THE VALUE OF TREATY-MAKING WITH INDIGENOUS PEOPLES IN AUSTRALIA

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Australia is the only British settler state that has not concluded treaties with its Indigenous population as a basis for coexistence. This may be starting to change, with support for treaties increasing and Victoria and the Northern Territory committing to the initiation of negotiation processes. However, successful treaty-making faces numerous obstacles. This article examines four significant challenges for Australia in enacting treaties with its Indigenous peoples: (1) the connotations of division attached to the term 'treaty'; (2) Australia's reluctance to acknowledge Indigenous sovereignty; (3) the lack of a national Indigenous representative body to negotiate with the Commonwealth government; and (4) the power imbalances inherent within treaty negotiations, arising from Indigenous peoples' entrenched marginalisation and vulnerability to the political interests of the settler state. Drawing on comparative experience from Canada and New Zealand, the article also analyses the utility of treaties in advancing Indigenous peoples' aims of a formalised relationship and reconciliation with the settler state, self-government, and control over land. It also considers the benefits that settler states can derive from treaties. The article concludes that the treaty-making process, while not perfect, is a valuable approach for reconciling Indigenous and settler claims, and ought to be adopted in this country.

I INTRODUCTION

Treaties have often existed between Indigenous peoples and settler governments throughout the British Empire.[1] Treaty-making was common in the colonial era,[2] when it was used by settlers in the United States, Canada and New Zealand to accommodate the sovereignty of original inhabitants.[3] Although these agreements were frequently

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[1] George Williams, 'Does True Reconciliation Require a Treaty?' (2014) 8(10) *Indigenous Law Bulletin* 3, 3–4; Sharon Venne, 'Treaty Doubletalk in Canada' (2000) 5(1) *Indigenous Law Bulletin* 8; Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (Federation Press, 2016) 266; Bruce Buchan, 'Australia: What's in a Name?' [2017] (149) *Arena Magazine* 5, 6.

[2] Isabelle Auguste, 'Rethinking the Nation: Apology, Treaty and Reconciliation in Australia' (2010) 12(4) *National Identities* 425, 426; Buchan, above n 1, 6.

[3] Megan Davis, 'Treaty, Yeah? The Utility of a Treaty to Advancing Reconciliation in Australia' (2006) 31(3) *Alternative Law Journal* 127; Paul Ban, 'Would a Formal Treaty Help Torres Strait Islanders Achieve Legal Recognition of Their Customary Adoption Practice?' (2006) 6(19) *Indigenous Law Bulletin* 17, 18; Auguste, above n 2, 426; Sean Brennan, Brenda Gunn and George Williams, ''Sovereignty' and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments' (2004) 26(3) *Sydney Law Review* 307, 344; Buchan, above n 1, 6; Beverley McLachlin, 'Aboriginal Peoples and Reconciliation' (2003) 9 *Canterbury Law Review* 240; John Borrows, 'Ground-Rules: Indigenous Treaties in Canada and New Zealand' (2006) 22(2) *New Zealand Universities Law Review* 188, 189–90; Williams, above n 1, 3.

violated,[4] Indigenous peoples were nonetheless able to benefit from them, by retaining some self-governance, lands and protection of their rights.[5] Furthermore, Canada and New Zealand have sought to ameliorate previous non-recognition by engaging in modern treaty-making and state-building processes.[6] In contrast, Australia is the only Commonwealth settler nation that has not signed such treaties.[7] The idea of a compact between Australia's Indigenous peoples and the federal government has been advocated for over forty years, but has not eventuated due to insufficient political support.[8] Agreement-making between Indigenous Australians and bodies such as state and local governments, proponents of infrastructure projects, resource industries and agricultural representative bodies has increased.[9] However, these local agreements do not focus on broader issues of self-determination and empowerment.[10] Therefore, while valuable progress has been made,[11] the challenge of Australia's 'unfinished business'[12] arising

[4] Stan Grant, 'Why it's Time for an Australia that Speaks to Us All' [2016] (29) *Law Society of New South Wales Journal* 39, 40–1; Venne, above n 1, 8; McLachlin, above n 3, 240; Borrows, above n 3, 191.

[5] Mansell, *Treaty and Statehood,* above n 1, 104, 145–6; Davis, 'Treaty, Yeah?', above n 3, 128; Brennan, Gunn and Williams, above n 3, 344; McLachlin, above n 3, 240; Borrows, above n 3, 189–90.

[6] Stuart Bradfield, 'Citizenship, History and Indigenous Status in Australia: Back to the Future, or Toward Treaty?' (2003) 27(80) *Journal of Australian Studies* 165; Davis, 'Treaty, Yeah?', above n 3, 127–8.

[7] Michael Dodson and Lisa Strelein, 'Australia's Nation-Building: Renegotiating the Relationship between Indigenous Peoples and the State' (2001) 24(3) *University of New South Wales Law Journal* 826, 828; Auguste, above n 2, 426; Mansell, *Treaty and Statehood,* above n 1, 97; Shireen Morris, 'Lessons from New Zealand: Towards a Better Working Relationship between Indigenous Peoples and the State' (2014) 18(2) *Australian Indigenous Law Review* 67, 73; Grant, above n 4, 41; Bradfield, above n 6, 165; Eileen Baldry, 'Comment on a Treaty between Indigenous and Non-Indigenous Australians' (2002) 5(21) *Indigenous Law Bulletin* 23; Williams, above n 1, 3–4; Peter Andren, 'Thoughts on the Treaty in Australia' (2002) 5(21) *Indigenous Law Bulletin* 8; Davis, 'Treaty, Yeah?', above n 3, 127; Ban, above n 3, 17.

[8] Jason De Santolo, 'Exploring the Treaty Settlement Process in Aotearoa/New Zealand' (2005) 7 *Balayi: Culture, Law and Colonialism* 71, 85; Mansell, *Treaty and Statehood,* above n 1, 97–8, 146; Morris, 'Lessons from New Zealand', above n 7, 74; Auguste, above n 2, 426–34; Larissa Behrendt, 'What Path Forward for Reconciliation? The Challenges of a New Relationship with Indigenous People' (2001) 12 *Public Law Review* 79, 80; Dodson and Strelein, above n 7, 830; Keith Windschuttle, 'Why There Should Be No Aboriginal Treaty' (2001) 45(10) *Quadrant* 15, 16; Andren, above n 7, 8–9; Anna Harley, 'What Value Does a Treaty Have in Australia?' (2015) 8(16) *Indigenous Law Bulletin* 17; Davis, 'Treaty, Yeah?', above n 3, 127–30; Williams, above n 1, 4; Lisa Strelein, 'Dealing with 'Unfinished Business': A Treaty for Australia' (2005) 7 *Balayi: Culture, Law and Colonialism* 88, 90; Shireen Morris, 'Agreement-Making: The Need for Democratic Principles, Individual Rights and Equal Opportunities in Indigenous Australia' (2011) 36(3) *Alternative Law Journal* 187; Bradfield, above n 6, 165.

[9] Marcia Langton and Lisa Palmer, 'Negotiating Settlements: Indigenous Peoples, Settler States and the Significance of Treaties and Agreements' in Australian Institute of Aboriginal and Torres Strait Islander Studies (ed), *Treaty: Let's Get it Right!* (Aboriginal Studies Press, 2003) 41, 43; Ban, above n 3, 19; Mansell, *Treaty and Statehood,* above n 1, 121.

[10] Michael Mansell, 'Finding the Foundation for a Treaty with the Indigenous Peoples of Australia' (2001) 4 *Balayi: Culture, Law and Colonialism* 83; Mansell, *Treaty and Statehood,* above n 1, 121, 125.

[11] Mansell, *Treaty and Statehood,* above n 1, 97, 99.

[12] Grant, above n 4, 38, 40–1; Mick Dodson, 'Unfinished Business: A Shadow Across Our Relationships' in Australian Institute of Aboriginal and Torres Strait Islander Studies (ed), *Treaty: Let's Get it Right!* (Aboriginal Studies Press, 2003) 30.

from its failure to negotiate a treaty remains.[13] This article evaluates several potential challenges to successful treaty-making in Commonwealth settler countries, including opposition to the concepts of 'treaty' and 'Indigenous sovereignty', the absence of a national representative body for Indigenous peoples, and their ongoing marginalisation and vulnerability to the political processes of the settler state. It also discusses the potential for treaties to advance Indigenous claims for reconciliation, self-government and control over land, by drawing on experiences of treaty-making in New Zealand and Canada. In addition, it briefly outlines some of the ways in which non-Indigenous governments and peoples can benefit from treaties. It concludes that while the treaty-making process may face ongoing challenges, it is ultimately a satisfactory method for reconciling Indigenous and settler interests. Therefore, in order to promote meaningful outcomes for Indigenous Australians, such as recognition, reconciliation and greater autonomy, treaties ought to be utilised in Australia.

It is worth noting that the notion that treaties are 'the eternally absent presence in our nation's modern history'[14] may be shifting. The commencement of talks and passage of treaty legislation in Victoria,[15] as well as the signing of a memorandum of understanding by the Northern Territory government,[16] reflect an increasing willingness by state and territory governments to engage with this issue. Additionally, Opposition Leader Bill Shorten's support for the Uluru Statement from the Heart and his openness to discussing a treaty shows an encouraging potential for the future commencement of national treaty talks.[17] It is hoped that these developments will generate further momentum towards treaty-making with Indigenous Australians.

