Chapter 14

Self-Determination and Treaty-Making in Australia

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INTRODUCTION

[14.10] In 2017, around 250 Aboriginal and Torres Strait Islander people 'from all points of the southern sky' gathered on the red dust of Mutitjulu to call for meaningful reform to the Australian Constitution.[1] Grounded in Aboriginal and Torres Strait Islander peoples' inherent right to sovereignty, the Uluru Statement from the Heart explains how constitutional reform is necessary to empower Indigenous peoples to take 'a rightful place in our own country'.[2] Characterising their proposals as 'Voice, Treaty, Truth', the delegates called for a constitutionally entrenched First Nations Voice with the power to advise the Parliament on laws that affect Indigenous peoples, and a Makarrata Commission to oversee a process of treaty-making and truth-telling. As the delegates expressed, these reforms 'capture[] our aspirations for a fair and truthful relationship with the people of Australia'.[3]

The Uluru Statement is a powerful instrument of and demand for self-determination. Instead of engaging with Aboriginal and Torres Strait Islander peoples' nuanced and modest aspirations, however, the Australian government summarily dismissed their proposals.[4] Nonetheless, notwithstanding the Commonwealth government's derisive rejection, the document retains considerable moral and political force as a testament to Aboriginal and Torres Strait Islander peoples' aspirations. Indeed, consistent with those aspirations, several state and territory governments have recently committed to beginning treaty negotiations with the Aboriginal and Torres Strait Islander nations

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1 'Uluru Statement from the Heart', reproduced in Referendum Council, *Final Report of the Referendum Council* (Canberra, 2017) i.

2 'Uluru Statement from the Heart', n 1.

3 'Uluru Statement from the Heart', n 1.

4 Prime Minister, Attorney-General, Minister for Indigenous Affairs, 'Response to the Referendum Council's Report on Constitutional Recognition', Media Release (26 October 2017).

whose traditional lands they claim. While these processes are only in their preliminary stages, they offer the potential to rebuild Aboriginal and Torres Strait Islander nations and re-empower Aboriginal and Torres Strait Islander peoples, enabling them to play a meaningful role in the development and implementation of solutions to problems faced by their communities.

In this chapter, I explore the emerging state and territory treaty processes to examine whether they are capable of realising international human rights law standards concerning self-determination.[5] I begin in [14.20] by outlining one understanding of this complex term. Drawing on international human rights instruments concerning Indigenous peoples, I argue that self-determination encompasses two key elements. As I explain, the principle entails both the right to make decisions over matters that directly concern a particular community, and a broader right to participate in the political affairs of the state more generally. Understood in this light, it is clear why self-determination has been described as the 'river in which all other rights swim'.[6]

In [14.30], I examine Indigenous-State treaties. Treaties are accepted around the world as the means of resolving differences between Indigenous peoples and those who have colonised their lands. They have been reached in the United States, and Aotearoa New Zealand, and are still being negotiated in Canada today. In contrast, despite decades of debate and generations of Indigenous advocacy, no treaty between Aboriginal and Torres Strait Islander peoples and the Australian state has ever been formally recognised. This is important, for as I explain, treaties are a distinct form of legal agreement.[7] Unlike other legal arrangements, treaties recognise that Indigenous peoples possess an inherent right to sovereignty and acknowledge or establish institutional arrangements empowering Indigenous peoples to exercise some form of self-government. For this reason, the state and territory treaty processes have significant potential.

In [14.40], I turn to those state and territory treaty processes. I examine the steps undertaken in Victoria, the Northern Territory and Queensland, as well as the abandoned negotiations in South Australia, and the single

5 In undertaking this task I write as a legal academic whose work examines how Australian law could make space for and recognise Aboriginal and Torres Strait Islander peoples' right to self-governance through Indigenous-State treaty-making. Although Aboriginal and Torres Strait Islander peoples have never ceded sovereignty, Australian law is predicated on the legitimacy of the state; all agreements will, therefore, be subject to and must be consistent with Australian law. I acknowledge the limitations of this approach. See further Irene Watson, 'Aboriginal Reconciliation: Treaties and Colonial Constitutions, "We Have Been Here Forever" ', (2018) 30(1) *Bond Law Review* 7.

6 Mick Dodson, cited in Craig Scott, 'Indigenous Self-Determination and Decolonisation of the International Imagination: A Plea', (1996) 18 *Human Rights Quarterly* 814, 814. See also Brenda Gunn, 'Self-Determination and Indigenous Women: Increasing Legitimacy through Inclusion', (2014) 26 *Canadian Journal of Women and the Law* 241, 260.

7 See Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty', (2018) 40 *Sydney Law Review* 1.

Noongar Settlement in Western Australia. As this study demonstrates, treaty negotiations are politically fragile. They are also legally vulnerable. In [14.100], I identify the lack of constitutional protection of treaty rights in Australia as potentially threatening the viability of the entire endeavour. Consequently, while treaties are capable of meeting Indigenous aspirations, it is too early to tell whether these particular processes will result in meaningful settlements consistent with international human rights law standards on self-determination.

SELF-DETERMINATION

[14.20] The right to self-determination is guaranteed in the *International Covenant on Civil and Political Rights* (ICCPR)[8] and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).[9] Common Article 1 of these two instruments provides that:

> All peoples have a right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

As outlined in the ICCPR and ICESCR, self-determination has both an external and internal dimension. The external aspect is perhaps the most visible. Under this limb, the right to self-determination has supported the process of decolonisation, through which the population of a colony, territorially separated from their colonial state, is entitled to freely determine their political status by choosing whether to secede and form their own state. The external aspect of self-determination has transformed international law and international relations, but it is generally not applicable for Indigenous peoples, except in extreme circumstances.[10] For this reason, I will focus on the internal dimension of self-determination. The internal aspect is generally understood as encompassing the right for all citizens to participate freely without discrimination in the public affairs of the state. The internal dimension of self-determination is thus linked to several other provisions of the two Covenants, including those that guarantee the right to participate in political life on a non-discriminatory basis.[11]

Australia is a party to the ICCPR and ICESCR. Under Art 2(1) of the ICCPR, Australia must 'respect' and 'ensure' all people within its territory and subject to its jurisdiction enjoy these rights. As the Human Rights Committee has explained, this means that Australia must refrain from taking any measures that would violate the rights within the instrument, take action to ensure that

8 *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR).

