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United Nations Expert Mechanism on the Rights of Indigenous Peoples

EMRIP Secretariat

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Dear EMRIP Secretariat,

Thank you for the opportunity to make a submission in response to the concept note on ‘Treaties, agreements and other constructive arrangements, between indigenous peoples and States, including peace accords and reconciliation initiatives, and their constitutional recognition’.

I am a Senior Lecturer in the Faculty of Law at the University Technology Sydney, Australia. My research expertise is in public law and the rights of Indigenous peoples. Over the last few years, I have written extensively on the emerging treaty negotiations between Australian governments and Aboriginal and Torres Strait Islander peoples. In this short note, I will provide an overview and update on these treaty processes, identify several barriers to their success, and outline one potential way to overcome those barriers.

**National overview**

No official treaty or treaties were ever signed between representatives of the British Crown or colonial governments and the Aboriginal and Torres Strait Islander peoples of the Australian continent. The rights of Aboriginal and Torres Strait Islander peoples were simply ignored. The absence of a formal negotiated settlement has left the moral and legal basis of the Australian nation ‘a little legally shaky’.[[1]](#footnote-1) It has also helped create a legal framework that fails to recognise Aboriginal and Torres Strait Islander peoples’ right to self-determination.

Aboriginal and Torres Strait Islander peoples have never been content with this state of affairs. For many years, First Nations peoples have called for a formal treaty or treaties to recognise their sovereignty ‘and set out mutually agreed terms for our relationship with the Australian government’.[[2]](#footnote-2) Most recently, in the 2017 Uluru Statement from the Heart, around 250 Aboriginal and Torres Strait Islander delegates from across Australia called for a constitutionally enshrined First Nations Voice and a Makarrata Commission to supervise a process of truth-telling and agreement-making between governments and First Nations.

The Australian government initially dismissed the proposals in the Uluru Statement. While it subsequently set up a process to explore the design of an Indigenous representative body, it continues to insist that any First Nations Voice be set up in legislation and not the Constitution. The government has also dismissed calls for a Makarrata Commission. However, since 2016, several subnational governments in Australia have begun to explore treaty.

**Emerging treaty processes at the state and territory level**

The treaty process in Victoria is furthest advanced.[[3]](#footnote-3) In 2018, following several years of consultation with First Nations, the State Parliament passed Australia’s first treaty Act. The *Advancing the Treaty Process with Aboriginal Victorians Act 2018* creates a legislative basis for negotiating a treaty with Aboriginal people in the State. Under the Act, the government is required to recognise an Aboriginal-designed representative body that will work with the government to establish a treaty negotiation framework. That framework must accord with several guiding principles set out in the Act and consistent with the UNDRIP: self-determination and empowerment; fairness and equality; partnership and good faith; mutual benefit and sustainability; and transparency and accountability.[[4]](#footnote-4) Following elections for the First Peoples’ Assembly in 2019, preliminary discussion on a treaty negotiation framework has commenced. Individual First Nations will eventually negotiate their own treaties under this framework. The process is deliberately slow. It allows time to build awareness and support for treaty.

Treaties will only succeed where the non-Indigenous community supports the process. Alongside consultation with the Aboriginal community, the state government developed an innovative public education campaign involving digital, radio, print, and billboard advertising. Under the campaign, prominent Aboriginal Victorians invited non-Indigenous Australians to ask ‘deadly questions’. Despite some concern that racist opinions might be amplified, the questions were overwhelmingly respectful. Almost four thousand questions were asked, with queries spanning Aboriginal culture, history, and relations with non-Indigenous Victorians. What a treaty would mean for First Nations was a recurring question. Independent research has suggested that the campaign has been relatively successful, with 51 per cent of surveyed Victorians agreeing or strongly agreeing that ‘the “State Government should formalise new relationships with Aboriginal Victorians” an increase of seven per cent from before the campaign’.[[5]](#footnote-5)

The Victorian process has and will continue to face barriers (some are discussed in more detail below). However, it is important to recognise that the treaty process itself has been led by Aboriginal Victorians, as is required by the UNDRIP.[[6]](#footnote-6) In key places, the government has even adapted its ordinary procedures to facilitate that leadership. The *Treaty Act*, for instance, was developed in partnership with an Aboriginal Treaty Working Group. This included working together to draft the Act itself, ‘a process usually strictly protected by Cabinet-in-Confidence provisions’.[[7]](#footnote-7)

An Aboriginal-led process is not only consistent with the right to self-determination. It also allows space for new and important issues to emerge organically. One such example is the recent establishment of Australia’s first comprehensive truth-telling process. Conversations within and with Aboriginal communities in Victoria in the early stages of the treaty process made clear that treaty must be accompanied by a process of truth telling. In May 2021, following several months of consultation with communities, the government and the First Peoples’ Assembly announced the creation of the Yoo-rrook Justice Commission. The Commission will complement the treaty process. The stories that will be told to the Yoo-rrook Justice Commission are expected to ‘shape Victoria’s conversation around Treaty-making, as well as the national conversation across Australia’.[[8]](#footnote-8) Its recommendations are also anticipated to identify matters that may form part of treaty negotiations.