II A PRELIMINARY NOTE: HOW MANY TREATIES?

There is debate as to whether, in the event that Australia engaged in treaty-making,

[13] Auguste, above n 2, 426, 434.

[14] Buchan, above n 1, 6.

[15] Muriel Bamblett, 'A Victorian Treaty?' [2016–17] (145) *Arena Magazine* 11, 11–12; Mansell, *Treaty and Statehood,* above n 1, 99; Aboriginal Treaty Interim Working Group, 'Aboriginal Community Consultations on the Design of a Representative Body – Summary Report' (Report, Ernst & Young, June 2017) 1 <https://www.vic.gov.au/system/user_files/Documents/av/EY_Summary_Report_Phase_2__ATIWG_20170627.pdf>; Madeline Hayman-Reber and Rachael Hocking, 'Historic Treaty Legislation Passes Victoria's Lower House', *SBS News* (online), 7 June 2018 <https://www.sbs.com.au/news/historic-treaty-legislation-passes-victoria-s-lower-house>.

[16] Shahni Wellington, 'Indigenous Treaty a Step Closer after NT Government Makes Historic Pledge', *ABC News* (online), 8 June 2018 <http://www.abc.net.au/news/2018-06-08/indigenous-treaty-a-step-closer-after-nt-government-pledge/9848856>.

[17] Ibid; Caitlyn Gribbin, 'Q&A: Bill Shorten Indicates Indigenous Treaty Possibility, Will Wind Back Border Protection Secrecy', *ABC News* (online), 13 June 2016 <http://www.abc.net.au/news/2016-06-14/q&a:-shorten-indicates-possibility-of-indigenous-treaty/7506964>; Mansell, *Treaty and Statehood*, above n 1, 99.

it ought to negotiate one or multiple treaties. Mansell supports a single national treaty on the basis that it would ensure a uniform standard of justice, set the standard for dealings with Indigenous peoples, and provide a singular approach to resource allocation and land returns.[18] In addition, he contends that one treaty may codify a politically united identity for Indigenous Australians, whereas multiple treaties may adversely affect Indigenous unity.[19] On the other hand, many Indigenous peoples would prefer that local treaties are made with each individual nation.[20] It is arguable that localised or regionalised treaty-making would better accommodate the varying circumstances, needs and aspirations of diverse groups.[21] However, some key issues can only be addressed on a national level.[22] As such, this article considers that the preferable approach is to adopt a national treaty as a model framework, which enshrines essential principles and sets the standards for regional processes,[23] as well as regional treaties to address specific issues arising at the state or local level.[24]

III CHALLENGES TO TREATY-MAKING

A *Language of 'Treaty'*

One of the most significant challenges to a treaty is the term itself.[25] In part, this may arise from the fact that there is no universal definition of a 'treaty' in this context. Various authors have conceptualised it as a negotiated agreement enabling Indigenous peoples and governments to live together;[26] a method of formalising dealings;[27] a mechanism for achieving harmony and defining parties' mutual responsibilities;[28] and a written agreement which recognises Indigenous peoples' rights and place in the constitutional system.[29] Treaties are commonly understood to be political in nature and to entail binding legal consequences.[30] However, they can also be regarded as formal

[18] Mansell, *Treaty and Statehood*, above n 1, 118–19.
[19] Ibid 119.
[20] Ibid 118.
[21] Ibid; Strelein, above n 8, 94; Larissa Behrendt, 'Practical Steps Towards a Treaty: Structures, Challenges and the Need for Flexibility' in Australian Institute of Aboriginal and Torres Strait Islander Studies (ed), *Treaty: Let's Get it Right!* (Aboriginal Studies Press, 2003) 18, 20.
[22] Strelein, above n 8, 94.
[23] Ibid 95; Dodson, above n 12, 32; Behrendt, above n 21, 20.
[24] Dodson, above n 12, 33.
[25] Brennan, Gunn and Williams, above n 3, 351.
[26] Mansell, 'Finding the Foundation', above n 10, 84. See also Williams, above n 1, 4.
[27] Mansell, 'Finding the Foundation', above n 10, 83.
[28] Mansell, *Treaty and Statehood*, above n 1, 113–14.
[29] Davis, 'Treaty, Yeah?', above n 3, 127.
[30] Baldry, above n 7, 23; Williams, above n 1, 3; Mansell, *Treaty and Statehood*, above n 1, 114; Brennan, Gunn and Williams, above n 3, 309–10, 351.

agreements between independent sovereign states.[31] Due to this additional layer of meaning, the word 'treaty' is polarising and can act as a barrier to discussion due to the negative reactions it engenders.[32] Many conservative politicians, including former Prime Minister John Howard, have opposed it on the basis that 'a nation cannot make a treaty with itself'.[33] They have argued that treaties are inappropriate in a domestic context, and that the government negotiating treaties with Indigenous peoples implies the existence of multiple nations within Australia.[34] Accordingly, some Indigenous advocates have warned that invoking the concept of 'treaty' may derail other methods of reconciliation, due to its potential to polarise non-Indigenous actors.[35]

However, opposition on this basis is arguably founded on an overly narrow understanding of 'treaty', which characterises the term solely in its international sense. Howard's position, for instance, is based on the notion that a 'treaty' implies the existence of independent Indigenous nations with international standing.[36] This fear is unfounded, as Indigenous peoples typically do not seek recognition of statehood.[37] Even if this were the case, treaties with Australian governments would not have this effect, since political settlements within a nation's borders remain domestic matters.[38] Hence, the challenge of resistance to the language of 'treaty' can be overcome by recognising the fallacy in the narrow conceptualisation, and adopting a broader view of treaties as negotiated domestic agreements which provide a framework for the mutual recognition of rights and future dealings.

Moreover, biases surrounding the language of 'treaty' are not necessarily fatal to the process, since alternative language could be used without changing the document's

[31] Mansell, *Treaty and Statehood*, above n 1, 99–100.
[32] Ibid 99–100, 114; Julie Nimmo, 'Treaty…' (2002) 5(21) *Indigenous Law Bulletin* 17; Mansell, 'Citizenship, Assimilation and a Treaty' in Australian Institute of Aboriginal and Torres Strait Islander Studies (ed), *Treaty: Let's Get it Right!* (Aboriginal Studies Press, 2003) 5, 13; Davis, 'Treaty, Yeah?', above n 3, 127; Andren, above n 7, 9.
[33] John Laws, Interview with John Howard, Prime Minister of Australia (Sydney, 29 May 2000). See also Buchan, above n 1, 7; Mansell, 'Citizenship, Assimilation and a Treaty', above n 32, 5–6; Brennan, Gunn and Williams, above n 3, 317; Andren, above n 7, 9; Mansell, *Treaty and Statehood,* above n 1, 114–15; Grant, above n 4, 40–1; Bradfield, above n 6, 170; Auguste, above n 2, 429.
[34] Andren, above n 7, 8–10; Brennan, Gunn and Williams, above n 3, 308, 317; Buchan, above n 1, 6–7; Mansell, *Treaty and Statehood*, above n 1, 114–15; Bradfield, above n 6, 165, 170; Auguste, above n 2, 428–9; Morris, 'Agreement-Making', above n 8, 190.
[35] Strelein, above n 8, 89; Auguste, above n 2, 432; Dodson and Strelein, above n 7, 831.
[36] Mansell, *Treaty and Statehood*, above n 1, 115.
[37] Ibid.
[38] Ibid.

nature or lessening its legal effect.[39] Previous proposals have suggested a 'compact'[40] or 'agreement',[41] to attract greater support and avoid the political implications of a 'treaty'.[42] The concept of *Makarrata*, a Yolngu term referring to a reconciliation and resumption of normal relations after a struggle, has also been promoted,[43] including in the Uluru Statement from the Heart.[44] The widespread use of the language of 'treaty' in New Zealand and North America further suggests that the divisive connotations attached to the word are not universal, and do not necessarily prevent its successful use in the context of agreement-making with Indigenous peoples. It is hence apparent that this particular challenge to treaty-making can be surmounted.

