



## TREATY RESEARCH PROJECT

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### Introduction

The ultimate objective of the proposed treaty campaign is to elevate the social, political and economic place of Aboriginal and Torres Strait Islander people in Australia. The plethora of issues surrounding treaty have been written about and debated extensively over a number of years however the contemporary political climate is ripe for pursuing the treaty agenda. With the Government's National Apology on the 13 February this year, 'the first Welcome to Country to Open Parliament and the commitment to 'Close the Gap' between Indigenous and non-Indigenous peoples'<sup>1</sup> accompanied by international recognition of the importance of the UN Declaration of the Rights of Indigenous People, space has finally emerged for mobilisation on these issues. With this in mind, the purpose of this review is to canvass some of the significant aspects of past discussions, while simultaneously exploring the new space that has emerged around self-determination and human rights discourses in order to begin building ANTaR's pro-treaty evidence base.

### Treaty – Historical Context

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<sup>1</sup> Muriel Bamblett & Dr Peter Lewis et al 'Social Inclusion and the Dangers of Neo-colonialism: An Aboriginal Child and Family Services Perspective on Social Inclusion and Building Partnerships with Mainstream' VACCA paper presented to the Partnerships for Social Inclusion - Conference Centre for Public Policy, University of Melbourne, 15 - 16 October, 2008

The idea of a treaty between Indigenous and non Indigenous people in Australia has a long history and is a topic that is going to remain on the national agenda.<sup>2</sup> A brief overview of important events/dates that have brought the treaty debate to its contemporary context is important to inform future treaty discussions. This snapshot is taken from ANTaR's 'Treaty Talks' publication<sup>3</sup>. 'Significant events have included:

- The establishment of a tent embassy outside Federal Parliament House in Canberra in January 1972, demanding land rights, compensation and recognition of Indigenous sovereignty;
- The 1979 proposal by the National Aboriginal Congress (NAC) for a Makarrata or treaty to be negotiated between the Commonwealth and Aboriginal peoples of Australia, and in which sovereign Aboriginal nations are recognised as equal in terms of status as the Commonwealth of Australia;
- Kevin Gilbert's 1987 draft treaty written in consultation with the Sovereign Aboriginal Coalition;
- The 1988 Barunga Statement presented to former Prime Minister Bob Hawke by the Chairpersons of the Northern Territory Land Councils calling on the 'Commonwealth Parliament to negotiate with us a Treaty or Compact recognising our prior ownership continued occupation and sovereignty and affirming our human rights and freedom';
- In 1992 the High Court of Australia's overturning of traditional views on Aboriginal rights in land in its famous *Mabo* decision which recognised native title as a form of customary title;<sup>4</sup>
- In 1994, considerations by the then previous Federal Government in consultation with the Council for Aboriginal Reconciliation as to whether there should be a formal place within the reconciliation process for a document or documents of reconciliation.
- Throughout the 1990s continued efforts by ATSIC to promote discussion of treaty-related matters, including the establishment of a treaty think-tank, National Treaty Support Group.<sup>5</sup>

Despite this course of events, opposition from the now past Federal Government stemmed any real progression in terms of formal treaty negotiations. Thankfully we have entered a new era.

## Treaty – Concepts

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<sup>2</sup> Linda Burney, 'Foreword' in *Treaty Talks*, (Melbourne: Eastern Suburbs Organisation for Reconciling Australia, 2006), 1

<sup>3</sup> Sarah Pritchard, 'Unfinished Business: Reaching For a Treaty' in *Treaty Talks*, (Melbourne: Eastern Suburbs Organisation for Reconciling Australia, 2006), 9

<sup>4</sup> Marica Langton & Lisa Palmer, 'Modern Agreement Making and Indigenous People in Australia: Issues and Trends' in *Australian Indigenous Law Reporter*, 8:1 (2003): 3

<sup>5</sup> Pritchard, 'Unfinished Business: Reaching For a Treaty', 9

Generally speaking, treaty concepts and definitions have evolved from being closely tied with legal outcomes to a greater focus on the relationship building aspect of the overall treaty making process. Some academics continue to refer to the relationship building process as 'treaty', however other academics are reluctant to employ the use of this term in contemporary debates.<sup>6</sup> Authors note how it is important 'to avoid becoming prisoners of our own terminology'<sup>7</sup> and acknowledge that 'treaty' can mean different things when employed in different contexts. It is more useful to think of the word treaty as an umbrella term, and accept that it 'acts as a label for a set of ideas about a document and a relationship.'<sup>8</sup>

