

The Road to a Treaty

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If you make the long journey to Possession Island, that jewel in the turquoise sea off the tip of Cape York, the folly of our past and the path to a brighter and just future is as clear as those crystal waters. It was on Bedanug, as the Kaurareg people had called that island for thousands of years, that Lt James Cook and his trigger-happy Marines, hoisted the English flag, fired a volley from the Endeavour's cannon and thereby claimed half a continent for King George III without ever carrying out the Royal orders to negotiate with the First Peoples of this land.

From that day in 1770, through the violent dispossession of the Frontier Wars and the failure to negotiate treaties with the First People who never surrendered the ancient rule of traditional law and custodianship over their country, Australians have continued to deny the full merit of Indigenous law that has existed here for 60,000 years or more.

In many other parts of the world where some 370 million First Nations people live today, a Treaty is viewed as an effective legal agreement to define certain important rights and relationships, a starting point for negotiations, and a powerful expression of the meaningfulness of those Indigenous laws and customs.

Our retiring Chief Justice of the High Court, Robert French, has made it perfectly clear that such a Treaty in Australia could be settled because it would recognize traditional law and custom. It would not bring down the nation like a house of cards. Quite the opposite! It would erect for the first time a just and lawful foundation for the modern nation.

Australia's political unwillingness to recognise the sovereign-to-sovereign relationship with our First Peoples through a Treaty creates our 21st century reality. Surely we can do better than this poverty within, this 'poverty trap' in a very wealthy nation?

Our First Peoples overwhelmingly remain dispossessed of their human rights, deeply disadvantaged, disempowered in all of the political decision-making that impacts their lives and discriminated against in so many tragic ways. As a consequence, our modern Australian nation is weakened, standing shakily on hollow, dubious, legal foundations. This holds us back from genuine equality and from embracing the full strength of the world's most ancient multicultural diversity and the Indigenous value of custodianship, which can guide many different people to co-exist in this land with respect and a unified, long term vision of how to preserve the land for future generations. A Treaty is about the common good.

Treaty is not about separation, superiority of any culture or about white or black supremacy in terms of power. Indeed it was such racist thinking that created the space between us in the first place, an exclusion of the First People that has lasted for almost two and a half centuries. Treaty is simply one of the best legal options, based on global evidence, to recognize the rights of First Peoples on the road to making things better.

Of all British Commonwealth nations with First People, Australia stands alone with a racist Constitution that permits discrimination and in the absence of a Treaty historic injustices continue unchecked. What a contrast to Canada where Section 35 of the Constitution recognizes Aboriginal people and reaffirms their Treaty rights. This illustrates how negotiation of Treaties and Constitutional reform need not be mutually exclusive, however minimalist Constitutional change without even a non-discrimination clause as currently discussed by Australian Government does not come close to the substantive change sought by most Indigenous people through the Treaty process. Either option requires leadership, mutual good will and political trust. Given the *Realpolitik*, the centuries old pattern of political treachery by Australian Governments towards Indigenous people, I agree with the late and great Aboriginal writer, Kevin Gilbert, who wrote “Because a white man’ll never do it.”

We need a heart transplant in our national leadership. We need far more courageous and visionary Prime Ministers of the calibre of Canada’s Prime Minister, Justin Trudeau or the United States President, Barack Obama. These leaders have raised great hope among First Peoples by listening to the priorities of their sovereign equals, the Native American and Indigenous Chieftains of North America. On Obama’s watch, the rights of Native Americans have improved dramatically through a direct sovereign-to-sovereign negotiation process based on the relationships defined in more than 350 treaties. Obama’s Administration has delivered 3.3 billion dollars in compensation to tribes that had lost their just entitlement for the resources taken from their lands over the past century alone.

This leads me to my major proposal. To end the continuing tragedy of the poverty and widespread inequality endured by our First People in their own land, a national Treaty should recognise Indigenous law and custom, immediately settle the remaining Native Title claims stuck in the courts and also guarantee Aboriginal and Torres Strait Islander people the sub-surface mineral rights to the wealth of their lands. My logic is that the depths of poverty, welfare dependence, chronic illness, housing shortages, unemployment, over-incarceration and suicide impacting so many of Australia’s 750,000 Indigenous people, can only be overcome through a transformational shift of some of the bounty of this land that is rightfully theirs. Currently there are vast tracts of Commonwealth land that can be acquired by State Governments and sold off as they please. Although Indigenous people are viewed in Australian law as having title to about 30% of the landmass, in most cases they are not able to benefit through just compensation for the mining and other uses of their land and waters. Instead of another century of welfare dependency and poverty we need a transformational Treaty that empowers the First People and establishes a democratically elected body that represents their interests, advises Governments and works on a collaborative plan for a brighter future.

The necessity for such a sovereign-to-sovereign relationship, expressed in a Treaty, is underscored by thirty years of evidence gathered by Professors Stephen Cornell and Joseph Kalt in the Harvard Project on American Indian Economic Development. I have not only spoken to these people and studied the evidence closely, I have seen the transformation of the lives of millions of Native Americans. When I arrived in the US as an ABC correspondent in 1972 and met up with the American Indian Movement at Wounded Knee in 1973, Russel Means of the Oglala Sioux told me that Native

American life expectancy was 12 to 16 years behind the mainstream. Today they have closed their 'gaps' to about 3.5 to 5 years. During my 14 years in the United States I witnessed how many but certainly not all First Nations groups made rapid gains compared to our Australian pattern of national inaction. The key, the Harvard evidence shows, is self-determination expressed through sovereign control of development decisions, a relationship and a negotiation process formulated through Treaties. This is the crucial missing element in Australia.

Treaty is the declared preference of Australia's First Peoples and that is clearly acknowledged in the appendix to the report by the Government appointed Expert Advisory Committee on Constitutional Recognition. Mopping up the stain of racism on the Constitution should not be the primary responsibility of Indigenous people but a task for the rest of Australians who through silence allow ongoing policies of child removal, institutional child abuse, the brutality of the prison system and the misery of dilapidated housing and wretched health.

Yes, Australians should erase the anachronism of Section 25 that is a hang over from Edward Barton's racist view that some human beings are just not fit to have the right to vote. We also need to abandon the ambiguity of Section 51 (xxvi) that allows our Government to enact clearly discriminatory and damaging policies against Indigenous people. Australia hypocritically pays lip service to Human Rights through the UN Declaration on the Rights of Indigenous Peoples and the Covenant for the Elimination of Racial Discrimination. Yet through the narrowest of interpretations of so-called 'Special Measures,' completely out of step with international norms, the Australian High Court allows tragic top-down policy disasters like the Northern Territory Intervention which have greatly increased Aboriginal suffering.

We should be considering Constitutional reform that bars any damaging discrimination on the basis of race, colour, ethnic origin, age, gender or religion. Are we talking about meaningful constitutional change of this kind that addresses the glaring lack of human rights protection in this country? Of course not! The lawyers in Federal Parliament tip toe around the issue of Treaty while their Victorian counterparts show that it is perfectly feasible to negotiate directly on a legal agreement that is shaped by the local, grassroots authority of myriad Aboriginal representatives across the State.

Around this country I have sat with Aboriginal and Torres Strait Islander people for some 50 years. I am certain that I share their deepest belief that rather than minimalist and near meaningless incremental change, Australia needs a bold and hopeful Treaty with its First Peoples.

Jeff McMullen took part in the discussion, *Is a Treaty the Best Way to Ensure the Rights of First Peoples?* at Western Sydney University on Monday 24th October 2016. This short article was published in the *New Matilda* November 2016.