B *Indigenous Sovereignty*

The concept of Indigenous sovereignty in Australia poses another challenge to treaty-making. Like 'treaty', the term 'sovereignty' has numerous definitions and implications, and Indigenous peoples have used it in different contexts for various purposes.[45] Some engage with the external concept of sovereignty, arguing for recognition as an independent state.[46] However, many advocates prefer an internal perspective and consider 'sovereignty' to refer to the increased recognition of rights, and inclusion in the democratic processes within a state.[47]

Characterised broadly, sovereignty relates to a people's authority to govern.[48] This gives rise to the controversial question of whether Indigenous Australians are distinct peoples with the power to govern and make binding political agreements with settler governments.[49] The federal government and High Court of Australia have rejected the characterisation of Indigenous peoples as sovereign,[50] suggesting that they would not

[39] Ibid 115–16; Andren, above n 7, 9.
[40] Andren, above n 7, 9; Auguste, above n 2, 428.
[41] Strelein, above n 8, 89.
[42] Mansell, 'Finding the Foundation', above n 10, 85.
[43] Megan Davis, 'To Walk in Two Worlds', *The Monthly* (Melbourne), July 2017, 8, 10; Andren, above n 7, 8; De Santolo, above n 8, 85; Auguste, above n 2, 427–8; Davis, 'Treaty, Yeah?', above n 3, 127.
[44] Davis, 'To Walk in Two Worlds', above n 43, 8, 10.
[45] Brennan, Gunn and Williams, above n 3, 311, 314–15.
[46] Ibid 315.
[47] Ibid 315–16.
[48] Ibid 311, 316.
[49] Ibid 308; Mansell, 'Citizenship, Assimilation and a Treaty', above n 32, 6; Dodson, above n 12, 32–3; Bradfield, above n 6, 176; Davis, 'Treaty, Yeah?', above n 3, 128.
[50] Auguste, above n 2, 426, 428; Brennan, Gunn and Williams, above n 3, 317–18, 322–3, 325–8, 347–8; Bradfield, above n 6, 168; Mansell, *Treaty and Statehood,* above n 1, 103; Strelein, above n 8, 92; Morris, 'Agreement-Making', above n 8, 189.

be able to conclude a national treaty.[51] This approach differs to that of North America and New Zealand, where Indigenous peoples' sovereign status and rights have been acknowledged to a greater extent.[52] Aboriginal and Torres Strait Islander peoples have contested Australia's position, arguing that their sovereignty was not lost upon colonisation and continues to exist.[53] They have used the concept to refer to their ability to take independent action, control their lives and determine their futures.[54] Consequently, they have argued that their right to lobby for treaties arises from their distinct history, culture and status.[55] Sovereignty is a charged concept, and it is difficult to convince people to shift their position in relation to it.[56] Regardless of this, Indigenous Australians clearly retain a unique voice and presence,[57] and will pursue their aspirations even if their capacity for political engagement is denied.[58] The doctrine of native title, as well as agreements between Aboriginal polities and external entities, indicates implicit recognition of Indigenous Australians' status as self-governing peoples.[59] Furthermore, the Victorian government has passed treaty legislation acknowledging Aboriginal peoples' view that their sovereignty was never ceded.[60] Consequently, the Commonwealth's refusal to recognise Indigenous sovereignty does not preclude the possibility of treaty-making in Australia.

Similarly to the language of 'treaty', 'Indigenous sovereignty' is a divisive concept.[61] Governments and conservative commentators have expressed reluctance to recognise it, fearing it may challenge the sovereignty, unity and legitimacy of the Australian colonial state.[62] However, Mansell has succinctly characterised this view as being 'based more

[51] Mansell, *Treaty and Statehood,* above n 1, 99–100; Auguste, above n 2, 426; Mansell, 'Finding the Foundation', above n 10, 86.
[52] Venne, above n 1, 8; Bradfield, above n 6, 167; Mansell, *Treaty and Statehood,* above n 1, 102–4.
[53] Behrendt, 'Practical Steps Towards a Treaty', above n 21, 18, 27; Mansell, 'Finding the Foundation', above n 10, 87; Langton and Palmer, above n 9, 45; Mansell, 'Citizenship, Assimilation and a Treaty', above n 32, 15–16; Strelein, above n 8, 92; Brennan, Gunn and Williams, above n 3, 308, 311, 345; Auguste, above n 2, 432.
[54] Brennan, Gunn and Williams, above n 3, 314, 316.
[55] Strelein, above n 8, 91–2; Behrendt, 'Practical Steps Towards a Treaty', above n 21, 18.
[56] Dodson, above n 12, 32–3; Brennan, Gunn and Williams, above n 3, 314.
[57] Behrendt, 'Practical Steps Towards a Treaty', above n 21, 27; Buchan, above n 1, 7.
[58] Brennan, Gunn and Williams, above n 3, 349; Bradfield, above n 6, 175.
[59] Mansell, *Treaty and Statehood,* above n 1, 102; Strelein, above n 8, 92; Langton and Palmer, above n 9, 42–3,45–6; Bradfield, above n 6, 168, 175; Morris, 'Agreement-Making', above n 8, 189; Brennan, Gunn and Williams, above n 3, 345.
[60] Advancing the Treaty Process with Aboriginal Victorians Bill 2018 (Vic).
[61] Mansell, *Treaty and Statehood,* above n 1, 3, 130–1; Davis, 'Treaty, Yeah?', above n 3, 128.
[62] Mansell, 'Finding the Foundation', above n 10, 88; Bradfield, above n 6, 165, 167, 171; Mansell, *Treaty and Statehood,* above n 1, 3, 99, 129, 268; Windschuttle, above n 8, 15–16, 23–4.

on emotion than logic'.[63] Most Indigenous peoples advocate for internal sovereignty and seek to renegotiate their place within the nation on the basis of their identity as First Peoples.[64] As such, they consider their sovereignty a basis for seeking greater rights and power within Australia, rather than secession.[65] The fact that the term 'sovereignty' carries multiple meanings beyond external sovereignty, and is now understood to be 'divisible and capable of being shared or pooled across different entities',[66] demonstrates that the recognition of Indigenous sovereignty is not incompatible with the continued existence of the Australian settler state.

In Canada, the federal government has acknowledged the constitutional protection of Aboriginal peoples' right of self-government.[67] For instance, in British Columbia, the 1998 Nisga'a Final Agreement recognised the Nisga'a Nation's legislative, executive and judicial power, as well as the Nisga'a government's responsibility for relations with the federal and provincial governments.[68] Canadian courts have also affirmed Indigenous peoples' right to self-government within the overarching framework of Crown sovereignty.[69] While this does not amount to an explicit recognition of Indigenous sovereignty in the international sense, it demonstrates that Canada is prepared to allow its Indigenous peoples to express their status and identity as distinct peoples.[70] Thus, it reflects greater willingness by the Canadian government to compromise and recognise Indigenous aims, compared to the Australian government. Canadians have not been alarmed by the recognition of Aboriginal self-government, and do not consider their society fragmented after accepting Indigenous aspirations.[71] Treaties are also not considered to constitute a surrender of nationhood,[72] as they have not led to independent Aboriginal nation-states within Canada.[73] There is no evidence that Canada's entrenchment of Indigenous agreements and self-governance has harmed its government's overarching sovereignty.[74] Rather, Aboriginal and settler Canadian laws co-exist, although Aboriginal peoples ultimately remain subject to Canadian laws.[75]

[63] Mansell, *Treaty and Statehood,* above n 1, 268.
[64] Brennan, Gunn and Williams, above n 3, 315–17.
[65] Ibid 315–16; Bradfield, above n 6, 171.
[66] Brennan, Gunn and Williams, above n 3, 311.
[67] Ibid 330; *Canada Act 1982* (UK) c 11, sch B ('*Constitution Act 1982*') s 35(1).
[68] Brennan, Gunn and Williams, above n 3, 332.
[69] Ibid 334–6, 339.
[70] Ibid 330–1.
[71] Ban, above n 3, 18.
[72] Mansell, *Treaty and Statehood,* above n 1, 97.
[73] Brennan, Gunn and Williams, above n 3, 331–2, 336.
[74] Ibid 332; Langton and Palmer, above n 9, 47.
[75] Brennan, Gunn and Williams, above n 3, 332.

Canada's experience therefore reveals that the recognition of Indigenous sovereignty need not be perceived as a threat to Australia's unity or constitutional framework,[76] and does not necessarily obstruct progress towards treaties.[77]

C *Indigenous Representation*

The absence of a distinct national Indigenous representative body is cited as a challenge to the prospects of a national treaty in Australia, due to uncertainty as to who would negotiate and sign treaties with the Commonwealth government on behalf of Indigenous peoples.[78] This is amplified by the diversity in culture, circumstances and aspirations within Indigenous communities across Australia.[79] As Behrendt acknowledges in her article, deciding the issue of representation will be difficult.[80] However, the mere fact that Australia's lack of a peak representative entity is a problematic hurdle to overcome should not be used to justify inaction. Indeed, 'to fail at the outset to investigate the possibilities of a treaty process simply because such issues are complex is not merely disingenuous, it continues Australia's 'psychological terra nullius', again leaving Indigenous demands unaddressed'.[81] Moreover, the question may not be as contentious as observers imagine.[82] There is considerable common ground among Indigenous groups as to the desired content of a national compact, notwithstanding socioeconomic and cultural differences.[83] The agreement-making process could involve nation-wide consultations and negotiations with various Indigenous groups,[84] as well as the election of representatives at conventions,[85] maximising community participation and input.[86] The method utilised by the Aboriginal Treaty Interim Working Group in Victoria provides a useful precedent for a national process. The Working Group recognised the

[76] Patrick Macklem, 'Indigenous Peoples and the Canadian Constitution: Lessons for Australia?' (1994) 5 *Public Law Review* 11, 13; Mansell, *Treaty and Statehood,* above n 1, 115, 129, 147, 163, 267; Harley, above n 8, 18; Borrows, above n 3, 212; Joel Gibson, 'Chief Justice Backs Aboriginal Treaty', *Sydney Morning Herald* (online) 28 March 2009 <https://www.smh.com.au/national/chief-justice-backs-aboriginal-treaty-20141112-9e79.html>.

[77] Brennan, Gunn and Williams, above n 3, 309, 350–2.

[78] Andren, above n 7, 8; Auguste, above n 2, 426; Harley, above n 8, 18; Bradfield, above n 6, 174; Behrendt, 'Practical Steps Towards a Treaty', above n 21, 24; Mansell, *Treaty and Statehood,* above n 1, 155.