Terminology in treaty discussions is also problematic because there is no consensus on whether a 'treaty' is the necessary or desired outcome of the process of relationship building or formal recognition. Formal recognition could emerge in various frameworks: as an agreement, pact, treaty, Bill of Rights or constitutional amendment.<sup>9</sup> Indeed, in the project outline for this paper it was noted that 'ANTaR is planning to begin a campaign to develop a national treaty OR series of treaties... AND/OR to reform our constitution'.<sup>10</sup>

This considered, if a treaty is the desired outcome of a process of formal recognition, the essence of the definition of treaty is: 'an agreement between two or more parties who seek to define the terms and parameters of their relationship with one another.'<sup>11</sup> Another way to define 'treaty': 'to treat is to negotiate the terms of a relationship.'<sup>12</sup> This definition aside, it is important to take into account the emphasis on the idea of the 'process' as being the central to treaty making. In other words, 'agreement making is a process, a relationship between two or more parties that rarely begins or ends with the signing of an actual agreement.'<sup>13</sup> Despite the lack of national consensus on outcomes and terminology, there is obvious movement toward any such result that aims to progress the reconciliation agenda.

### **Agreement Making in Australia**

In Australia throughout the past twenty years agreement making with Indigenous people across public and private sectors has become commonplace.<sup>14</sup> The areas where there has been a

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<sup>6</sup> Marcia Langton et al, 'Modern Agreement Making and Indigenous People in Australia: Issues and Trends', 1

<sup>7</sup> Sean Brennan et al, 'The Treaty Debate' in *Treaty*, (Sydney: Federation Press, 2005), 3

<sup>8</sup> Ibid

<sup>9</sup> Ibid.

<sup>10</sup> Michael Dodson's work is of key importance here. See bibliography.

<sup>11</sup> Pritchard, 'Unfinished Business: Reaching For a Treaty', 9

<sup>12</sup> Langton, 'Modern Agreement Making and Indigenous People', 6

<sup>13</sup> Lisa Palmer, 'Introduction: Agreement Making, Outcomes, Constraints and Possibilities' in *Honour Among Nations: Treaties and Agreements with Indigenous People* (Melbourne: Melbourne University Press, 2004), 252

<sup>14</sup> Langton, 'Modern Agreement Making and Indigenous People', 1

proliferation of agreement making include: 'resource extraction companies, railway, pipeline and other major infrastructure project proponents, local governments, state governments, farming and grazing representative bodies, universities, publishers, arts organisations and many other institutions and agencies.'<sup>15</sup> A group of the foremost academic commentators in this area have established a database that systematically catalogues current examples of these agreements.<sup>16</sup> The forms of the agreements catalogued here are of various structures, for example some have statutory status, others are memorandums of understanding, statements of intent and others are registered under the Native Title Act.<sup>17</sup> There is a plethora of information available through this website that provides an excellent comprehensive reference base on the range of issues relating to treaty.

There is not space in a project of this kind to adequately canvass the complex range of issues raised by the treaty debate. Nor would this author in this short amount of time be able to add to the knowledge of ANTaR's working group on the planned treaty campaign. The best recommendation that can be provided is to read the attached paper by Marcia Langton and Lisa Palmer titled 'Modern Agreement Making and Indigenous People in Australia'. This work covers the historical, legal and political concepts that would well inform the group on the contemporary and pragmatic context of treaty in Australia.<sup>18</sup>

### **Possibilities and Constraints**

One of the key problems of past treaty campaigns has been the conflict between the pragmatic objectives of Government approaches and the political objectives of treaty advocates. Therefore, 'the challenge for treaty advocates is to demonstrate that the 'rights agenda' and what the government calls 'practical reconciliation' – the issues of health, housing, education and economic development – are not mutually exclusive but inextricably linked'.<sup>19</sup> In recent years there has been an emerging and growing body of literature that does exactly this.<sup>20</sup> It is now accepted in many policy arenas that there is a direct link between economic development and self-determination, or the process of self-determination as a means to Indigenous poverty

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<sup>15</sup> Ibid.

<sup>16</sup> The database can be located at [www.atns.net.au](http://www.atns.net.au). The researchers involved with this project include Professor Marcia Langton, Associate Professor Maureen Tehan, Dr Lisa Palmer, Kathryn Shain and Odette Mazel and Professor Larissa Behrendt. The book *Honour Among Nations: Treaties and Agreements with Indigenous People* is one product of this research. Building on that work, a collection of case studies is soon to be published entitled *Settling with Indigenous Peoples: Case Studies in Agreement Making From Australia, Canada and New Zealand*.

<sup>17</sup> Langton, 'Modern Agreement Making and Indigenous People', 4

<sup>18</sup> There is opportunity for this process to take into account and learn from international precedents. The United States, Canada, and New Zealand all have formalised agreements with their Indigenous populations. Much has been written by Australian authors on how these insights would best inform a local treaty process. A good starting point is chapter five, titled 'What can we learn from overseas?' in Brennan's et al *Treaty*. See bibliography.