9 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (ICESCR).

10 Matthias Åhrén, *Indigenous Peoples Status in the International Legal System* (Oxford University Press, Oxford, 2016) 131.

11 ICCPR, Arts 25 and 26; ICESCR, Art 2.

those rights are not inhibited by third parties and 'adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations'.[12] Australia has not fulfilled this obligation because it has not incorporated the Covenant into domestic law.[13] Although this means that the rights enshrined in the ICCPR and ICESCR are not legally enforceable domestically, Australia is required by international law to meet its obligations under the Covenants.

For many years, Australia did not meet this standard. Aboriginal and Torres Strait Islander peoples were denied the vote in federal elections in several states until as late as 1962,[14] and a swathe of legislation and policy discriminated against them in myriad ways. Law reform has ensured that Aboriginal and Torres Strait Islander peoples are today entitled to participate in public affairs without formal discrimination, but this does not mean that Australia satisfies Indigenous peoples' right to self-determination. This is because the right applies in a particular way for Indigenous peoples. Indeed, as Matthias Åhrén has explained, international law recognises that the internal aspect of the right to self-determination entitles Indigenous peoples both to participate in the political life of the state and to 'preserve and develop their own distinct societies, to exist side-by-side with the majority society'.[15]

The dual dimensions of the internal aspect of self-determination are reflected and elucidated in the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP).[16] Article 3 mirrors the language in common Art 1, providing that Indigenous peoples may 'freely determine their political status and freely pursue their economic, social and cultural development'. This broad entitlement is particularised by Arts 4 and 5, which guarantee Indigenous peoples the 'right to autonomy or self-government' in relation to 'internal and local affairs', as well as the right to maintain their distinct political, legal, economic, social and cultural institutions. Consistent with this right, Indigenous peoples are entitled to 'belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned'[17] as well as the right to maintain and manifest their

12 Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [7].

13 *Kioa v West* (1985) 159 CLR 550.

14 *Commonwealth Electoral Act 1962* (Cth), s 2. Aboriginal and Torres Strait Islander peoples entitled to vote in state elections were enfranchised at the federal level in 1949: *Commonwealth Electoral Act 1949* (Cth), s 3. As Indigenous peoples in Queensland, Western Australia and the Northern Territory were precluded from voting in state elections, they remained unable to vote in Commonwealth elections until 1962; Murray Goot, 'The Aboriginal Franchise and Its Consequences', (2006) 52 *Australian Journal of Politics and History* 517, 525.

15 See Åhrén, n 10, 132. See further Ch 5.

16 GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) (UNDRIP).

17 UNDRIP, Art 9.

traditions, languages, customs, histories and cultures.[18] Indigenous peoples are also entitled to participate within the state. Article 5 provides a broad guarantee that Indigenous peoples have the right to 'participate fully…in the political, economic, social and cultural life of the State'. This means that Indigenous peoples are entitled to a nationality,[19] as well to participate in any state process that may affect their rights 'in accordance with their own procedures' and 'decision-making institutions'.[20]

Australia endorsed the UNDRIP in 2009,[21] but it is important to acknowledge that the Declaration is not legally binding. Notwithstanding its formal status, however, the instrument has always enjoyed a distinctive character. Adopted with overwhelming majority support, some scholars have suggested it carries particular authority.[22] Others have argued, and some courts have accepted, that while the Declaration is a soft-law instrument, many of its provisions, including those on self-determination, political participation and consultation reflect hard law norms.[23] In any case, the United Nations Office of Legal Affairs has noted that in practice, declarations are considered 'formal and solemn' instruments, 'suitable for rare occasions when principles of great and lasting importance are being enunciated'.[24] As such, there is 'a strong expectation that Members of the international community will abide by' them.[25] For this reason, the manner in which the Declaration expands upon understandings of self-determination is significant.[26]

James Anaya, the Special Rapporteur on the Rights of Indigenous Peoples, has also explored the dual dimensions of this right. Anaya identifies two distinct strains of substantive (as opposed to remedial) self-determination: constitutive and ongoing. Constitutive self-determination requires that 'the governing institutional order be substantially the creation of processes guided by the will of the people[s]', while ongoing

18 UNDRIP, Arts 11-16.

19 UNDRIP, Art 6.

20 UNDRIP, Arts 18-19.

21 Jenny Macklin, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Official Statement, 3 April 2009).

22 Clive Baldwin and Cynthia Morel, 'Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation', in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, Oxford, 2011) 121, 123-124.

23 James Anaya, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development*, UN Doc A/HRC/12/34 (15 July 2009) 12-15, [38]-[42].

24 Commission on Human Rights, Report of the Eighteenth Session, UN ESCOR, UN Doc E/CN.4/L.610 (2 April 1962) 1, [3].

25 Commission on Human Rights, n 24, 2, [4].

26 See also Harry Hobbs, 'Treaty Making and the UN Declaration on the Rights of Indigenous Peoples: Lessons from Emerging Negotiations in Australia', (2019) 23(1-2) *International Journal of Human Rights* 174.

self-determination ignores the process of creation of the state, inquiring only whether it is one 'under which people may live and develop freely on a continuous basis'.[27] Ongoing self-determination asks whether the state's democratic political order is such that Indigenous peoples (as well as non-Indigenous peoples) are 'able to continue [their] distinct character and to have this character reflected in the institutions of government under which [they] live[]'?[28] As Melissa Castan has noted, in Australia answering this question in the affirmative would require developing 'institutional frameworks that include Aboriginal and Torres Strait Islander peoples in the decisions, processes, lawmaking and administration that impact their lives',[29] as well as recognising and establishing institutions of Indigenous self-governance.[30] As relational instruments reached through political negotiation, treaty-making offers one way to develop those frameworks in a manner consistent with self-determination's underlying themes of autonomy, participation and consultation.