[79] Baldry, above n 7, 23; Mansell, 'Citizenship, Assimilation and a Treaty', above n 32, 6, 12; Behrendt, 'Practical Steps Towards a Treaty', above n 21, 19; Andren, above n 7, 8–10.

[80] Behrendt, 'Practical Steps Towards a Treaty', above n 21, 24.

[81] Bradfield, above n 6, 174.

[82] Mansell, *Treaty and Statehood,* above n 1, 152.

[83] Behrendt, 'Practical Steps Towards a Treaty', above n 21, 19.

[84] Davis, 'Treaty, Yeah?', above n 3, 131; Harley, above n 8, 18; Mansell, *Treaty and Statehood,* above n 1, 152.

[85] Behrendt, 'Practical Steps Towards a Treaty', above n 21, 24.

[86] Ibid.

need for a state-wide body capable of representing Aboriginal peoples and negotiating with the Victorian government, and conducted extensive consultations with Aboriginal communities on the way in which an effective body ought to be designed.[87] In light of this, the absence of a national Indigenous representative organisation should not threaten the prospect of treaty-making in Australia.

This purported challenge only applies to treaty-making at the national level. The absence of a national Indigenous body should not, for instance, threaten the success of regional treaties. The approach taken by the Working Group in Victoria could be adopted in other Australian states and territories, facilitating the creation of organisations with the capacity to represent the Indigenous peoples of their respective jurisdictions in negotiations with governments. Similarly, the lack of a peak national body does not prevent negotiations occurring on a nation-by-nation basis, as Canada's experience demonstrates. Historically, individual First Nations such as the Mi'kmaq, Chippewa, Maliseet, Huron, and Passamaquoddy Nations signed peace and friendship treaties, and other agreements, with the British Crown.[88] Modern agreements are also typically negotiated between individual claimant groups and the federal, provincial and territorial governments.[89] Given that Aboriginal and Torres Strait Islander peoples are already entering into agreements with governments and industry representatives,[90] they are clearly capable of representing the interests of their group in treaty negotiations. Thus, the perceived barrier arising from the absence of a national body could be circumvented by negotiating multiple treaties at the state or local level.

D *Power Imbalances*

The ongoing marginalisation of Indigenous peoples from the political processes of the Australian settler state is also problematic for the treaty-making process.[91] Aboriginal and Torres Strait Islander peoples' capacity for political participation and influence is limited by their extreme minority status.[92] The abolition of the Aboriginal and Torres Strait Islander Commission in 2004, and the ongoing dearth of recognition within key institutions, compounds the vulnerability of Indigenous peoples to 'the whims of the

[87] Aboriginal Treaty Interim Working Group, above n 15, 1, 3, 4.
[88] Macklem, above n 76, 15–16; Borrows, above n 3, 188–9.
[89] Christopher Alcantara, 'To Treaty or Not to Treaty? Aboriginal Peoples and Comprehensive Land Claims Negotiations in Canada' (2007) 38 *Publius* 343, 345.
[90] Langton and Palmer, above n 9, 41, 43; Ban, above n 3, 19; Mansell, *Treaty and Statehood,* above n 1, 121.
[91] Davis, 'Treaty, Yeah?', above n 3, 127, 129.
[92] Ibid 130–1; Morris, 'Agreement-Making', above n 8, 189; De Santolo, above n 8, 87; Mansell, 'Citizenship, Assimilation and a Treaty', above n 32, 9.

goodwill of the ruling political party and any ideological fashions of the day'.[93] Previous treaty campaigns have faltered due to lack of government action and will,[94] as evidenced by the 1996 election of the Howard government effectively stalling the progress made under Labor Party predecessors.[95] Similar trends have been observed in New Zealand; De Santolo, for instance, noted the potential for settlement processes under the Treaty of Waitangi to be impeded as a result of political and economic factors acting upon the settler government.[96] The interests of Indigenous peoples, and the success of potential treaties, are vulnerable due to the changeability of political processes and interests of governments. Convincing settler governments to negotiate, and generating the collective impetus to implement an agenda, is an extremely difficult problem for Indigenous Australians[97] given their relative lack of power and government reluctance. Prima facie, the need for political leadership and action thus suggests an insurmountable obstacle to Australian treaties.[98] However, this is not necessarily the case, as organised campaigns with clear aims and strong leadership can be highly effective.[99] As Dodson writes, 'it cannot be an impossible task. We have achieved great things in the past and we need a great deal of patience and perseverance to achieve present goals'.[100]

However, the inherent power imbalance in favour of the settler state poses a further hindrance to successful, fair negotiations.[101] This is emphasised by the discrepancy between the vast resources and power available to Australian governments, and the lack thereof for Australia's Indigenous peoples.[102] In the mid-1990s, during consultations on the New Zealand government's settlement policy, Māori delegates similarly highlighted the unilateral nature of the mechanism proposed and the fact that they were not consulted on the best method of settling Treaty claims.[103] Likewise, Alcantara has noted the effect of power relations on negotiation outcomes in Canada, and the fact that the formal

[93] Davis, 'Treaty, Yeah?', above n 3, 127. See also Mansell, *Treaty and Statehood,* above n 1, 155; Auguste, above n 2, 429; Bradfield, above n 6, 166, 172; Behrendt, 'What Path Forward for Reconciliation?', above n 8, 81.
[94] Harley, above n 8, 17; Strelein, above n 8, 89–90; Mansell, 'Citizenship, Assimilation and a Treaty', above n 32, 14; Bradfield, above n 6, 172.
[95] Mansell, *Treaty and Statehood,* above n 1, 3–4.
[96] De Santolo, above n 8, 80.
[97] Dodson, above n 12, 31.
[98] Ibid; Davis, 'Treaty, Yeah?', above n 3, 130; Mansell, *Treaty and Statehood,* above n 1, 163; Strelein, above n 8, 89.
[99] Mansell, *Treaty and Statehood*, above n 1, 3.
[100] Dodson, above n 12, 31.
[101] Alcantara, above n 89, 350, 353, 362; Mansell, *Treaty and Statehood,* above n 1, 156; Behrendt, 'Practical Steps Towards a Treaty', above n 21, 27.
[102] Mansell, *Treaty and Statehood,* above n 1, 155–6.
[103] De Santolo, above n 8, 80.

procedures and rules of the comprehensive land claims process weaken the position of Aboriginal groups relative to that of settler governments.[104]

This hurdle is not, however, insurmountable. Various means could be used to alleviate systemic Indigenous disadvantage in treaty-making processes, such as culturally appropriate and respectful procedures, and the provision of sufficient resources – including finances, advisors and research – to enable Indigenous Australian representatives to conduct negotiations directly and more effectively.[105] Additionally, an independent body such as a Treaty Commission could be created to interpret and enforce any agreement,[106] to better ensure a balance between the parties.[107] Thus, it is possible for Commonwealth and state governments to fairly negotiate treaties with Aboriginal and Torres Strait Islander peoples, despite their entrenched powerlessness.

IV SIGNIFICANCE OF TREATIES

A *General Potential*

A central aspect of the treaty debate is whether treaties can achieve tangible outcomes for Indigenous Australians.[108] However, the fundamental value of treaties lie in their symbolic and practical benefits,[109] as well as their ability to promote a collaborative approach and reconcile Indigenous and settler claims.[110] Treaties are essential because they recognise the history of prior Indigenous land ownership and subsequent dispossession due to colonisation, and establish a foundation for remedying past wrongs and addressing their ongoing consequences.[111] Measures such as native title, consultation and service delivery programs, while vital, cannot by themselves address grievances or comprehensively resolve Indigenous claims, reflecting the necessity of treaties for

[104] Alcantara, above n 89, 350, 353.
[105] Mansell, *Treaty and Statehood,* above n 1, 156; Behrendt, 'Practical Steps Towards a Treaty', above n 21, 28.
[106] Behrendt, 'Practical Steps Towards a Treaty', above n 21, 27.
[107] Ibid 27–8.
[108] Harley, above n 8, 17–18.
[109] Ibid 19; Auguste, above n 2, 432; Davis, 'Treaty, Yeah?', above n 3, 131; Behrendt, 'Practical Steps Towards a Treaty', above n 21, 19.
[110] Harley, above n 8, 18; Brennan, Gunn and Williams, above n 3, 351.
[111] Dodson and Strelein, above n 7, 826, 838; Mansell, *Treaty and Statehood,* above n 1, 106, 113, 116, 120, 132, 134–6, 144, 146–8; Borrows, above n 3, 191; Behrendt, 'Practical Steps Towards a Treaty', above n 21, 18–19; Grant, above n 4, 40–1; Baldry, above n 7, 23; Auguste, above n 2, 427–8, 432–4; Mansell, 'Citizenship, Assimilation and a Treaty', above n 32, 5, 16–17; Williams, above n 1, 4; Harley, above n 8, 18–19; Mansell, 'Finding the Foundation', above n 10, 88; Dodson, above n 12, 31, 33; McLachlin, above n 3, 246–7; Bradfield, above n 6, 173.

reconciliation.[112] Furthermore, treaties formalise the relationship between Indigenous peoples and governments, enabling constructive negotiations and partnerships based on consent and mutual respect for parties' rights and obligations.[113] Agreements are also valuable in enshrining the unique status and rights of First Peoples.[114] Implementing one or more treaties in Australia would reverse the position of non-recognition by explicitly acknowledging the prior occupation and historical treatment of Indigenous peoples,[115] enshrine Aboriginal and Torres Strait Islander peoples' rights, voice and interests, and go some way towards equalising the power imbalance between the parties.[116] Treaties could therefore provide a framework for future progress,[117] and enhance the prospect of national unity and reconciliation.[118]

E *Other Jurisdictions*

The success of treaties is evident in New Zealand. The Treaty of Waitangi is not legally enforceable on its own;[119] nevertheless it has considerable power, as it is

[112] Heron Loban, 'Reflections on a Treaty from a Torres Strait Islander Lawyer' (2001) 5(21) *Indigenous Law Bulletin* 22; Dodson and Strelein, above n 7, 837–8; De Santolo, above n 8, 84; Mansell, *Treaty and Statehood,* above n 1, 6–8, 121, 144; Behrendt, 'Practical Steps Towards a Treaty', above n 21, 18; Ban, above n 3, 17; Williams, above n 1, 4; McLachlin, above n 3, 247; Mansell, 'Finding the Foundation', above n 10, 83.