<sup>19</sup> Brennan et al, *Treaty*, 10

<sup>20</sup> See The Harvard Project website at [www.hks.harvard.edu/hpaied/](http://www.hks.harvard.edu/hpaied/)

alleviation. This argument emanates from and was developed primarily by American academic Stephen Cornell accompanied by other researchers at The Harvard Project.<sup>21</sup>

Cornell describes self-determination as the 'idea that Indigenous peoples should be the primary arbiters of what happens in their communities and on their lands'.<sup>22</sup> And for nations to employ the concept of self-determination, Cornell advocates taking 'decision-making power out of the hands of government agencies and putting it into the hands of Indigenous communities'.<sup>23</sup> Cornell's work documents how this idea of self-determination has been implemented in the United States and has had a significant impact on reducing Indigenous poverty.<sup>24</sup> In addition to Cornell, there are other international and domestic advocates of this perspective. An international example:

'self-determination is not simply a political issue...this quest is directly related to indigenous poverty. This is an important point, because states often draw the distinction between the political claims of Indigenous people and their socio-economic needs. States may highlight the need to do something about indigenous poverty, without seeing that this has anything to do with indigenous political claims for self-determination...[this book] suggests that the reason state anti-poverty programs have failed is precisely because they have not taken the need for self-determination into account.'<sup>25</sup>

It is worth noting how international versions of this argument readily use the word 'poverty' in arguments based around self-determination. This is not the case in Australian academia. Here is an example of a similar argument for the Australian context:

'Good governance, and the importance of cultural autonomy and legitimacy in establishing capable governing institutions is emerging as the key factor necessary for successful Indigenous economic development. In Australia, agreement-making processes which increase the effective exercise of jurisdiction by Aboriginal and Torres Strait Islander groups have the potential to both safeguard social and cultural rights and interests and deliver economic development, in many cases revitalising the rural and remote areas in which Aboriginal populations constitute significant majorities.'<sup>26</sup>

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<sup>21</sup> Ibid.

<sup>22</sup> Stephen Cornell, 'A North American Perspective Lecture', seminar presented for *Reconciliation Australia*, 11 September 2008, Canberra.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> John Andrew McNeish & Robyn Eversole, 'Overview – the right to self-determination' in *Indigenous Peoples & Poverty: An International Perspective*, (London, New York: Zed Books, 2005), 105

<sup>26</sup> Palmer, *Honour Among Nations: Treaties and Agreements with Indigenous People*, 252

The concept of self-determination is directly related to and often invokes rights discourse, and vice versa. For example: 'human rights enables self-determination and self-determination enables Indigenous communities to have the capacity to take action for their responsibilities.'<sup>27</sup> Therefore human rights discourse forms an innate part of the treaty debate. Concurrently, the use of rights-based arguments has become more frequent and accepted in international policy spheres. The globalisation of the idea of Indigenous rights has helpful impacts for leveraging the pro-treaty agenda. The passing of the UN Declaration on the Rights of Indigenous People (DRIP) in September 2007 is the obvious significant example. 20 years in the making, the Declaration is a non-binding agreement, but provides an internationally 'recognised document that Indigenous people can use in their political advocacy and in their discussions with all levels of government.'<sup>28</sup>

Australia along with the United States, Canada and New Zealand did not ratify the DRIP. Apart from these four votes against the Declaration, there were 143 votes in favour and 11 abstentions.<sup>29</sup> Australia's central problem with the DRIP relates to the previously mentioned idea of self-determination. Australia's main concern in ratifying the Declaration was that the nation would be advocating Indigenous peoples right to self-determination and subsequently 'give an impression that we are prepared to have a separate Indigenous state'.<sup>30</sup> It was argued by the Howard Government that this would result in a secessionist movement and potentially elevate Indigenous customary law above that of domestic law. This argument may be re-employed in the future to counter ANTaR's proposed campaign.

Before elected last year, the new Labor government informally made a commitment to sign the DRIP. This commitment returned the Australian position to where it initially began. At the first Working Group in 1991, Australia took the view that:

'We have made statements in the WGIP in favour of the use of the term self-determination in the Draft Declaration. We have done so on the basis that the principles of territorial integrity of states is sufficiently enshrined internationally that a reference to self-determination in the Draft Declaration would not imply a right of secession.'<sup>31</sup>

With the anniversary of the passing of the DRIP approximately one month ago, this viewpoint has again been emphasised in academic and public domains. Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma recently wrote:

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<sup>27</sup> Bamblett & Lewis, 'Social Inclusion and the Dangers of Neo-colonialism', 10

<sup>28</sup> Megan Davis, 'The United Nations Declaration on the Rights of Indigenous People', accessed online [www.austlii.edu.au/au/journals/UNSWLRS/2008/16.html](http://www.austlii.edu.au/au/journals/UNSWLRS/2008/16.html), 8 October 2008

<sup>29</sup> Ibid.