INDIGENOUS-STATE TREATIES

[14.30] Indigenous-State treaties are valuable for another reason. Over hundreds of years, Indigenous peoples and communities have sought and attained many forms of agreements with states.[31] In Australia, for example, there are agreements relating to land rights, joint-management of national parks, and resource benefit-sharing, among many others. These agreements can secure important outcomes and may empower Indigenous peoples to play a meaningful role in the development and implementation of solutions to problems faced by their communities as well as enable those communities to make their own choices over their development. They are not treaties, however. As has been established elsewhere, a treaty is a special kind of agreement that satisfies three conditions.[32] These conditions are drawn from contemporary international human rights instruments concerning Indigenous peoples and modern comprehensive land settlements being negotiated in Canada. As such, these conditions are consistent with the right to self-determination.

27 James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, Oxford, 2004) 105.

28 Anaya, n 27, 106.

29 Melissa Castan, 'Constitutional Recognition, Self-Determination and Indigenous Representative Bodies', (2015) 8(19) *Indigenous Law Bulletin* 15, 16.

30 For discussion on this point, see Harry Hobbs, 'Aboriginal and Torres Strait Islander peoples and Multinational Federalism in Australia', (2018) 27 *Griffith Law Review* 307, 317-321; Alison Vivian et al, 'Indigenous Self-Government in the Australian Federation', (2017) 20 *Australian Indigenous Law Review* 215.

31 See generally Marcia Langton et al (eds), *Settling with Indigenous Peoples: Modern Treaty and Agreement-Making* (Federation Press, Sydney, 2006).

32 Hobbs and Williams, n 7, 7-14.

First, a treaty must recognise Indigenous people as a distinct polity based on their status as prior self-governing communities who owned and occupied the land now claimed by the state. Acknowledgment of this status differentiates Indigenous peoples from other citizens of the state, distinguishes the agreement from other legal forms and reflects international law standards concerning self-determination as affirmed in the UNDRIP.[33] It also redresses previous state actions that may have sought to assimilate or erase Indigenous peoples' political autonomy.

Second, a treaty is a political agreement that must be reached by way of a fair process of negotiation between equals. Negotiation is the appropriate process for resolving differences between Indigenous peoples and the state as it reduces the risk that important rights and interests will be ignored, brings all relevant information and perspectives to the decision-making process and recognises that winner-take-all processes are unlikely to endure or to produce good policy.[34] While securing a fair negotiation process can be challenging, the UNDRIP articulates a standard predicated on respecting the status of Indigenous peoples as a self-determining political community.

Third, a treaty requires both sides to accept a series of responsibilities so that the agreement can bind the parties in a relationship of mutual obligation. As part of this, Indigenous peoples are expected to withdraw all current and future claims relating to historical and contemporary dispossession. But the state must also agree to certain conditions, for a treaty must contain more than symbolic recognition. Although the content of every negotiated settlement will differ in accordance with the aspirations of each Indigenous political community, a treaty must recognise that Indigenous nations retain an inherent right to sovereignty. Consequently, as an exercise of that right, a treaty must empower Indigenous peoples with some form of decision making and control that amounts to a form of self-government. This is both a concomitant of the recognition of an Indigenous people as a distinct political community, as required under the first condition, and a recognition that a treaty is designed to improve the lives of Indigenous communities and to secure the foundations for a just relationship. The effect of this third condition is to exclude from the definition of treaty any agreement struck between Indigenous peoples and governments that acknowledges their distinct status but fails to recognise a domain of autonomy.

Consider the modern treaties currently being negotiated in Canada. Since 1973, 26 comprehensive agreements have been reached in Canada, 18 of which include provisions related to self-government.[35] While each is specific

33 GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) (UNDRIP, Arts 6, 99, 33).

34 See also George Williams and Harry Hobbs, *Treaty* (Federation Press, 2nd ed, Sydney, 2020) 11.

35 Government of Canada, '"Comprehensive Claims", Indigenous and Northern Affairs Canada', available at: https://www.aadnc-aandc.gc.ca/eng/1100100030577/1100100030578.

to the particular First Nation, as well as place, history, and circumstance, they all recognise culturally appropriate forms of decision making, amounting to a degree of self-government in internal and local affairs, and provide recurrent financing as a means to ensure their autonomous functioning.[36] Jurisdiction recognised under each treaty typically includes, the administration of justice, family and social services, healthcare, and language and cultural education.[37] These treaties are limited instruments. Reflecting Indigenous peoples' right to the internal aspect of self-determination, all agreements are reached on the basis of overriding sovereignty of the state. As such, federal and provincial law applies where an inconsistency or conflict arises with Indigenous law-making.[38] However, First Nations participating in these negotiations do not see this condition as inhibiting their aspirations, but as a central element of their goals. On signing the *Nisga'a Final Agreement*, for example, Edward Allen, CEO of the Nisga'a Lisims Government declared that 'we have negotiated our way into Canada, to be full and equal participants of Canadian society'.[39] As the *Final Agreement* noted, the treaty relationship is a symbol of equal partnership, based on 'mutual recognition and sharing'.[40]

Indigenous-State treaties are capable of meeting Aboriginal and Torres Strait Islander peoples' aspirations for self-determination. By definition, treaties recognise Indigenous nations as possessing a right to exercise a degree of autonomy and decision-making authority within the state. Furthermore, in establishing or recognising institutions of self-government, treaties can create links between the state and Indigenous communities, enabling Indigenous peoples to participate fully in the political life of the state, if they choose. However, whether this happens in practice depends on the progress and process of negotiations.

