

HYLLUS MARIS LECTURE LATROBE UNIVERSITY

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From Here To A Treaty

IN FAVOUR OF A TREATY

Reconciliation is on everybody's lips. That much is obvious from the outstanding turnout at the reconciliation walk in Sydney. There have been equally significant walks for reconciliation in other capital cities and regional areas.

But how do we achieve reconciliation? Some argue it is enough if the goodwill expressed by walkers for reconciliation is captured in a document of reconciliation. For them it is the show of public support that is both the beginning and the end. I disagree.

Reconciliation must have more substance. The goodwill expressed provides the mandate to achieve reconciliation. It virtually begs for some strategy to translate the goodwill into something tangible - something that will bring about reconciliation as a result of the strategy.

I said at the Sydney walk for reconciliation that a treaty was the appropriate vehicle, and I am even more convinced about it now.

As each term of government concludes we again remind ourselves that governance of Aboriginal affairs in Australia is ultimately a shrewd game between the major political parties.

Let me quickly recount some recent history to make my point.

In 1967, a significant step forward began with the change in the Constitution to remove discriminatory provisions, especially the removal of the restriction on Commonwealth legislation for Aboriginal and Torres Strait Islander people.

This marked the period of the Land Rights campaigns, of the late 1960's and the 1970's.

In the space of a decade, mostly between the years 1973 to 1976, we saw for the first time in Australia, real steps taken to recognise equal rights in Australia. The government passed legislation such as:

The Aboriginal Loans Commission Act 1974;
 The Aboriginal Land Fund Act 1974;
 The Racial Discrimination Act 1975; and
 The Land Rights (Northern Territory) Act 1976.

Also the government passed two laws which served to override State governments. They were:

The Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975;
 and
 The Aboriginals and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978.

The now-departed Senator Neville Bonner (with my respects to his spirit and his memory) as a conservative member of the Senate said in a speech to the Senate on 19 September 1974:

I do not deny the present government, in many areas of Aboriginal and Torres Strait Islander affairs, has instigated superbly beneficial schemes to improve my fellow Aborigines' and Torres Strait Islanders' way of life within our broader Australian community. But it is truly to no avail, dignity-wise, when it is but an allocating of money for a disadvantaged people because it is but a form of charity. We, the indigenous people, for far too long have been the recipients of charity – the charity of the government of the day, charity, with its modern day connotations implying a handout mentality....

I am asking for an amount of money to be set aside from the annual national budget which will become the true entitlement of the Aborigines and Torres Strait Islanders...

By the end of the 1970s discussion in Aboriginal affairs had moved onto a treaty. The National Aboriginal Conference in 1979 set out its procedures for establishing a treaty.

The NAC proposed to summon a convention of representatives and negotiators chosen by communities; organise the negotiations with government; and submit a Treaty, Covenant or Convention to Parliament for ratification;

The NAC wanted the treaty to provide:

1. The protection of languages;

2. Restoration of land in accordance with the Woodward Commission recommendations;
3. Regulation of mining and exploration on Aboriginal land;
4. Compensation for loss of lands and way of life; and
5. Control of Aboriginal affairs.

Then, in August 1979, the Aboriginal Treaty Committee – led by Dr Coombs – placed an advertisement in the National Times headed:

“We Call For A Treaty Within Australia, Between Australians”

The treaty petition was signed by many noted academics, historians, doctors, unionists, authors, artists, economists and other community-minded people.

So, clearly, by 1980, Australia had examined the its history and foundation, and had at last arrived to face the challenge for a fair, just and dignified nation.

So where has the movement for a treaty fallen down? I myself am not sure.

I believe that the examination of the issues had occurred and the ‘cloak of ignorance’ had been lifted. The next steps relied upon the political will.

We know that in 1983 the Australian Labor Party was elected to government, and that it would enjoy thirteen year in power. However the delivery of a Labor government did not necessarily advance the treaty cause.

The Prime Minister considered from the outset that mention of a ‘treaty’ was too radical for the public and contemplated some other expression, like ‘compact’.

The worst blow to the Aboriginal rights movement was the defeat, within the Labor Party itself, of national Land Rights legislation. In 1985 the government simply decided that, to proceed with national land rights legislation, was to risk the chances of the Bourke government in Western Australia being returned to office.

