of equality of people and peoples, a fundamental human right. It has confronted a nation not used to resolving competition amongst its citizens for scarce resources and their own cultural identities on the basis of racial equality.

While the notion that all persons are equal and that there is no place for discrimination in our society, or in our legal rules, may still be causing consternation in some quarters, by and large and increasingly governments and good citizens, especially good corporate citizens, are ‘getting on with the job’ in recognising native title and finding practical and legally enforceable outcomes that benefit Indigenous people.

¹² Clark 2000. ¹³ (1992) 175 CLR 1.

Indeed, the *Native Title Act* is designed to achieve native title outcomes that go a significant way towards realising the expectations that talk of treaty might create in Indigenous groups. The *Native Title Act* not only enables the Federal Court of Australia to determine the existence of native title, but also authorises the ‘right to negotiate’ of Indigenous groups in some (though not all) major resource proposals. This right makes possible agreements that provide for the immediate, intermediate and long-term needs of Indigenous peoples, especially in cultural and financial terms.

The *Native Title Act* also provides for the making of broad regional agreements – known as Indigenous Land Use Agreements (ILUAs) – that have the potential to resolve a wide range of native title and non-native title issues between State, Territory and Commonwealth Governments and non-governmental parties, on the one hand, and Indigenous groups, on the other.

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Additionally, the *Native Title Act* provides those native title holders whose native title has been confiscated by the ‘extinguishing’ provisions of the Act, to claim compensation. Whenever native title would exist, but for the extinguishing effect of the *Native Title Act*, the holder of the expropriated native title may claim compensation. Just what should be compensated for in terms of the taken interest remains to be argued in the courts.

Compensation claims under the *Native Title Act* are likely to become the significant ‘second wave’ of native title proceedings. On their own they may produce significant financial compacts for particular Indigenous groups. They may also provide an impetus for governments to secure a wider regional, State/Territory and Commonwealth financial accord with Indigenous peoples, thereby stimulating the negotiation of a treaty.

The emerging picture then under the *Native Title Act* is of a number of Indigenous peoples having recognition of their traditional rights to land and waters, agreements with governments and other non-native title parties and, increasingly, awards of compensation for their confiscated native title rights. This picture suggests an array of regional compacts that provides outcomes not entirely dissimilar from those contended for by those in the affirmative in the 1980s Treaty debate. At least, that is one view of the prospective outcome of the *Native Title Act* experience.

Another view is that, even if some of these things come to pass (and one should not doubt that they will – indeed they are already), they will not be available generally to Indigenous people. Moreover, the outcomes that native title may deliver to some Indigenous people will not satisfy the deeper demands of many Indigenous people for constitutional recognition of them, of their cultural rights and their desire for a larger degree of sovereignty over their own economic, social, cultural and political development.

The issue of sovereignty, whether written with a little ‘s’ or a big ‘S’, will never go away in debates that will continue about the Treaty or Reconciliation or the harmonisation of Indigenous relations in Australia. As Dr Lisa Strelein notes:

Indigenous peoples do not limit their claims against the state to the equal distribution of resources and enjoyment of fundamental services, although these claims remain an integral part of the ‘unfinished business’ agenda. However, they are only part of the rights claimed.

The place of collective rights is consistently reinforced, as well as the collective enjoyment of distinct cultural rights. Indigenous peoples also emphasise that the divide that exists in relation to the equal enjoyment of fundamental citizenship rights is a reflection of the much deeper issue of their identity as Indigenous peoples.¹⁴

Native title will produce some small, large and important successes for individual groups of Indigenous peoples. However, it is unlikely that native title will produce the type of constitutional settlement the proponents of a treaty have long had in mind.

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As it is, we are already witnessing the politics of native title as larger Indigenous groups splinter into smaller groups, not merely by reason of asserted cultural differences but also because it is well understood by all concerned that significant material benefits may eventually flow to the group that is determined by the Federal Court of Australia to be the 'common law holder' of native title under the Act.