[113] Borrows, above n 3, 191, 197–9, 203; Dodson and Strelein, above n 7, 826–7; 830, 832, 837–8; De Santolo, above n 8, 85, 87; Mansell, *Treaty and Statehood,* above n 1, 2–3, 113–14, 128, 144, 148, 155; Brennan, Gunn and Williams, above n 3, 328; Behrendt, 'Practical Steps Towards a Treaty', above n 21, 19; Williams, above n 1, 4; Mansell, 'Citizenship, Assimilation and a Treaty', above n 32, 16–17; Bradfield, above n 6, 165, 171–2; Strelein, above n 8, 89, 92, 95; Auguste, above n 2, 427–8, 434; Dodson, above n 12, 31, 33; Harley, above n 8, 18; Andren, above n 7, 8; Baldry, above n 7, 23; Morris, 'Agreement-Making', above n 8, 190; Mansell, 'Finding the Foundation', above n 10, 83; Davis, 'Treaty, Yeah?', above n 3, 127.

[114] Loban, above n 112, 22; Mansell, *Treaty and Statehood,* above n 1, 128, 155; Ban, above n 3, 19; Dodson and Strelein, above n 7, 837–8; Auguste, above n 2, 427, 432, 434; Bradfield, above n 6, 173, 175; Baldry, above n 7, 23; Dodson, above n 12, 32; Harley, above n 8, 19.

[115] Williams, above n 1, 3–4; Bradfield, above n 6, 166, 175–6; Dodson, above n 12, 32; Davis, 'Treaty, Yeah?', above n 3, 128.

[116] Davis, 'Treaty, Yeah?', above n 3, 127–8; Auguste, above n 2, 427, 433; Mansell, 'Citizenship, Assimilation and a Treaty', above n 32, 15; Bradfield, above n 6, 172, 174; Morris, 'Agreement-Making', above n 8, 188, 190; Baldry, above n 7, 23; Dodson and Strelein, above n 7, 838; Mansell, *Treaty and Statehood,* above n 1, 132, 144, 164.

[117] Auguste, above n 2, 427; Williams, above n 1, 4; Bradfield, above n 6, 174, 176; Harley, above n 8, 18; Mansell, *Treaty and Statehood,* above n 1, 105, 146; Borrows, above n 3, 203.

[118] Loban, above n 112, 22; Dodson, above n 12, 31; Mansell, *Treaty and Statehood,* above n 1, 2, 134, 146, 272; Bradfield, above n 6, 165, 171, 174; Auguste, above n 2, 427, 429, 433–4; Behrendt, 'What Path Forward for Reconciliation?', above n 8, 79; Borrows, above n 3, 192–3; Harley, above n 8, 18–19; Buchan, above n 1, 7; Grant, above n 4, 41.

[119] Claire Charters and Tracey Whare, 'Shaky Foundations' (Winter 2017–18) 34 *World Policy Institute* 11, 12; Morris, 'Lessons from New Zealand', above n 7, 72, 78; Brennan, Gunn and Williams, above n 3, 343; Borrows, above n 3, 190; Mansell, *Treaty and Statehood,* above n 1, 152; Ban, above n 3, 18–19; Morris, 'Agreement-Making', above n 8, 188.

quasi-constitutional and forms part of the fabric of society.[120] The Treaty established important Māori rights and inclusive structures, providing the foundation for principles of biculturalism, partnership and state fiduciary duties.[121] The government of New Zealand is required to take Treaty principles into account in passing laws and conducting other business; however, this does not compromise its ability to govern.[122] This clearly evidences the influence of the Treaty in balancing Māori and Pākehā claims,[123] as it has contributed to equalising the status of Māori peoples without unduly limiting the power and authority of the New Zealand settler government.

The creation of the Waitangi Tribunal in 1975, to hear and resolve Crown breaches of the Treaty,[124] also signified an increase in governmental recognition of Māori Treaty rights.[125] New Zealand's government adopted various principles in its policy towards the settlement of Treaty claims, including good faith, relationship restoration, just redress, transparency and fairness.[126] Notions of equality, reasonable cooperation and *kāwanatanga* (government) were also adopted.[127] Tribunal processes have enabled Māori peoples to tell their stories, resolve grievances and pursue reconciliation.[128] Treaty settlements involve an official Crown apology for historic violations, recognition, and financial and cultural redress, thereby establishing an ongoing process for truth, reconciliation, and a constructive partnership between the Māori and the Crown.[129]

The Canadian experience further evinces the importance of treaties. Various Indigenous peoples in Canada have benefited from agreement-making throughout its history.[130] There have been over 500 treaties in Canada,[131] many of which date back to the arrival of British settlers in North America.[132] Indigenous laws and customs were

[120] Charters and Whare, above n 119, 12–14; Morris, 'Agreement-Making', above n 8, 188; Ban, above n 3, 18; Morris, 'Lessons from New Zealand', above n 7, 74, 78; Borrows, above n 3, 190, 196; Harley, above n 8, 17–18; Brennan, Gunn and Williams, above n 3, 342–3; De Santolo, above n 8, 73.
[121] Ban, above n 3, 18; Morris, 'Lessons from New Zealand', above n 7, 72, 74; McLachlin, above n 3, 241; De Santolo, above n 8, 74; Borrows, above n 3, 196.
[122] Charters and Whare, above n 119, 14; Ban, above n 3, 18; Mansell, *Treaty and Statehood,* above n 1, 102, 150–1; Borrows, above n 3, 196–7; Brennan, Gunn and Williams, above n 3, 343; De Santolo, above n 8, 73.
[123] Morris, 'Agreement-Making', above n 8, 188.
[124] Morris, 'Lessons from New Zealand', above n 7, 75.
[125] Ibid; De Santolo, above n 8, 73–4.
[126] De Santolo, above n 8, 76.
[127] Ibid 73.
[128] Ibid 71, 78–9; McLachlin, above n 3, 241; Borrows, above n 3, 212; Morris, 'Lessons from New Zealand', above n 7, 75; Ban, above n 3, 18; Mansell, *Treaty and Statehood,* above n 1, 150.
[129] Charters and Whare, above n 119, 13; Morris, 'Lessons from New Zealand', above n 7, 75.
[130] Davis, 'Treaty, Yeah?', above n 3, 128.
[131] Borrows, above n 3, 189.
[132] Brennan, Gunn and Williams, above n 3, 332.

often instrumental in the creation of historical agreements such as peace and friendship treaties.[133] The Royal Proclamation of 1763 also protected Indigenous peoples' interests, by reserving significant expanses of land for their use and preventing private purchases of it.[134] Following Confederation, the Crown negotiated 11 numbered treaties, which spanned much of Canada's landmass and granted reserves, traditional rights and annual payments to Aboriginal peoples.[135] Claims continue to be addressed under these agreements,[136] reflecting their lasting legal and political effect.[137]

Historically, the Crown regarded treaties with First Nations peoples as lasting 'for as long as the grass grows, the river flows, and the sun shines',[138] and the Supreme Court of Canada has sought to interpret treaties liberally.[139] Canadian jurisprudence has played a key role in attempting to reconcile Crown sovereignty with Indigenous prior occupation, and the Canadian government's response to the 1996 Royal Commission on Aboriginal Peoples acknowledged its role in historical injustices as the starting point for negotiations.[140] Canada's Constitution specifically enshrines Aboriginal and treaty rights,[141] reflecting the nation's commitment to reconciliation and facilitating Aboriginal recognition and development.[142] This affords significant protection, as it imposes a fiduciary duty upon the Crown, and can constrain legislation and government action on issues affecting Indigenous peoples' interests.[143] The legal prominence of treaties can also facilitate government activities and harmonious relations,[144] emphasising their potential.