<sup>30</sup> Alexander Downer in Megan Davis, 'The United Nations Declaration on the Rights of Indigenous People'

<sup>31</sup> Bill Barker cited in Ibid.

'Self-determination does not mean supporting secession. Indeed, the Declaration states that 'Nothing in this Declaration may be interpreted as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.'"<sup>32</sup>

## Recommendations

As mentioned in the introduction, the ultimate objective of the proposed treaty campaign is to elevate the social, political and economic place of Aboriginal and Torres Strait Islander people in Australia. To this end, ANTaR's campaign should seek the best way/method to elucidate a cohesive positive majority response from a somewhat wary Australian public.

It is important and necessary to engage with the academic discussions and debates around this topic however, it is also important not to become entrapped by problematic discourse, and subsequently run in to difficulty progressing the treaty agenda in private academic and public domains. At the recent 2020 Summit the Aboriginal and Torres Strait Islander discussion paper noted this concern in relation to the public sphere: 'some group members...were anxious that the notion of a treaty would raise concerns in some sectors of the wider community'.<sup>33</sup>

It appears again and again that choosing the right terminology to frame the campaign is crucial. Past experiences suggest terms like 'sovereignty are difficult and divide public opinion. Like the international self-determination argument devised by Cornell, ANTaR could seek to connect the popularist and accepted discourse of 'poverty' and 'human rights' - especially with reference to the established mantle of the UN - to frame the campaign. From a marketing and communication perspective, and given that a treaty campaign has been done before, this approach may speak to the 'young left' and simultaneously remind the Government of the perception of Australia in relation to Indigenous rights by the international community. After all, 'Australia's behaviour, its unwillingness to be accountable for its human rights performance, or to respect the views of the monitoring bodies, means that it has lost the claim to be described as a good international citizen in the human rights era.'<sup>34</sup>

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<sup>32</sup> Tom Calma, 'Australia Needs to Declare Support for Indigenous Peoples in Words and Actions', in *The Koori Mail*, 24 September 2008, 27

<sup>33</sup> 'Options for the future of Indigenous Australia' in *2020 Summit Report*, accessed online [www.australia2020.gov.au/final\\_report/index.cfm](http://www.australia2020.gov.au/final_report/index.cfm), 8 October 2008

<sup>34</sup> Hannah McClade, 'Race Discrimination in Australia: A Challenge for Treaty Settlement?' in *Honour Among Nations: Treaties and Agreements with Indigenous People* (Melbourne: Melbourne University Press, 2004), 279

Some pragmatic recommendations include providing a link from the 'Constitutional Change' page of the ANTaR national website to the 'Agreements, Treaties and Negotiated Settlements' website. For those supporters who would like more information about the treaty process this is an invaluable resource. Also, ANTaR should consider 'walking the talk' and devise frameworks and templates to provide supporters with examples of how agreements should look/work so this practice becomes more accessible for local community organisations.<sup>35</sup>

In looking to the future it is important to refer to past experiences. Michael Anderson, the research director of the 1988 Treaty-Makarrata project for the National Aboriginal Conference, when reflecting on 'an opportunity lost' implores future campaigners 'to think of our common objectives, and not seek to locate differences...we are losing in more ways than one and it is now time to once again look at our hopes and aspirations and seek to work together in the peoples' interests and not in our own.'<sup>36</sup>

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<sup>35</sup> This initiative is being followed up in continuing work with ANTaR Victoria.

<sup>36</sup> Michael Anderson, 'A Reflection: Treaty – Makarrata', accessed online <http://www1.aiatsis.gov.au/exhibitions/treaty/seminar.htm>, 25 September 2008

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\* The Harvard Project. See [www.hks.harvard.edu/hpaied/](http://www.hks.harvard.edu/hpaied/)

\* Denotes Key Resources



## Talkin' Treaty

**'To treat is to negotiate the terms of a relationship'**  
Professor Marcia Langton

**Why should there be an agreement between Indigenous and non-Indigenous people in Australia?**

- There are proven connections between Indigenous self-determination and self-government as a key factor to help reduce Indigenous poverty
- Australia is one of four countries who did not ratify the United Nations Declaration on the Rights of Indigenous People in 2007. 143 countries voted in favour of the Declaration. Recognition of Indigenous Rights would redefine the relationship between Indigenous and non-Indigenous people and progress long term reconciliation.
- Australia is the only common law country in the world to not have a national formalised agreement with Indigenous people. Despite this, throughout the past twenty years, agreement making with Indigenous people in Australia across public and private sectors has become commonplace.

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You can walk the treaty talk**

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