STATE AND TERRITORY TREATY PROCESSES

[14.40] No treaties were signed at first contact or the early years of British settlement in Australia. It is not clear why the British never sought to formally negotiate a treaty with the Indigenous peoples of Australia when

36 In relation to the British Columbia Treaty Process, see Christina Godlewska and Jeremy Webber, 'The Calder Decision, Aboriginal Title, and the Nisga'a', in Hamar Foster, Heather Raven and Jeremy Webber (eds), *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (University of British Columbia Press, Vancouver, 2007) 1, 17-18.

37 See, for example, *Tla'amin Final Agreement*, signed 10 July 2012 (entered into force 5 April 2016) Ch 15.

38 See, for example, *Yale First Nation Final Agreement,* signed 12 March 2011 (entered into force 19 June 2013) Ch 3.11.3. For concerns relating to this issue, see Taiaiake Alfred, 'Deconstructing the British Columbia Treaty Process', (2001) 3 *Balayi: Culture, Law and Colonialism* 37, 39-43.

39 Edward Allen, 'Our Treaty, Our Inherent Right to Self-Government: An Overview of the Nisga'a Final Agreement', (2004) 11 *International Journal on Minority and Group Rights* 233, 234.

40 *Nisga'a Final Agreement*, signed 4 May 1999 (entered into force 11 May 2000) Preamble.

they had a long history of treaty-making in other colonies.[41] However, their failure to do so had significant consequences for Aboriginal and Torres Strait Islander peoples' exercise of political authority. Although some early court decisions flirted with the prospect of recognising Indigenous systems of law and governance,[42] the British never formally accepted Aboriginal and Torres Strait Islander peoples' rights to self-government. Instead, the British contended that the continent was 'practically unoccupied, without settled inhabitants or settled law'.[43] This legal fiction was finally overturned by the High Court of Australia in 1992,[44] but the continuing absence of a foundational settlement recognising Aboriginal and Torres Strait Islander peoples' inherent sovereignty and legitimating the Australian state's claim to political authority is an ongoing concern.

Aboriginal and Torres Strait Islander people have long sought to commence negotiations with the Australian state. In some cases, governments have appeared to entertain such entreaties though no negotiation has ever commenced. In 1979, for instance, the National Aboriginal Conference, an elected Indigenous body advising the federal government, passed a resolution calling for a 'Makarrata' between 'the Aboriginal Nation and the Australian Government'.[45] This resolution led to an inquiry on the idea of a treaty by the Australian Senate's Standing Committee on Constitutional and Legal Affairs. In 1983, the Committee recommended constitutional change in order to implement a 'compact'.[46] In 1988, Prime Minister Bob Hawke adopted the *Barunga Statement*, promising to negotiate a treaty to respect and recognise Aboriginal sovereignty within the term of the Parliament.[47] No treaty eventuated, however, and the idea was quietly shelved in 1991. Calls for a national treaty by the Council for Aboriginal Reconciliation and the Aboriginal and Torres Strait Islander Commission in the new millennium were also dismissed.[48]

41 For suggestions, see Williams and Hobbs, n 34, 27-29.

42 See, for example, *R v Ballard* (Unreported, NSWSC, 13 June 1829); *R v Bonjon* (Unreported, NSWSC, 16 September 1841).

43 *Cooper v Stuart* (1888) 14 App Cas 286, 291 (Lord Watson).

44 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

45 National Aboriginal Conference, 'The Makarrata: Some Ways Forward' (Position Paper presented at World Council of Indigenous Peoples, Canberra, April 1981).

46 Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Two Hundred Years Later… Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Feasibility of a Compact or 'Makarrata' between the Commonwealth and Aboriginal People* (1983) xii, Recommendation 1.

47 Bob Hawke, 'Statement of the Prime Minister: Barunga Festival', (1988) 2(6) *Land Rights News* 22.

48 Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge* (Final Report of the Council for Aboriginal Reconciliation, 2000) 106, Recommendation 6; Hannah McGlade (ed), *Treaty: Let's Get It Right!* (Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2003).

In recent years, the idea of a treaty has been renewed by a long-running national debate on constitutional recognition of Aboriginal and Torres Strait Islander peoples.[49] The federal government may have rejected the Uluru Statement from the Heart's call for a Makarrata Commission, but over the last few years, several states and territories have officially committed to enter treaty negotiations. Reflecting the political nature of these agreements, however, the situation is complex and subject to change. In June 2018, for instance, a newly elected Liberal South Australian government formally abandoned the treaty process.[50] Nonetheless, notwithstanding this step backwards, treaty processes are continuing in Victoria, the Northern Territory and Queensland, and leaders in several other States have indicated support. Significantly, treaties are not only the province of Labor governments. As I have argued previously, the size and scope of a recent agreement signed between the Noongar people and the Liberal Western Australian government signifies it as Australia's first treaty.[51] Each of these processes will be outlined in turn.

Victoria

[14.50] The treaty process in Victoria emerged in early 2016. In February of that year, representatives of Victorian Aboriginal communities met with government and expressed their support for a treaty. These views were reiterated at a State-wide Aboriginal Victoria Forum held in May 2016, where 500 participants unanimously agreed to advance self-determination and a treaty by establishing an Aboriginal representative body.[52]

The State government responded by establishing an Aboriginal Treaty Working Group to lead consultations with Aboriginal Victorians over the design of an appropriate body to represent them in treaty negotiations and advise the Minister for Aboriginal Affairs on progress towards a treaty, as well as 'the broader self-determination agenda'.[53] The Working Group was composed entirely of Aboriginal people, with a balance between male and female representatives. It was not clan-based, however. Rather it comprised representatives of Victorian Aboriginal community organisations and members appointed in their individual capacity by the Minister for

49 See generally Megan Davis and George Williams, *Everything You Need to Know About the Referendum to Recognise Indigenous Australians* (University of New South Wales Press, Sydney, 2015).