Negotiations are the primary legal method through which Indigenous Canadians are pursuing historical claims, reconciliation and resolution of contemporary issues.[145] Since the 1970s, the Canadian federal government has implemented a modern-day treaty process to resolve issues such as self-government, land, service delivery and resources.[146]

[133] Borrows, above n 3, 188–9; Macklem, above n 76, 15–16.
[134] Macklem, above n 76, 16–17.
[135] Ibid 16; Mansell, *Treaty and Statehood,* above n 1, 145.
[136] Harley, above n 8, 17.
[137] Mansell, *Treaty and Statehood,* above n 1, 145; Macklem, above n 76, 16.
[138] Borrows, above n 3, 199–200. See also Venne, above n 1, 10.
[139] Macklem, above n 76, 19–20; Borrows, above n 3, 200.
[140] Brennan, Gunn and Williams, above n 3, 332, 334; McLachlin, above n 3, 241.
[141] *Constitution Act 1982* s 35(1); Brennan, Gunn and Williams, above n 3, 330; Borrows, above n 3, 195; Davis, 'Treaty, Yeah?', above n 3, 128.
[142] McLachlin, above n 3, 241, 244.
[143] Borrows, above n 3, 195–6; Ban, above n 3, 18.
[144] McLachlin, above n 3, 241; Borrows, above n 3, 196.
[145] Borrows, above n 3, 196; Brennan, Gunn and Williams, above n 3, 332; McLachlin, above n 3, 241.
[146] Brennan, Gunn and Williams, above n 3, 332.

In particular, Canada has engaged in negotiations with Indigenous peoples who did not enter into treaties at first contact.[147] For instance, the relative historical absence of treaty-making in British Columbia has been reversed through modern agreements such as the Nisga'a Final Agreement.[148] Agreements have also been reached relating to lands in the James Bay region of Québec, the western Arctic, and the Northwest Territories.[149] This reflects the fundamental and ongoing relevance of treaty-making in Canada as a method for defining the relationship between Aboriginal peoples and the Crown, and the potential for a culture of negotiation to lead to substantive change.[150]

It is undeniable that historical treaties in New Zealand and Canada were frequently founded on misunderstanding and deception,[151] and breached by the colonial states.[152] Additionally, ongoing breaches remain a problem, due to issues of interpretation, implementation, and settler governments ignoring historical agreements and the original intentions underlying them.[153] Nonetheless, negotiated agreements have been valuable in acknowledging history, creating a legal relationship, preserving Indigenous voices, and acting as a theoretical 'higher law' to limit colonial exploitation and resolve disputes.[154] They have also retained their potential to mediate problems between peoples.[155] Borrows considers that treaties in Canada and New Zealand promote unity and reflect a normative foundation of peace, agreement and respect.[156] Canada's Royal Commission on Aboriginal Peoples similarly viewed treaties as a practical mechanism for achieving enduring peace and harmony.[157] Observers have also recognised the reciprocal nature of treaties, and their role in upholding the rights and responsibilities of all parties.[158] Hence, it is evident that negotiated agreements constitute a valuable approach to reconciliation, and that Australia could adopt a similar approach to other nations in order to shift public

[147] Macklem, above n 76, 20; Ban, above n 3, 18; Davis, 'Treaty, Yeah?', above n 3, 127–8.
[148] McLachlin, above n 3, 241, 245; Davis, 'Treaty, Yeah?', above n 3, 127–8.
[149] Macklem, above n 76, 20.
[150] McLachlin, above n 3, 244–5; Behrendt, 'Practical Steps Towards a Treaty', above n 21, 22; Ban, above n 3, 18.
[151] Buchan, above n 1, 6; Harley, above n 8, 17; McLachlin, above n 3, 241.
[152] Venne, above n 1, 8; Borrows, above n 3, 191; Morris, 'Lessons from New Zealand', above n 7, 72; Buchan, above n 1, 6; De Santolo, above n 8, 72.
[153] Harley, above n 8, 17; Venne, above n 1, 8; Ban, above n 3, 18; Brennan, Gunn and Williams, above n 3, 341.
[154] Morris, 'Lessons from New Zealand', above n 7, 72–4; Buchan, above n 1, 6; Borrows, above n 3, 190–1, 194–7, 199–200; Grant, above n 4, 40–1; Charters and Whare, above n 119, 11; De Santolo, above n 8, 72; Venne, above n 1, 8; Harley, above n 8, 18.
[155] Borrows, above n 3, 191.
[156] Ibid 193–4, 199, 205.
[157] Mansell, *Treaty and Statehood,* above n 1, 113.
[158] Venne, above n 1, 11; Borrows, above n 3, 197–9.

attitudes and afford comparable recognition of Indigenous peoples' rights.[159]

V ADVANCING INDIGENOUS SELF-GOVERNMENT

A *General Potential*

Treaties can provide for a range of Indigenous rights, including empowerment, self-government and self-determination.[160] Australia's existing rights recognition does not come close to satisfying Indigenous peoples' aspirations of autonomy and independence from colonial structures,[161] since they do not possess the requisite capacity to make decisions or realise their vision.[162] Settler state entities currently manage Indigenous affairs in Australia, while Indigenous peoples are sidelined and subordinated to government will.[163] Indigenous Australians thus have limited control and decision-making power over matters that directly affect them. Negotiating a treaty or treaties could 'mark an important break from a system that for many decades has disregarded the views of Aboriginal people, and reinforced their feelings of powerlessness'.[164] It could transform Indigenous peoples' status by ending government domination, and safeguarding their rights and authority to act.[165] Additionally, acknowledging self-government in a negotiated agreement would lead to better Indigenous governance institutions,[166] which could in turn lead to improvements in the position of Indigenous Australians. Recognition of self-government would also correspond with Indigenous peoples' rights under the United Nations *Declaration on the Rights of Indigenous Peoples*.[167] Contrary to perceptions that self-determination is an overreach and will lead

[159] Loban, above n 112, 22; Mansell, *Treaty and Statehood,* above n 1, 102, 150; Morris, 'Agreement-Making', above n 8, 188–9; Ban, above n 3, 17.

[160] Andren, above n 7, 8; Mansell, *Treaty and Statehood,* above n 1, 106, 113, 120, 128, 133–4, 139; Behrendt, 'Practical Steps Towards a Treaty', above n 21, 19; Davis, 'Treaty, Yeah?', above n 3, 127; Bamblett, above n 15, 12; Mansell, 'Finding the Foundation', above n 10, 88; Auguste, above n 2, 427, 432.

[161] De Santolo, above n 8, 84; Buchan, above n 1, 6; Mansell, *Treaty and Statehood,* above n 1, 128; Bamblett, above n 15, 11.

[162] Williams, above n 1, 5; Mansell, 'Finding the Foundation', above n 10, 84.

[163] Mansell, *Treaty and Statehood,* above n 1, 128–9; Davis, 'To Walk in Two Worlds', above n 43, 10; Mansell, 'Finding the Foundation', above n 10, 84; Davis, 'Treaty, Yeah?', above n 3, 129; Williams, above n 1, 5; Bamblett, above n 15, 11; Mansell, 'Citizenship, Assimilation and a Treaty', above n 32, 15.

[164] Williams, above n 1, 5.

[165] Mansell, 'Finding the Foundation', above n 10, 88; Bradfield, above n 6, 176; Bamblett, above n 15, 11–12; Mansell, *Treaty and Statehood,* above n 1, 128, 132–3, 148.

[166] Williams, above n 1, 5.

[167] *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) arts 18, 23; Dodson and Strelein, above n 7, 834; Mansell, *Treaty and Statehood,* above n 1, 128, 141; Morris, 'Agreement-Making', above n 8, 189.

to Indigenous demands of statehood or secession,[168] it is unlikely that Australia would face harmful consequences, since the treaties and Indigenous rights would remain subject to the Constitution.[169] Allowing Indigenous peoples fulfilment and the opportunity to determine their own destinies in treaties does not threaten settler claims,[170] but instead unifies them with Indigenous claims by creating power-sharing arrangements.[171]

Conservative commentator Keith Windschuttle opposed a treaty on the basis that it would inhibit Indigenous self-determination, citing failed attempts by Indigenous communities to manage their own education services and arguing that a treaty would prevent necessary intervention by non-Indigenous actors.[172] However, Windschuttle failed to appreciate both the ability of and benefits to Indigenous peoples in governing themselves. Much of the contemporary dysfunction and social problems that Indigenous peoples face have resulted from Australia's failure to recognise customary law and negotiate settlements, and institutional inertia has undoubtedly damaged Indigenous community development and cultures.[173] Clearly, Indigenous peoples are best placed to understand the particular challenges they face,[174] and address them in a lasting and productive manner. Research by the Harvard Project on American Indian Economic Development reveals that Indigenous peoples consistently out-perform external decision-makers in deciding on the best developmental approaches in a range of areas, including economic development, social service provision, healthcare and natural resource management.[175] Granting decision-making powers to Indigenous peoples is therefore more likely to address long-term disadvantage and restore Indigenous communities.[176] Consequently, treaties can advance Indigenous claims by acknowledging and respecting Indigenous peoples' capacity for self-government, which can in turn improve their circumstances.