Because of Labor’s pragmatic approach the national land rights legislation has disappeared entirely, and we have inherited, against our will, a much weaker law known as the Native Title Act 1993.

I say ‘much weaker’ because the Labor government’s national land rights legislation was to be founded upon five principles:

1. Ownership of Aboriginal reserve lands and ability to claim vacant crown lands;
2. Compensation;
3. Protection of sites of cultural heritage significance;
4. Control of mining; and

5. Access to mining royalty equivalents

Under the Labor government which survived to 1996, there was a second reversal of policy. The Aboriginal Social Justice Package was promised by Prime Minister Keating in his second reading speech when the Native Title Bill was introduced into parliament in 1993.

He stated:

We will, in consultation and negotiations with ATSIC and Aboriginal and Torres Strait Islander organisations, look at ways to increase the participation of Aboriginal people in Australian economic life and to safeguard and develop Aboriginal and Torres Strait Islander culture. We will invite ATSIC and the Council for Aboriginal Reconciliation, in consultation with Aboriginal and Torres Strait Islander organisations, to develop proposals and to provide formal advice... What I will be looking for is constructive, realistic proposals, which will develop a positive community consensus and contribute to a lasting reconciliation.

In 1995 ATSIC presented to the Prime Minister its formal report setting out the further measures that the government should consider to address the situation of Aboriginal and Torres Strait Islander people. The report stated:

Our focus is on institutional, structural, collaborative, cooperative reform. It is about a fundamental shift from welfare to basic rights, from dependence to autonomy, from government assistance to power. Central to the social justice agenda is self-determination. (Preface, Recognition Rights & Reform, ATSIC, 1995)

Again, this proposal was to fail. The government formally announced some years later that the 'social justice package' was no longer a project of government.

The information that I have presented here is selective, but I hope that it is sufficient to make my point.

In summary, I have proposed that a legitimate movement for a treaty was active in the late 1970's. That movement has been diverted through other agendas, mostly led by government, which continually returned to the same proposition – that a national settlement had to be made – only to fail each time.

Once again we find ourselves at the edge of going onwards to true self-determination, but we are at risk of turning back for some other option. There is no other option, for all endeavours come back to the same issues. Issues of Aboriginal control, respect for indigenous rights, preservation of Aboriginal and Torres Strait Islander ways of life, and our economic independence.

I intentionally refer to a treaty, because I do not want the nervous people, who say that the ‘treaty’ word will only scare away support, to divert our agenda again. I am not convinced that each time we have turned away from the proposition of a true settlement that we have gotten closer to a settlement by other means.

The diversionary tactics do us no favours. I question whether those who seek to divert the agenda are in fact being consumed by their own importance, their own relevance and their own perspective, rather than worrying about those who are the disadvantaged and powerless.

I turn to the issue of what is a treaty. This has been one of the scare tactics – to say that a treaty is a legal impossibility. I will try to give some explanation.

WHAT IS A TREATY

A treaty is an agreement between two parties at the highest level seeking to establish a relationship between themselves. In this case it would be the Australian Government with Aboriginal and Torres Strait Islander peoples.

That relationship could include the role and responsibility of federal, state and local governments on the one hand, and Aboriginal communities on the other, when dealing with issues directly affecting Aboriginal people.

For instance, it could spell out the scope for Aboriginal communities to make decisions over their land including access and economic development through to the type of facilities and lifestyle the people wish to have. It could spell out the limits of Aboriginal autonomy, or self-government, or self-rule and indicate the extent to which Aboriginal decision-making is subject to national or local laws.

The treaty could provide for national or state representation of Aborigines. Should there be a number of seats reserved in the parliament for indigenous people as is the case in New Zealand? Or is it better to set up new electoral boundaries in which Aborigines form at least fifty percent of the electorate. It is not important which of these is adopted. It is more important that some mechanism provide for indigenous representation at the national level. The treaty could establish this.

The work on this has all been done. The Nunavit agreement, the north America treaties and even the practical application of the treaty of Waitangi in New Zealand affords models to look at. We could even look at advances in each of the States or Territories within this country to see if there are models which can be applied nationally within the framework of a treaty.