50 Michael Owen, 'Aboriginal People Failed by "Expensive Gesture" Treaties', *The Australian* (11 June 2018), available at: https://www.theaustralian.com.au/national-affairs/indigenous/aboriginal-people-failed-by-expensive-gesture-treaties/news-story/84b000a2f0b81c82801d93cc9a45cb3c.

51 Hobbs and Williams, n 7. Compare Hannah McGlade, 'The McGlade Case: A Noongar History of Land, Social Justice and Activism', (2017) 43 *Australian Feminist Law Journal* 185, 210.

52 Aboriginal Victoria, *Summary of the Aboriginal Victoria Forum, 26-27 May 2016, Melbourne* (2016) 1.

53 Aboriginal Victoria, *Aboriginal Treaty Interim Working Group, Terms of Reference* (2017).

Aboriginal Affairs. Some Aboriginal Victorians were concerned that this compromised their cultural integrity; in April 2017, Gunnai and Gunditjmara woman Lidia Thorpe resigned from her position on the Working Group on this basis.[54]

Two rounds of community consultations across 16 locations were held in 2016 and 2017.[55] In an effort to 'allow the community to drive the next steps in the Treaty process',[56] individuals were also encouraged to hold 'Treaty Circles'. These community-run conversations were coordinated and supervised by self-nominated individuals who held discussions in their local area, with the aim of 'ensuring maximum participation by as many members of the Victorian Aboriginal community as possible'.[57] An online 'Message Stick' was created to allow those unable to attend a community consultation or Treaty Circle to have their say as well. Approximately 7,500 Aboriginal Victorians (out of a 2016 self-reported total of 47,788) were consulted or engaged directly through this process.

The results of these consultations were presented to an Aboriginal Victoria Forum at the end of April 2017 where the State government committed to provide $28.5 million to progress the treaty process in the 2017/18 budget.[58] This funding included provision for an Aboriginal Community Assembly to discuss and provide further advice to the Working Group on the design of a representative body, and a Victorian Treaty Advancement Commission (VTAC) to operationalise the outcomes of the Community Assembly. The VTAC is empowered to guide the establishment of the representative body, maintain momentum for treaty, consult with Aboriginal Victorians, provide research and advice on the process, and keep all Victorians informed.[59] When the representative body was established, VTAC was abolished.

All Aboriginal Victorians aged over 18 years were eligible to apply for membership in the Aboriginal Community Assembly. Three Aboriginal Victorians reviewed all applications, and 33 people were eventually

54 Rachel Hocking, 'Where Is Treaty at in Victoria', *NITV News* (17 April 2017), available at: http://www.sbs.com.au/nitv/nitv-news/article/2017/04/17/where-treaty-victoria. Thorpe became the first Aboriginal woman elected to the Victorian Parliament after a by-election in November 2017.

55 Aboriginal Treaty Working Group, *Aboriginal Community Consultations on the Design of a Representative Body* (December 2016); Aboriginal Treaty Working Group, *Aboriginal Community Consultations on the Design of a Representative Body – Phase 2* (June 2017).

56 Aboriginal Treaty Working Group, *Treaty Circle Facilitators Handbook* (2017) 27.

57 Aboriginal Treaty Working Group, n 56.

58 'Victorian Government Commits $28.5M for Treaty Discussions, amid Confusion and Criticism', *NITV News* (2 May 2017), available at: http://www.sbs.com.au/nitv/nitv-news/article/2017/05/01/victorian-government-commits-285m-treaty-discussions-amid-confusion-and-criticism.

59 Aboriginal Victoria, 'Victorian Treaty Advancement Commission', available at: https://www.vic.gov.au/aboriginalvictoria/treaty/victorian-treaty-advancement-commission.html.

selected to ensure accurate demographic representation in the Assembly.[60] In November and December 2017, 31 of these members 'from across Victoria with a diversity and wealth of cultural knowledge, expertise and experience' met over six days to deliberate and provide their advice.[61] That same month, Jill Gallagher was appointed the Victorian Treaty Advancement Commissioner.[62]

In June 2018, the process took a considerable step forward, with the Victorian Parliament passing Australia's first treaty Bill. The *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) creates a legislative basis for negotiating a treaty with Aboriginal people in the State. Under the Act, the government must recognise an Aboriginal-designed representative body – known as a First People's Assembly – that will administer a self-determination fund to support Aboriginal Victorians in treaty negotiations.[63] The First People's Assembly will also work with government to establish a treaty negotiation framework, which must accord with several guiding principles set out in the Act: self-determination and empowerment; fairness and equality; partnership and good faith; mutual benefit and sustainability; and transparency and accountability.[64]

In February 2019, details concerning the state-wide representative body were announced. Established as a not-for-profit company rather than under legislation, the First Peoples Assembly of Victoria is independent of government. Cultural authority will also be respected: 12 representatives will be elected from 12 formally recognised traditional owner groups with native title, *Traditional Owner Settlement Act*,[65] or Registered Aboriginal Party[66] status. Additional reserved seats will be added as more groups are added in the future. A further 21 representatives will be elected from five voting regions based on the Aboriginal population of the region. An Elders Voice will also be established to guide the Assembly's work and provide cultural strength and integrity, though its form is still being discussed.[67] At

60 *Aboriginal Community Assembly Information Handbook: Continuing on the Journey towards Treaty* (2017) 15.

61 Aboriginal Community Assembly, *Final Statement and Recommendations to the Aboriginal Treaty Working Group* (December 2017) 3.

62 Reconciliation Victoria, 'Jill Gallagher Named Victorian Treaty Advancement Commissioner', available at: http://www.reconciliationvic.org.au/news/jill-gallagher-named-victorian-treaty-advancement-commissioner.php.

63 *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), ss 8-10.

64 *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), ss 21-25.