F *Canada*

Indigenous Canadians' self-government jurisdiction has been confirmed in federal

[168] Windschuttle, above n 8, 16. See also Mansell, *Treaty and Statehood,* above n 1, 272.
[169] Mansell, *Treaty and Statehood,* above n 1, 140–1.
[170] Ibid 128, 266–7, 272; Mansell, 'Finding the Foundation', above n 10, 84, 88.
[171] Mansell, *Treaty and Statehood,* above n 1, 140–1, 144, 146, 266–7.
[172] Windschuttle, above n 8, 19–20.
[173] Mansell, *Treaty and Statehood,* above n 1, 5, 11; Davis, 'Treaty, Yeah?', above n 3, 129; Mansell, 'Citizenship, Assimilation and a Treaty', above n 32, 5.
[174] Morris, 'Agreement-Making', above n 8, 190.
[175] Williams, above n 1, 4–5; The Harvard Project on American Indian Economic Development, *About Us,* <https://hpaied.org/about>.
[176] Mansell, *Treaty and Statehood,* above n 1, 5, 11, 147–8; Williams, above n 1, 4–5.

government policy, treaties and settlements.[177] This recognition has been regarded as a meaningful step towards effective and enduring agreements.[178] Land claims agreements have empowered several Indigenous communities to exercise broad political, social and economic powers over their territory.[179] For instance, in the Nisga'a Final Agreement, the federal and provincial governments recognised the governmental power of the Nisga'a Nation.[180] The Liberal Opposition party in British Columbia challenged the Nisga'a Agreement, on the basis that any right of Indigenous peoples to self-government had been extinguished.[181] However, the Nisga'a successfully argued that the acknowledgment of land and hunting rights necessarily required power to create rules and make decisions pertaining to these rights.[182] The Indigenous right to self-government is not absolute, but instead exists within the broader framework of Canadian sovereignty.[183] The Nisga'a government's power and authority is consequently limited to specific areas.[184] In *Campbell v British Columbia (Attorney General)*,[185] the Supreme Court of British Columbia considered that the historical assertion of sovereignty by the British Crown did not exclude self-government by the Aboriginal peoples of Canada,[186] and that authority did reside in the Nisga'a people.[187] Canada's courts have accordingly legitimised Indigenous self-government within the nation.[188] Given that Indigenous peoples and the Canadian settler state have been able to agree to recognise the self-government rights of the former, without compromising the sovereignty of the latter, it is clear that agreements are a reasonable means of settling competing claims. Consequently, Australia should consider adopting a similar approach to Canada, in advancing Indigenous self-government rights through one or more treaties.

VI LAND CLAIMS

A *Australia*

Recognition of Indigenous rights to land and resource wealth is a crucial aspect of

[177] Venne, above n 1, 10; Ban, above n 3, 18; Brennan, Gunn and Williams, above n 3, 339; Bradfield, above n 6, 167–8; Behrendt, 'Practical Steps Towards a Treaty', above n 21, 23–4.
[178] Strelein, above n 8, 93.
[179] Macklem, above n 76, 32.
[180] Brennan, Gunn and Williams, above n 3, 332; Strelein, above n 8, 93.
[181] Strelein, above n 8, 93.
[182] Ibid 93–4.
[183] Brennan, Gunn and Williams, above n 3, 335.
[184] Ibid 335–6.
[185] (2000) 189 DLR (4th) 333.
[186] Brennan, Gunn and Williams, above n 3, 336.
[187] Ibid.
[188] Ibid.

any treaty,[189] as many contemporary problems experienced by Aboriginal and Torres Strait Islander peoples result partly from the loss of their land and resources.[190] The High Court's decision in *Mabo v Queensland (No 2)*[191] and the development of native title were momentous in providing Indigenous Australians with a firmer foundation for a larger decision-making role, and encouraging a more widespread respect for their claims and right to assert their identity.[192] A culture of agreement-making emerged following *Mabo*, as is demonstrated by the proliferation of Indigenous Land Use Agreements and other claims under the native title regime.[193] For instance, the 2015 Noongar settlement in Western Australia was described as 'comparable to a Treaty settlement'.[194] However, the doctrine of native title has failed to deliver a just settlement or entrench Indigenous rights to own, control and develop lands to the fullest extent.[195] Hence, it is valuable to consider other nations' approaches to reconciling land claims.

G *New Zealand*

The Waitangi Tribunal was established in 1975 to investigate alleged Crown breaches of the Treaty of Waitangi.[196] It is empowered to investigate and report on historic and contemporary Māori claims,[197] including those pertaining to land. In addition, it can make recommendations to the New Zealand government.[198] Although the recommendations are not binding and may be rejected by the executive,[199] Māori claimants often utilise Tribunal findings when negotiating historical land settlements.[200] The Tribunal has thus played a fundamental role in evaluating government Treaty policies,[201] engaging with Māori interests and providing assistance with other land settlement processes.

The Waitangi Tribunal is regarded as a global standard in the adjudication of

[189] Baldry, above n 7, 23; Auguste, above n 2, 427; Mansell, *Treaty and Statehood,* above n 1, 5, 120, 128, 133–4, 148; Behrendt, 'Practical Steps Towards a Treaty', above n 21, 18–19.
[190] Mansell, *Treaty and Statehood,* above n 1, 5, 113.
[191] (1992) 175 CLR 1 (*'Mabo*').
[192] Dodson and Strelein, above n 7, 836.
[193] Langton and Palmer, above n 9, 47–8, 50; Mansell, *Treaty and Statehood,* above n 1, 121; Behrendt, 'Practical Steps Towards a Treaty', above n 21, 20–2.
[194] Morris, 'Lessons from New Zealand', above n 7, 79. See also Mansell, *Treaty and Statehood,* above n 1, 121–3, 139.
[195] Mansell, *Treaty and Statehood,* above n 1, 137–8; Dodson and Strelein, above n 7, 836.
[196] Harley, above n 8, 17; Charters and Whare, above n 119, 13.
[197] Charters and Whare, above n 119, 13; De Santolo, above n 8, 74.
[198] De Santolo, above n 8, 72.
[199] Kerensa Johnston, 'Treaty of Waitangi' [2011] *New Zealand Law Review* 211, 214; Charters and Whare, above n 119, 13.
[200] Charters and Whare, above n 119, 13.
[201] De Santolo, above n 8, 74.

Indigenous rights.[202] A Māori claimant group must first register their claim,[203] alleging that the Crown breached the Treaty through laws, policies, or other acts or omissions, resulting in harmful effects.[204] The group must then elect either to have their claims heard by the Tribunal, or enter into direct negotiations with the Crown.[205] The Tribunal process usually lasts for three to four years, involving in-depth research, conferences, hearings and eventual reporting.[206] The perspectives of Māori groups are considered throughout the Tribunal's analysis, and inform its final reports.[207] The processes are flexible, as demonstrated by the admissibility of oral evidence and the ability to stage hearings within the relevant Māori community.[208] This clearly reveals the potential for agreements, and the institutions tasked with their interpretation, to accommodate Indigenous land rights.

The significance of these processes in reconciling Māori and Pākehā interests is undeniable. Thousands of claims have been lodged, and several major settlements have been reached.[209] In March 2014, the government signed an agreement for the return of Crown land sites to the peoples of the Rangitāne o Wairarapa and Rangitāne o Tamaki Nui-ā-Rua *iwi*.[210] Government representatives noted that these peoples had been rendered effectively landless due to Crown action and considered the settlement would aid in acknowledging historical injustices.[211] Furthermore, the 1995 Waikato-Tainui settlement ended years of historical warfare and failed negotiation attempts,[212] reflecting the vital role of land settlements in reconciling demands. The redistribution of colonised lands has been invaluable for Māori reconciliation,[213] and has had a notable, ongoing economic impact on rural communities.[214] Consequently, New Zealand's experience of resolving land claims illustrates the usefulness of negotiated agreements as a strategy for reconciling Indigenous and non-Indigenous interests.

[202] Charters and Whare, above n 119, 13.
[203] De Santolo, above n 8, 77; Johnston, above n 199, 212.
[204] *Treaty of Waitangi Act 1975* (NZ) s 6(1). See also De Santolo, above n 8, 72–3; Johnston, above n 199, 212–14.
[205] Johnston, above n 199, 212; De Santolo, above n 8, 77.
[206] De Santolo, above n 8, 77; Charters and Whare, above n 119, 13.
[207] Charters and Whare, above n 119, 13.
[208] Ibid.
[209] Charters and Whare, above n 119, 13; Harley, above n 8, 18.
[210] Harley, above n 8, 18.
[211] Ibid.
[212] Morris, 'Lessons from New Zealand', above n 7, 75.
[213] Harley, above n 8, 18.
[214] Ibid.