Of course land would need to be returned. The treaty might either stipulate the exact areas of lands to be returned to Aborigines or it could establish a framework for gradual return of certain lands to Aboriginal peoples. Common sense suggests unalienated crown

land should be returned to Aboriginal people. Crown lands that are subject to other interests should also be returned to Aborigines subject to those interests.

The relationship between native title lands, ILC purchased lands and land rights legislation lands could also be easily addressed. Maybe the weaker aspects of native title such as loss of rights because of a change of lifestyle, could be addressed.

The treaty framework can provide for a uniform approach to Aboriginal cultural practices. For instance, it could clarify the right of indigenous people to practice their culture in all its forms without interference from authorities. It might embrace solutions to copyright, hunting and gathering and intellectual property issues.

The scope of the content of the treaty would be determined by a common approach to problem solving. In other words a 'lets get it right' approach.

THE FOUNDATION FOR A TREATY

Prime Minister John Howard stated there cannot be a treaty with Aborigines because treaties may only be signed between sovereign states. The according of citizenship to Aborigines, according to the Prime Minister, wiped out any legal or political base from which Aborigines could enter into a treaty. There cannot, he stated, be a treaty between citizens. What then is the foundation for an Aboriginal rights to treaty with the Australian Government.

The Prime Minister's statement needs to be examined to see if it has any validity. No doubt the current federal government is relying on the well accepted doctrine that the national government of a territory is the sole sovereign. Citizens, or groups of citizens, cannot challenge the authority of the state in which they live. True.

However, are the indigenous people of this country subject to that doctrine? The answer rests in examining how we could have got ourselves in such a messy situation.

It has been argued that the formation of the Australian nation in 1901 vested the sovereign rights of all citizens in the parliament and the courts. But isn't it true that Aborigines were excluded from the discussions leading up to the establishment of the 1901 constitution, and isn't it also true that the only reference to Aborigines in the 1901 constitution was to exclude us? How can it then be said that Aborigines gave up any sovereign rights we had to the parliaments and the courts through the formation of the Constitution in 1901? Such an argument cannot be sustained. The self-serving declaration by governments and domestic courts to the effect that Aborigines did lose their sovereign rights at federation are ineffective.

Statements by successive Australian governments that Aborigines are not a sovereign people are not statement of fact or law. They are simply opinions being expressed by

Australia's political leaders. It is no different from me saying Aborigines do have sovereignty.

There needs to be a review by social, legal and political commentators of this outstanding question: Is there a form of 'subsisting' or residual Aboriginal sovereignty? If it does exist, it clearly provides the basis for us to sign treaties with anybody.

The High Court decision of 'Mabo' gives further weight to this issue of surviving sovereignty in Australia's indigenous peoples. Until the Mabo case in 1992 it was thought Aborigines had no rights in Australia other than those given by politicians. The underlying message in 'Mabo' was that Aborigines always had certain rights, but those rights had not been recognised. The lack of recognition through the domestic courts and the parliaments over such a long period did not mean those rights did not exist.

If that is true of common law native title rights, why is it not also true of Aboriginal political rights? We clearly owned the land before white people came here. Despite differences of language and recognition of territorial boundaries, our differences were not as great as were the things we had in common. In modern contemporary terms, we were a nation of people made up of different tribes. That means we were a sovereign people.

Mabo shows that rights can subsist or continue to exist despite the extraordinary degree to which a people might be dominated by another. That domination can continue for hundreds of years. In itself, that domination does not extinguish the sovereign rights of Aboriginal people.

Despite these complex possibilities for a treaty in Australia, overseas experience shows it can be done if the political will is there. Governments and courts in North America and New Zealand and the several treaties with Indians in North America all recognise the right of indigenous peoples to make treaties with the national government. Indigenous people in those countries are in no different situation that we are here. It seems not to be a matter of "can't" but "won't".

There is an incentive for an Australian government to treaty with Aborigines. It might seriously be to the disadvantage of the Australian government if it was found Aborigines do have sovereign rights. An Australian government could sign a treaty to prevent the possibility of Aboriginal sovereignty being recognised internationally and being unilaterally acted on locally by indigenous people.

In providing a new political relationship between Aborigines and government a treaty could also restrict certain rights by indigenous people, including the acceptance of the power and authority of the national government. That authority would be subject to the treaty agreement.