65 See *Traditional Owner Settlement Act 2010* (Vic), s 3 (definition of 'traditional owner group entity').

66 See *Aboriginal Heritage Act 2006* (Vic), s 4 (definition of 'registered Aboriginal party'), Pt 10.

67 Federation of Victorian Traditional Owner Corporations, 'Talking Treaty: What Will the Proposed First Peoples Assembly of Victoria (Assembly) Do?', (Fact Sheet, 20 April 2019), available at: https://www.fvtoc.com.au/blog/2019/treaty-assembly-fact-sheet.

the time of writing in mid 2019, elections for the body were being held. In order to maintain the Assembly's independence, the election was managed by VTAC and conducted by a private company, instead of the Australian Electoral Commission.

The First Peoples Assembly will not negotiate for Aboriginal Victorians, but will simply assist in developing an appropriate framework. Significantly, the First Peoples Assembly will not then be disbanded but will continue to serve as a standing representative body of Aboriginal Victorians – a Voice to the Victorian Parliament.[68] In the meantime, Aboriginal Victorians will need to organise their negotiating position, decide what treaty means to them, and what form a treaty or treaties should take. The final step will involve negotiations between individual First Nations and the State. Based on the Canadian example, this stage could take many years.

Northern Territory

[14.60] In the Northern Territory, the prospect of a treaty was initially raised in 2016, but a process did not formally commence for several years. In September 2016, incoming Northern Territory Chief Minister Michael Gunner declared that his Government would establish a subcommittee on Aboriginal affairs to 'drive public discussions on a treaty' between the Territory and Aboriginal peoples.[69] No firm commitment followed this announcement, but treaty remained on the government's agenda. Nonetheless, concerns over the slow process led the Northern Land Council to hold a treaty workshop in Darwin in February 2018, where representatives of the government reiterated their support for a treaty process. Renewed discussion eventually led to a meeting between the four Aboriginal Land Councils and the Northern Territory government in April 2018, where the parties agreed to establish a working group to develop a Memorandum of Understanding (MoU) about how a treaty between the government and the Territory's Aboriginal people should progress. Chief Minister Gunner and representatives of the four Land Councils signed the MoU at the Barunga Festival in 2018 – 30 years after Prime Minister Bob Hawke's promise that Australia would enter into a treaty with Indigenous peoples.[70]

The Barunga Agreement is intended to develop and implement a consultation process that will lead to a treaty negotiation framework. That consultation will be led by an independent Treaty Commissioner and is expected to take several years. The signatories also agreed to several guiding principles, including that Aboriginal Territorians never ceded sovereignty of their

68 Sophie Biss, 'A Conversation with Jill Gallagher: Treaty for Victoria', *Victorian Women's Trust Journal* (Blog Post, 5 July 2019), available at: https://www.vwt.org.au/a-conversation-with-jill-gallagher-treaty-for-victoria.

69 Helen Davidson, 'Northern Territory Labor Government Announces Majority Female Cabinet', *The Guardian* (12 September 2016), available at: https://www.theguardian.com/australia-news/2016/sep/12/northern-territory-labor-government-announces-majority-female-cabinet.

70 Hawke, n 47.

lands, seas, and waters, and that a Northern Territory Treaty should benefit all Territorians. The Agreement is not legally enforceable but all parties have signalled their commitment to implement its provisions in a 'transparent, consultative and accountable manner'.[71] The *Barunga Agreement* envisages treaty as a substantive concept that will empower Aboriginal communities with real decision-making authority. At the same time, it understands treaty as offering the potential to ground 'lasting reconciliation between the First Nations of the Territory and other citizens with the object of achieving a united Northern Territory'.[72]

In February 2019, Yawuru professor of Law Mick Dodson was appointed Treaty Commissioner.[73] Over 12 months, Dodson will consult with Aboriginal Territorians to understand their aspirations for treaty and consider an appropriate model, including whether there should be one-Territory wide treaty or multiple treaties. Within 18 months after the initial period of negotiations, Dodson must provide recommendations to the government about the best model for future negotiations. While the process is still in its preliminary stages and will be based on the views of Aboriginal Territorians, Dodson has identified that any treaty must acknowledge past injustices, as well as provide material benefits, likely including financial compensation.[74]

Queensland

[14.70] Queensland has also declared a commitment to treaty, though the process is in its very preliminary stages. It began in July 2019, when Queensland Deputy Premier Jackie Trad announced that the State would begin a conversation about a pathway to treaty with Aboriginal and Torres Strait Islander peoples.[75] In order to progress this commitment, the government established a bipartisan eminent panel of Indigenous and non-Indigenous leaders, co-chaired by Indigenous academic Jackie Huggins and former Commonwealth Attorney-General Michael Lavarch. The panel engaged with key stakeholders across the State in the second half of 2019. Following the approach in Victoria, a Treaty Working Group was also established. The Working Group led consultations with Aboriginal and Torres Strait Islander Queenslanders, allowing them to discuss and reach agreement on what a

71 *The Barunga Agreement* (8 June 2018) 13.

72 *The Barunga Agreement*, n 71, 6.

73 '"Unfinished Business": Mick Dodson Appointed NT Treaty Commissioner', *NITV* (18 February 2019), available at: https://www.sbs.com.au/nitv/nitv-news/article/2019/02/18/unfinished-business-mick-dodson-appointed-nt-treaty-commissioner.

74 Jano Gibson, '"Practical Benefits" and Possible Compensation on the Table for NT Treaty: Commissioner Mick Dodson', *ABC News* (18 February 2019), available at: https://www.abc.net.au/news/2019-02-18/possible-compensation-on-the-table-for-nt-treaty:-mick-dodson/10823096.

75 Annastacia Palaszczuk, Jackie Trad and Leeanne Enoch, 'Historic Signing of "Tracks to Treaty" Commitment', Media Release (14 July 2019).

treaty might contain.[76] In February 2020, the Eminent Panel submitted their advice and recommendations to the Queensland government. In August 2020, the government released their response, along with a statement of principles to guide the process moving forward.[77] Negotiations are unlikely to begin for many years.