H *Canada*

Historically, treaties were a significant method of settling land claims in Canada. The Crown entered into hundreds of treaties, covering more than half of the country's landmass.[215] Under these agreements, Indigenous signatories ceded their land rights in exchange for treaty-based rights, including reserve land, hunting, trapping and fishing rights, and financial benefits.[216] While the outcomes of historical treaties reflect the imbalance between the parties, they demonstrate the powerful settler state's preparedness to make lasting agreements with weakened Indigenous peoples.[217] The modern treaty era began in the 1970s, after the Supreme Court of Canada recognised the continued existence of Aboriginal title.[218] The Canadian federal government created specific and comprehensive land claims processes as mechanisms for negotiating and managing treaty relationships.[219] Treaty-making thus re-emerged as a method for defining the relationship between Aboriginal peoples and the Canadian government, with the aim of developing a strengthened partnership for the future.[220] Several modern settlements have been concluded, creating exclusive land rights, land management and self-government regimes for Aboriginal peoples in various Canadian provinces and territories.[221]

Canadian settlement processes have been criticised for their difficulty, slow pace, expense, and inability to reconcile differing conceptions of the process and truly protect Indigenous interests from settler governments.[222] Fewer than 30 Aboriginal groups have successfully completed treaties, while many more have not.[223] In some cases, negotiations have been ongoing for decades.[224] Delays have been attributed to factors such as lack of unity among negotiating parties, the need to resolve overlapping claims, third party interests, a lack of political will to complete negotiations quickly and

[215] Macklem, above n 76, 15; Alcantara, above n 89, 344.
[216] Alcantara, above n 89, 344; Macklem, above n 76, 15–16; Mansell, *Treaty and Statehood,* above n 1, 145.
[217] Mansell, *Treaty and Statehood,* above n 1, 145.
[218] *Calder v British Columbia (Attorney-General)* [1973] SCR 313; Behrendt, 'Practical Steps Towards a Treaty', above n 21, 22; Ban, above n 3, 18; Alcantara, above n 89, 345.
[219] Isabelle Schulte-Tenckhoff, 'A Brief Note on Treaties, Real and Fictitious' (2000) 5(1) *Indigenous Law Bulletin* 12; Alcantara, above n 89, 344–5; Behrendt, 'Practical Steps Towards a Treaty', above n 21, 22.
[220] Behrendt, 'Practical Steps Towards a Treaty', above n 21, 22; Langton and Palmer, above n 9, 45; Schulte-Tenckhoff, above n 219, 12.
[221] Christopher Alcantara and Adrienne Davidson, 'Negotiating Aboriginal Self-Government Agreements in Canada: An Analysis of the Inuvialuit Experience' (2015) 48(3) *Canadian Journal of Political Science* 553, 553–4; Ban, above n 3, 18; Alcantara, above n 89, 343; Williams, above n 1, 3; Macklem, above n 76, 20.
[222] Schulte-Tenckhoff, above n 219, 12; Behrendt, 'Practical Steps Towards a Treaty', above n 21, 22; Alcantara, above n 89, 343–4, 346–7, 351, 353–6; Venne, above n 1, 9–11.
[223] Alcantara, above n 89, 356; Alcantara and Davidson, above n 221, 553–4.
[224] Alcantara and Davidson above n 221, 553–4; Alcantara, above n 89, 356.

geographical distances between parties.[225] Further, the process places Aboriginal groups in a weaker position relative to the dominant government actors.[226] Indigenous parties must use Western forms of knowledge and discourse instead of their own, often have to borrow money from the Federal government to cover the costs of negotiation, and are unable to influence the agenda.[227] Additionally, there are fundamental differences in the parties' understandings of the treaty process: settler governments perceive themselves as representatives of the Crown meeting with minority groups, while Aboriginal peoples regard themselves as nations negotiating with the Crown as equals.[228] These differences have also hindered the completion of treaties.[229] Alcantara has suggested that Indigenous groups may benefit from abandoning settlement processes and pursuing alternative means of achieving their goals.[230] Prima facie, this may indicate that treaty processes are not a satisfactory method of reconciling government and Aboriginal land claims.

However, settlements are beneficial in that they allow for consideration of a broad range of issues, direct participation by affected Indigenous groups, certainty in their relationship with the settler state and ratification by elected officials.[231] The rights and guarantees accorded to Aboriginal peoples in Canada under historical, contemporary and future land settlements are constitutionally protected, requiring the Crown to consult with Aboriginal peoples prior to commencing action that may interfere with their rights or interests.[232] Moreover, issues of delay may be overcome by splitting large claim areas and negotiating them in segments,[233] while power imbalances could be addressed by accommodating traditional knowledge in settlement processes to a greater extent. The fact that Aboriginal peoples and the Crown have continued to negotiate treaties, despite the 'fundamental incongruence'[234] in their worldviews, arguably reflects their continued potential. Hence, despite their shortcomings, modern treaty processes are an important method of advancing Indigenous land claims in Canada and balancing them with government interests, and would be valuable in Australia.

[225] Behrendt, 'Practical Steps Towards a Treaty', above n 21, 22; Alcantara, above n 89, 356.
[226] Alcantara, above n 89, 350, 353.
[227] Ibid 353, 356.
[228] Ibid 347.
[229] Ibid 347, 355.
[230] Ibid 343–4, 357–63.
[231] Behrendt, 'Practical Steps Towards a Treaty', above n 21, 22; Borrows, above n 3, 195.
[232] *Constitution Act 1982* ss 35(1), (3); Macklem, above n 76, 21–2, 31–2; Behrendt, 'Practical Steps Towards a Treaty', above n 21, 22; Williams, above n 1, 3.
[233] Behrendt, 'Practical Steps Towards a Treaty', above n 21, 22.
[234] Alcantara, above n 89, 348.

VII BENEFITS FOR NON-INDIGENOUS PEOPLES

In addition to advancing the aims of Indigenous peoples, treaties can be beneficial for settler governments. For instance, they can create legal certainty and provide a firm basis for development initiatives on traditional land. In Canada, modern agreements benefit the federal and subnational governments by removing legal ambiguities surrounding the ownership of Crown land which had not been subject to historical treaties.[235] As a result, that land becomes freely available for economic development.[236] For instance, government interest in building hydroelectric dam facilities on the traditional lands of the James Bay Cree peoples contributed to the conclusion of the James Bay Cree Agreement, while the negotiations surrounding the Inuvialuit Final Agreement benefited from government interest in the oil and gas resources found underneath Inuvialuit territory.[237] Furthermore, research undertaken in the United States suggests that improvements in the economic fortunes of Indigenous reservations also benefits non-Indigenous communities, by improving job opportunities, decreasing burdens on taxpayers and contributing to regional economies.[238] Thus, the potential for treaties to facilitate economic development, and provide concrete legal foundations for access to resources and land, are strong incentives for settler governments to enter into treaties.

VIII CONCLUSION

Aboriginal and Torres Strait Islander peoples have attempted to negotiate agreements with the Australian settler state numerous times throughout the country's history.[239] Thus far, they have not succeeded. However, demands for a treaty persist,[240] and developments in Victoria and the Northern Territory in 2018 highlight the ongoing salience of this issue. Prima facie, the process of negotiating treaties in Australia encounters a multitude of challenges, including resistance to the concept of a 'treaty', the issue of Indigenous sovereignty, deficiencies in representation, systemic bias against Indigenous peoples and political inaction. However, experiences in Canada and New Zealand demonstrate that these obstacles are not necessarily insurmountable.

[235] Alcantara and Davidson above n 221, 554.
[236] Ibid.
[237] Ibid.
[238] Stephen Cornell, 'Nation-Building and the Treaty Process' (2002) 5(17) *Indigenous Law Bulletin* 7, 9.
[239] Morris, 'Lessons from New Zealand', above n 7, 73.
[240] Strelein, above n 8, 96.

The relevance of comparative analysis ought not to be overstated, since Australia's experience is unique.[241] However, it is valuable in providing guidance on the utility of treaties in reconciling the claims of Indigenous peoples and settler states, as well as potential effective approaches to reform.[242] The examples of New Zealand and Canada clearly show that treaties are able to promote Indigenous aspirations, such as acknowledgment, reconciliation, self-government and land rights, whilst preserving settler interests in maintaining unity and sovereignty.[243] Research in North America also demonstrates that treaties can serve settler government interests such as legal certainty and the ability to pursue economic development projects.

Therefore, while the treaty-making process is not simple, rapid or unproblematic,[244] it is a suitable method for reconciling Indigenous and settler interests.[245] Hence, Australia should adopt it, to ensure that the voices of Indigenous peoples are heard and the goal of reconciliation is furthered.[246] It is hoped that the commitments made by the Victorian and Northern Territory governments to treaty negotiation processes will translate into meaningful outcomes for Indigenous peoples in these jurisdictions, and provide a foundation for further agreements between Indigenous Australians and the state, territory and Commonwealth governments. As Mansell writes, '[i]f Australia is to be a country of peoples of many backgrounds sharing a vision of living together in peace and prosperity, then a treaty is the mechanism to achieve it'.[247]

[241] Davis, 'Treaty, Yeah?', above n 3, 129; De Santolo, above n 8, 86.
[242] Brennan, Gunn and Williams, above n 3, 344; Morris, 'Lessons from New Zealand', above n 7, 75, 78; Ban, above n 3, 19–20; Alcantara, above n 89, 343–4; Harley, above n 8, 17; Davis, 'Treaty, Yeah?', above n 3, 129.
[243] Mansell, *Treaty and Statehood,* above n 1, 267; Morris, 'Lessons from New Zealand', above n 7, 80.
[244] De Santolo, above n 8, 85; Harley, above n 8, 19; Behrendt, 'Practical Steps Towards a Treaty', above n 21, 28–9; Langton and Palmer, above n 9, 47; Mansell, *Treaty and Statehood,* above n 1, 119; McLachlin, above n 3, 241, 247; Borrows, above n 3, 191, 193; Bradfield, above n 6, 166, 171.
[245] Mansell, *Treaty and Statehood,* above n 1, 129; Borrows, above n 3, 191; Buchan, above n 1, 7; McLachlin, above n 3, 241, 247; Williams, above n 1, 5.
[246] Davis, 'Treaty, Yeah?', above n 3, 127; Williams, above n 1, 4–5; Harley, above n 8, 17; Behrendt, 'Practical Steps Towards a Treaty', above n 21, 18–19.
[247] Mansell, *Treaty and Statehood,* above n 1, 146.