Treaty and sovereignty IN AUSTRALIA

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What is a treaty?

A treaty can mean various things in different contexts but for Australia at this time, it means a political agreement between the Indigenous peoples and Australian governments that has a legally binding effect.

Throughout history there have been three types of treaties typically used in the context of Indigenous colonisation:

1. Treaties of cession: where territories are ceded and result in the creation of reserves and protection of some rights
2. Peace and friendship treaties: which build military alliances, prevent war and facilitate trade
3. Recognition and self-government agreements: co-existence agreements that create parallel governance arrangements in the same territory

It is the third group of treaty that best reflect contemporary arguments in Australia. Historically, these treaties, such as *Tiriti o Waitangi*, have often been interpreted differently by government and Indigenous parties, and have often, as the saying goes, been honoured more in their breach than their observance.[i] However, in contemporary times such treaties have been reinvigorated and reclaimed by Indigenous peoples as a source of strength in relations with government and similar modern treaties and settlements are sought after by Indigenous peoples to redefine Indigenous-government relationships.

Treaty making is based on a relationship between self-determining peoples, or we sometimes refer to sovereign-to-sovereign agreements. Negotiations and agreement making can occur at a local, regional, state or national level and different Indigenous groups have their own preference about which level is right for them. Treaty making can occur at multiple levels, for example a national treaty could establish a framework that offers regional or local agreements greater legal protection.[ii]

What could a treaty deliver?

Indigenous peoples around Australia will decide what they want a treaty to contain when entering into treaty negotiations, but co-existence rather than cession is key. No treaty should seek to undermine or curtail Indigenous peoples' rights under international law and indeed should strengthen the recognition and enjoyment of these rights. There are some key concessions to avoid:

- No agreement should cede or surrender inherent rights, sovereignty, or territory
- No reconciliation should be offered without reparation (compensation)
- No agreement creates a 'full and final settlement' of the colonial relationship for all time
- No transfer of authority should occur without clear financial arrangements

The kind of things we might expect to see in a modern treaty might include:

- Statement of recognition and co-existence
- Supporting framework and resourcing for negotiation
- Principles and values for an ongoing relationship
- Land and economic settlements
- Jurisdiction, authority and Indigenous governance or self-government
- Implementation framework and ongoing financial arrangements
- Legal protections[iii]

All treaties between Indigenous peoples and colonial governments involve inherent risk for Indigenous peoples because the negotiation processes require some compromise even if this is just recognising the power of the state to enter into an agreement.

Dr Irene Watson has argued that movement away from colonialism can only occur where the state and non-Indigenous participants in the debate are prepared to question their own institutions and ways of thinking in order to listen to Indigenous peoples' claims.[iv] There is a risk that any treaty or settlement process will be limited by imagination more than anything else, if both sides cannot envisage a different institutional arrangement. It is here that the risk lies – not that an agreement will undermine the inherent sovereignty of Indigenous peoples and their rights under international law, but simply that it will not go far enough in recognising those rights.

Can Australia (and its states) enter into a treaty?

Questions have arisen about the legal status of 'internal' treaties in international law, particularly in contrast to the *Vienna Convention on the Law of Treaties 1969*. For the purposes of this convention treaties are defined as 'an international agreement concluded between States in written form and governed by international law'. But this definition is only for the purpose of the Treaty Convention itself, which only applies to treaties between signatory member states of the United Nations. Importantly, the convention notes that it does not apply to treaties or agreements entered into by states with other 'subjects of international law' which would include Indigenous peoples. Moreover, the preamble to the Treaty Convention encourages treaties as a form of peacekeeping and recognises the international customary law of treaties and agreements upon which the conventions is based.[v]

Since the inception of the United Nations Indigenous peoples have argued that their treaties are international instruments and should be subject to international recognition and oversight. However this was resisted by member states and international recognition of Indigenous and non-Indigenous treaties were excluded from international law until the development of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), Article 37.[vi]

What is the relationship between treaty and sovereignty?

Currently some states and territories in Australia, such as Victoria and the Northern Territory, are looking at negotiating state based treaties. This has raised the question of what power states and territories have to enter into treaties. In modern times, sovereignty is rarely vested in one person or entity, for example, since Federation, 'Australian sovereignty' has been divisible between the Crown, the Commonwealth and the States and Territories.'[vii] In law, we often hear the phrase *'the Crown in right of'* the state or the commonwealth. State governments in Australia are representatives of the Crown and have particular jurisdiction, including over lands and local government. While there are many reasons why it may be preferable for Indigenous peoples to enter into a treaty with all levels of government, state or territory governments may be able to offer Indigenous peoples some of what they seek from a treaty process.

Gunai country, Cape Conran Victoria
Credit: Dr Belinda Burbidge

The sacred fire for peace and justice, Aboriginal Tent Embassy, Parkes, ACT

There are some First Nations people who fear that engaging with governments and entering into agreements means risking or undermining their claims to sovereignty. That is, by recognising the authority of the State to enter into an agreement, Indigenous people are ceding sovereignty or falsely recognising non-Indigenous sovereignty and it's true that a treaty with the Australian government requires some recognition of the power of the state. Although, reaching agreement with the Australian state should not exclude recognising the colonial history of violent invasion and dispossession, of frontier wars and resistance, of Indigenous cultural strength and resurgence.

Michael Dodson has said 'the sovereign pillars of the Australian state are arguably, at the very least, a little legally shaky.[viii] In entering into treaties, Indigenous peoples are in fact offering some level of legitimacy to the state that is often underestimated.

Some non-Indigenous people see the notion of sovereignty as a barrier to treaty making – arguing that we cannot have competing claims of sovereignty.

Sovereignty is often linked to self-determination and both form part of the ongoing revision of the political settlement between Australia and its first peoples. Self-determination is a recognised right of all peoples and particularly Indigenous peoples. Part of self-determination is the autonomy to decide one's political status, and freely pursue their economic, social and cultural development, which may also include the right to self-govern. Although the two concepts are similar and have many links in law and political theory, self-determination sits more comfortably with the Australian public, perhaps because sovereignty is often linked to territory and complete independence.

The right to self-determination and self-rule through negotiated self-government arrangements may provide the foundations of a negotiated state-structure that is representative of both Indigenous and non-Indigenous sovereignties.

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[i] Dodson, 2002, 'Sovereignty', *Balayi: Culture, Law and Colonisation* 4, p.16.

[ii] Brennan, S., Behrendt, L., Strelein, L. and G. Williams, 2005. *Treaty.* New South Wales: The Federation Press, pp.11-12.

[iii] Brenan et al, 2005, p.132-34.

[iv] Irene Watson, 'Indigenous Peoples' law-ways: Survival against the colonial state', *Australian Feminist Law Journal,* vol. 8, 1997, p. 58.

[v] 23.1 The Vienna Convention on the Law of Treaties 23 May 1969, < **https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf**>, accessed 5 August 2019.

[vi] Article 37 of UNDRIP specifically recognises treaties, agreements and other constructive agreements with their states or their successors, See < **https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf**>, accessed 5 August 2019.

[vii] Dodson, M., 2002, p. 19.

[viii] Dodson, M., 2002. Sovereignty, *Balayi: Culture, Law and Colonisation* 4, p. 18.