South Australia

[14.80] In December 2016, the South Australian Labor government announced that it would commence discussions with three Indigenous nations whose traditional land sits within state boundaries, with the aim of finalising a treaty.[78] The process began two months later, when Dr Roger Thomas, a senior Kokatha and Mirning man, was appointed as Treaty Commissioner to lead consultation between Aboriginal people and the State Government on a framework for a treaty.[79] In only a few months, Dr Thomas and his team met with over 600 people and received over 280 written submissions and responses to surveys, overwhelmingly supportive of a treaty.[80] Based on the Treaty Commissioner's July 2017 report, the government invited Aboriginal nations in South Australia to submit expressions of interest to 'enter a new relationship' with the State.[81] Following this period, a newly established Aboriginal Treaty Advisory Committee recommended three Aboriginal nations – the Narungga, Adnyamathanha and Ngarrindjeri Nations – take part.[82] On 22 September 2017, the first negotiations in Australia between a government and an Indigenous nation explicitly understood as treaty discussions commenced between South Australia and the Ngarrindjeri Nation.[83]

76 Department of Aboriginal and Torres Strait Islander Partnerships (Qld), *Path to Treaty*, available at: https://www.datsip.qld.gov.au/programs-initiatives/tracks-treaty/path-treaty.

77 Queensland Government, *Treaty Statement of Commitment and Response to Recommendations of the Eminent Panel* (August 2020).

78 Kyam Maher MLC, 'Treaty Speech' (Parliament House, Adelaide, 14 December 2016), available at: https://statedevelopment.sa.gov.au/upload/aboriginal-affairs/treaty-speech.pdf?t=1504335059137.

79 Ruby Jones, 'Indigenous Treaty Commissioner Roger Thomas Appointed in South Australia', *ABC News* (28 February 2017), available at: http://www.abc.net.au/news/2017-02-28/treaty-commissioner-roger-thomas/8310348.

80 Roger Thomas, *Treaty Talk: Summary of Engagements and Next Steps* (Office of the Treaty Commissioner, July 2017) 6.

81 Government of South Australia, Department of State Development, 'Treaty Discussions', available at: https://statedevelopment.sa.gov.au/aboriginal-affairs/aboriginal-affairs-and-reconciliation/initiatives/treaty-discussions.

82 Government of South Australia, Department of State Development, 'Treaty Commissioner', available at: https://statedevelopment.sa.gov.au/about-us/our-partners/treaty-commissioner.

83 Nick Grimm, 'Ngarrindjeri Regional Authority and Aboriginal Affairs Minister Meet to Mark "Historic" Negotiation', *The Murray Valley Standard* (25 September 2017), available at: http://www.murrayvalleystandard.com.au/story/4941413/nations-first-treaty-talks-commence/.

In March 2018, the Labor government was defeated in the state election, fuelling doubts about the viability of the process. The new Premier initially placed negotiations on hold, pending a report from Dr Thomas.[84] However, just two months later and on the same day that the Northern Territory government signed the Barunga Agreement, Premier Marshall declared State-based treaties 'expensive gestures' and announced that his government would abandon the process.[85] This abrupt ending reveals the fragility of treaty processes. Treaties are political agreements that require ongoing support from both sides. Only political and moral pressure, not legal obligation, can push participants to the table.

Western Australia

[14.90] Western Australia has not commenced a formal treaty process. However, the size and scope of a native title agreement signed between the Noongar people and the Western Australian Liberal government in 2015 qualifies it as Australia's first treaty.[86] The largest and most-comprehensive agreement to settle Aboriginal interests in land in Australian history, the *Noongar Treaty* involves 30,000 Noongar people, covers around 200,000 km^2 and includes agreement on rights, obligations and opportunities relating to land, resources, governance, finance and cultural heritage, amounting to a total value of about $1.3 billion. In exchange for this package, the Noongar people have agreed to surrender all current and future claims relating to historic and contemporary dispossession.

Conducted under the framework of the *Native Title Act 1993* (Cth), the Settlement takes the form of six Indigenous Land Use Agreements (ILUAs). Those agreements recognise the Noongar people as a distinct political community, were reached via a process of political negotiation respectful of each party's equality of standing and settle Noongar and non-Indigenous claims by recognising and establishing a limited form of self-governance as well as providing financing for the autonomous operation of that administration. It is important to acknowledge that the Noongar Treaty does not recognise self-government rights to the same extent as modern treaties in Canada. By formalising mechanisms of self-governance, however, it may lead to more extensive settlements in the future.[87]

That the settlement is properly considered a treaty was recognised by several parliamentarians at the time. Upon notification that the Noongar people had

84 Rebecca Puddy, 'South Australia's Treaty Negotiations on Hold while Premier Considers Their Future', *ABC News* (30 April 2018), available at: http://www.abc.net.au/news/2018-04-30/treaty-negotiations-on-hold/9708458.

85 Owen, n 50.

86 Gian De Poloni, 'WA Premier Signs $1.3 Billion Noongar Native Title Settlement', *ABC News* (8 June 2015), available at: http://www.abc.net.au/news/2015-06-08/premier-signs-noongar-native-title-settlement/6530434.

87 Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Federation Press, Sydney, 2018) 238.

voted to accept the Settlement, Premier Colin Barnett issued a press release, noting that the 'break-through agreement' was 'a historic achievement in reconciliation' and an 'extraordinary act of self-determination by Aboriginal people…provid[ing] them with a real opportunity for independence'.[88] Later that year, Deputy Western Australia Opposition Leader Roger Cook, explained in Parliament that, 'by its very nature, the Noongar agreement is in fact a classic treaty'.[89]

Once again, however, revealing some of the challenges in treaty-making, the Settlement has not yet taken effect. In February 2018, several objections were lodged by Noongar people against registering the ILUAs with the National Native Title Tribunal.[90] Those objections were struck out and the six ILUAs were finally registered on the Native Title Register in October 2018.[91] However, applications seeking judicial review of the Native Title Registrar's decision were immediately lodged in the Federal Court.[92] It was not until December 2019 that the Federal Court dismissed the final objections. Those opposing the deal have sought leave to appeal to the High Court of Australia. The settlement will only commence if leave is not granted or their application is dismissed.