Similarly, many Indigenous persons, fully appreciating that their family's separation from its ancestors' traditional country over the course of many years may prevent them, on their own account, from establishing the 'connection' required by s.223 of the Act to establish native title, seek to incorporate, or re-incorporate, their family or themselves in a larger group that can show the maintenance of 'connection'. This process of attempted integration is not always uncontroversial.

Accordingly, there is a realisation amongst many Indigenous people that not all of them will be able to show they have 'native title' as it is defined by s.223 of the *Native Title Act*. For example, the High Court's controversial decision in *Members of the Yorta Yorta Aboriginal Community v State of Victoria*¹⁵ suggests that Indigenous groups in parts of Australia long-settled by European Australians may find it extremely difficult to show that they enjoy their 'rights and interests' under their 'traditional laws and customs', and that they maintain a 'connection' with lands or waters claimed under those laws and customs.

Such uncertainties may well result in unequal bargains being concluded between different Indigenous groups and governments and other parties. How then are the Indigenous people for whom the *Native Title Act* makes no, or unequal, provision by way of land or compensation to be provided for? A similar question was at the root of the Treaty debate and Indigenous affairs policy developments in the 1980s and is likely to remain relevant in the twenty-first century.

There is, of course, an assumption in this question to the effect that those Indigenous people who do not have access to native title should be provided for in special ways. The historic policies of States such as Western Australia for most of the twentieth century seemed based on the premise that, once 'de-tribalised' and brought into the material 'European' economy, Aboriginal people would, or should, be able to fend for themselves. However, these policies have not proved universally successful, to say the least.

The promise of native title is that some Aboriginal groups will materially and culturally benefit from native title. The promise of a treaty is that all Aboriginal people – especially those without native title – might benefit materially and culturally from the wealth 'European' Australia has

¹⁴ Strelein 2000: 259–64. ¹⁵ (2003) 214 CLR 422.

reaped, albeit with the sweat of its collective brow, and not a little luck, from the lands of the forefathers of the Aborigine.

In practical terms, one suspects that the successes – or the lack thereof – of the *Native Title Act* over time will cause some of the planks of the 1980s Treaty proposal, such as statutory land rights, to be put back on the reform agenda in Aboriginal politics. Similarly, the proposal for a defined percentage of GNP or some other measure of the nation's economic performance to be invested in a fund for Indigenous peoples may also re-emerge.

When he raised the treaty issue, Mr Geoff Clark stated that negotiation of a national treaty could settle on:

- the roles and responsibilities of the different levels of government: Commonwealth, State, Local and Indigenous communities;
- the scope of Indigenous decision-making power: the limits of autonomy and self-rule;
- the extent to which Indigenous decision-making is subject to national laws;
- Indigenous political representation at a national and state level, including reserved seats in Parliament or other mechanisms designed to ensure representation;
- the return of lands, whether specifically identified or to be identified by an agreed process and the relationship between the Indigenous and other land regimes; and
- the recognition and protection of cultural practices including copyright protection.¹⁶

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Conclusion

The issues put on the table by talk of a Treaty in the 1980s and now are undoubtedly confronting for many Australians. Not every Australian and not every Indigenous Australian will feel comfortable with a debate about the issues. And not all will agree a treaty is necessary or necessarily the right way forward. However, until the matters that have given rise to the debate over the past 200-plus years are satisfactorily addressed, the demand for a treaty or something that truly looks and sounds like a treaty, and which has a national application, will continue to simmer or boil within the Australian body politic.

While many of these issues could be responded to by individual pieces of Commonwealth or State and Territory legislation, the reality is that they are of concern to Indigenous Australians wherever they may live in our nation: whether they live in Torres Strait, the Centre, the Top End, the West, South or East. A treaty process, undertaken as part of a constitutional amendment process, would have the fundamental advantage of achieving reconciliation at one historic moment for all Australians.

¹⁶ Clark 2000.

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