If that were done, why would Aborigines bother pursuing the sovereignty issue? It would seem there is every incentive for Aborigines to pursue this subject if Australian

governments refused to sign a treaty. From that point of view, it seems more sensible for government to hedge its bets by making a treaty with indigenous people now.

Neither a treaty alone, nor return of land alone, nor education alone, nor finding jobs for Aborigines in itself is the answer to providing a decent future for Aboriginal people. But a collective approach to all of those issues, which includes clarifying the political rights Aborigines have in this country is, in my view, that way to proceed.

PROCESS TO A TREATY

Now I have already mentioned some aspects of how a treaty could be pursued. The National Aboriginal Conference identified a process whereby delegates would be elected and a treaty would be drafted at a Convention or series of Conventions.

This is a familiar process for Australians, because it reflects the way the Constitution was developed.

ATSIC, in its 1995 report 'Recognition, Rights & Reform' recommended that:

The Commonwealth Government agree that the initial stage in the development of a treaty should be the development of a framework agreement negotiated after both indigenous people and Government have developed settlement principles. [Recommendation 47]

and

The Commonwealth Government agree that a mechanism independent of the parties should be established, after consultation with ATSIC and the Aboriginal Reconciliation Council, to manage the reconciliation process.

[Recommendation 49]

On 12 May this year Patrick Dodson presented the Wentworth Lecture entitled 'Beyond the Mourning Gate – Dealing With Unfinished Business', during which he made the proposal that an independent 'treaty commission' should be established to draft a Treaty between the Australian Government and Aboriginal peoples, based upon matters raised by the Reconciliation Council and any other matters relayed before it.

This Commission of forty people, he proposed, should consist of twenty people proposed by the government and twenty people proposed by ATSIC. The Commission is to be established independent of government or 'the bureaucracy'. To complete the Treaty, Patrick Dodson identified that the two parties then choose their representatives to negotiate the treaty, which would then be placed before the Aboriginal people for consideration by referendum.

Taking into account these prior proposals, I have had the opportunity in the past two months to have held brief counsel with a key group of Aboriginal people from around the country. Following this counsel the ATSIC Board of Commissioners has received a briefing on the following suggestions:

1. That ATSIC establish a treaty committee consisting of Aboriginal and Torres Strait Islander representatives to devise strategies and procedures for the achievement of a Treaty;
2. That ATSIC participate in the development of a 'think tank' or 'think tanks' to promote an informed public debate on the advantages of achieving a settlement with the Aboriginal and Torres Strait Islander peoples; and
3. That ATSIC take the initial step of convening a national forum of the Aboriginal and Torres Strait Islander people to foster support and unity for a settlement through a treaty.

In the first part of my speech, I identified some ideas for the composition of the treaty. Let me now give some more coverage to the issue. I stress that these comments are not the final position, and that I expect a 'cross-fertilisation' of ideas, from many experienced and wise people in our community, in the forthcoming months which will then shape the procedures ahead.

Firstly, I am convinced that there must be a national treaty put in place before there is any devolution to local or regional treaties.

During the 'Makarrata' debate conducted by the NAC there was a widespread view that the various groups of Aboriginal and Torres Strait Islander people should be negotiating, as sovereign people in their own right, their own treaties, and without interference from other indigenous groups.

This became a problem at that time, in the 1980s, and contributed (although perhaps in only a small way) to the lack of momentum in obtaining government commitment to the treaty concept.

Further the separate and uncoordinated negotiation of treaties has the potential:

- to result in unequal results for different groups,
- to lead to omission of fundamental provisions in treaties, and
- to cause a blockage through uncoordinated demands upon government and professional services.

A national treaty could and should serve as the standard-setting document for local or regional treaties. It could ensure that basic elements are addressed in all treaties. It could

ensure that basic rights and provisions are delivered where other treaties have not or will not be negotiated.

If a national treaty is to be prepared then it is necessary that the Aboriginal and Torres Strait Islander people become committed to that purpose and remain disciplined in following a set course of procedure. It is counter-productive for people to 'splinter' from the national agenda, to claim that they do not accept the national approach. This will happen of course. There is no way to prevent it.

But we must stay together as the majority and ensure that the struggle for our rights to self-determination as peoples succeeds.

Ladies and Gentlemen, I complete this presentation with this call for the Aboriginal and Torres Strait Islander people to begin the process for the implementation of the treaty – with or without the government's support.

Thank You.