LEGAL PROTECTION

[14.100] Political will remains a key challenge for the success of the state and territory treaty processes. Other challenges also exist, including the practical difficulties of negotiating within a federation, as well as determining how to recognise Indigenous sovereignty in any legal instrument. One further issue, considered here, is a legal one. Unlike the situation in Canada where modern treaty settlements are constitutionally protected,[93] in Australia, the

88 Department of Premier and Cabinet (WA), 'Noongars Vote to Accept Historic Offer', Media Statement (30 March 2015), available at: https://www.mediastatements.wa.gov.au/Pages/Barnett/2015/03/Noongars-vote-to-accept-historic-offer.aspx.

89 Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 November 2015, 8688.

90 Victoria Laurie, 'Objections Put Noongar Native Title Deal on Hold', *The Australian* (18 February 2018), available at: https://www.theaustralian.com.au/news/nation/objections-put-noongar-native-title-deal-on-hold/news-story/b963893d31a5a75198fb3267eee0cc82; South West Native Title Settlement, 'ILUA Registration' (7 September 2018), available at: https://www.dpc.wa.gov.au/swnts/Indigenous-Land-Use-Agreements/ILUA-Registration/Pages/default.aspx.

91 National Native Title Tribunal, 'South West Indigenous Land Use Agreements Registered', Press Release (17 October 2018), available at: http://www.nntt.gov.au/News-and-Publications/latest-news/Pages/South-West-Indigenous-Land-Use-Agreements-Registered.aspx.

92 Calla Wahlquist, '"It Is Not About Money": Australia's Largest Native Title Settlement Challenged Again', *Guardian Australia* (30 November 2018), available at: https://www.theguardian.com/australia-news/2018/nov/30/it-is-not-about-money-australias-largest-native-title-settlement-challenged-again.

93 *Constitution Act 1982*, s 35. The protection of treaty rights is not absolute. The Supreme Court has developed a two-part test to assess whether infringement is permissible: *Sparrow v The Queen* (1990) 1 SCR 1075.

Commonwealth Parliament may invalidate any eventual settlement. This is because there is no legal protection or recognition of Indigenous rights, let alone a Bill of Rights, in the Australian *Constitution*.

Section 51(xxvi) of the *Constitution* empowers the federal Parliament with the authority to make laws with respect to the people of any race. Under s 109 of the *Constitution*, Commonwealth legislation prevails over inconsistent State legislation to the extent of any inconsistency. Although there is some uncertainty as to the scope of s 51(xxvi), the orthodox position is that the provision permits Parliament to enact legislation that imposes a disadvantage on Aboriginal and Torres Strait Islander peoples.[94] This suggests that the Parliament could legislate to deny the effectiveness of the terms of a treaty signed by any State. It also means that any state or territory treaty must conform to existing Commonwealth legislation.

Even a Commonwealth treaty will not be legally impregnable. In the absence of constitutional protection of treaty rights, a future federal Parliament could enact legislation to abrogate any national treaty settlement as well. In this sense, the constitutional position of treaties with Aboriginal and Torres Strait Islander peoples will be similar to that in the United States, where the Supreme Court has held that treaty rights are defeasible by Congressional action.[95] This vulnerability could only change if a constitutional amendment limited s 51(xxvi), inserted a protection against racial discrimination, or protected treaty rights. In that absence, any Commonwealth treaty – like any State or Territory treaty – will be vulnerable to federal legislative override.

In Australia, treaties may therefore only be protected through political conventions. A political cost must be imposed on a government that contemplates abrogating its terms. One way that this could be imposed is via constitutional entrenchment of a First Nations Voice.[96] Proponents of the Voice have suggested that a national Indigenous representative body empowered to advise the Parliament on issues of concern to Aboriginal and Torres Strait Islander peoples will contribute to the development of a political convention that inhibits the federal Parliament from enacting legislation contrary to Indigenous peoples interests.[97] This may be correct. However, whether such a convention develops relies on several features of the representative body, including its legitimacy within the Indigenous community, its credibility within government and the public at large, and the personal relationships between members of the body and Parliament. Problematically, political conventions can be displaced and Australian governments have historically

94 *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (1998) 195 CLR 337.

95 *United States v Whe*eler (1978) 435 US 313, 323 (Stewart J).

96 'Uluru Statement from the Heart', n 1.

97 See, for example, Parliamentary Joint Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Interim Report* (2018) 40-45, [3.98]-[3.115].

obtained political mileage by acting contrary to the interests of Aboriginal and Torres Strait Islander peoples.[98] As such, it is impossible to state with any certainty that a constitutionally entrenched First Nations Voice would prevent this. An Australian treaty will always be vulnerable to unilateral amendment.

CONCLUSION

[14.110] In this chapter, I have outlined the emerging steps towards treaty in Australia and considered whether these processes are capable of meeting international human rights law standards concerning Indigenous self-determination. I have argued that although the state and territory treaty processes are only in their preliminary stages and remain vulnerable to political and legal change, they could eventually lead to innovative settlements that secure important outcomes for the Aboriginal and Torres Strait Islander communities who sign them. Assuming that meaningful agreements are eventually reached, negotiated treaties will expressly recognise the inherent sovereignty of Aboriginal and Torres Strait Islander peoples. This will rectify a continuing injustice, but it will also satisfy Indigenous peoples' right to self-determination. Finalised treaties could empower Aboriginal and Torres Strait Islander nations to exercise a form of self-government over internal and local affairs, as well as participate in the political life of the Australian state.

Additional Resources

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Roger Thomas, *Talking Treaty* (Office of the South Australian Treaty Commissioner, 2017).

George Williams and Harry Hobbs, *Treaty* (2nd ed, Federation Press, 2020).

98 George Williams, 'Constitutional Recognition by Way of an Indigenous Advisory Body?', (2015) 8(19) *Indigenous Law Bulletin* 12, 12.