Several other States and Territories have followed Victoria’s lead. The Northern Territory established a Treaty Commission in 2019. Initially led by Commissioner Mick Dodson, the Commission undertook extensive consultation with Aboriginal Territorians before releasing a Discussion Paper in June 2020. It is now undertaking a second round of consultation to assess support for the proposed treaty process set out in the Discussion Paper. Queensland has also committed to a treaty process. An Eminent Panel and Treaty Working Group conducted several months of consultation across the state in 2019, recommending the State pursue treaty negotiations and truth-telling processes. In February 2021, the government formalised the process by establishing a Treaty Advancement Committee to conduct a second round of consultations and report to government on the appropriate next steps.

Not all processes have moved smoothly. In 2016, the South Australian government announced that it would commence treaty discussions with Aboriginal nations in the state. After several months of consultation, treaty negotiations with the Ngarrindjeri Nation formally commenced in 2018. However, a newly elected state government abandoned the treaty process in June 2018. Nonetheless, other states and territories may soon begin their own processes. In February 2021, the Australian Capital Territory government announced it would facilitate a conversation with the Ngunnawal people ‘about what treaty means in the ACT and what a treaty process will look like’.[[9]](#footnote-9) In June 2021, the Tasmanian government also pledged to consult with Aboriginal Tasmanians and work on a ‘pathway to treaty’.[[10]](#footnote-10)

**Barriers to Australian treaty processes**

The treaty processes in Australia are significant. They represent the first time in Australian history that any government has committed to talk treaty with Aboriginal and Torres Strait Islander peoples. Nonetheless, there are several major barriers to the success of these processes. I have space to highlight only a few.

First, the abandoned negotiations in South Australia reveals the fragility of existing treaty processes. Treaties are political agreements that require ongoing support from both Indigenous peoples and governments. Where treaty is associated with one side of politics, there is a risk that negotiations can be brushed aside with a change of government. Equally, if governments act inconsistent with First Nations interests, Aboriginal and Torres Strait Islander peoples may choose to withdraw from treaty talks.

Second, any successfully concluded treaty will be legally vulnerable in Australia. Modern treaty processes in Canada occur against the backdrop of constitutionally protected rights. Section 35 of the Canadian Constitution recognises and affirms ‘existing aboriginal and treaty rights of the aboriginal people in Canada’, meaning modern treaties cannot be altered by ordinary legislation. A lack of similar constitutional protection in Australia leaves any treaty legally vulnerable. Relying on the race power in s 51(xxvi) and the territories power in s 122 of the Constitution, the Commonwealth Parliament could revoke the terms of any treaty. Efforts to legally protect or politically insulate treaties in Australia need to be identified and developed. First Nations in Australia may be less inclined to engage in treaty talks if they fear that the Commonwealth government may abrogate any concluded agreement.

Third, while states and territories have the power to negotiate and sign treaties, it is preferable that the Commonwealth joins the table.[[11]](#footnote-11) The Australian Constitution divides legislative power between the Commonwealth and the states. As a result, there may be some areas that state and territory governments lack the power to negotiate, and which therefore could not form part of a sub-national treaty. Similarly, without a national body monitoring the state and territory treaty processes, there is a risk that the content of treaties may differ wildly across the federation.[[12]](#footnote-12) Equally, the framework or process under which treaties are negotiated may be weaker in some jurisdictions than others. Already concerns have been raised about the consultation process in Queensland. Any concerns along these lines may undermine necessary public and political support for treaty-making.

Fourth, treaty requires a fair negotiation process. Without institutions to ensure this it is likely that Aboriginal and Torres Strait Islander peoples will suffer a disadvantage in negotiations. In Canada and New Zealand, constitutional principles structure the relationship between Indigenous peoples and the Crown to prevent the State from acting in their self-interest in negotiations.[[13]](#footnote-13) The historic absence of treaty in Australia means that these constitutional principles do not exist, placing more pressure on the need to develop institutions and processes that will promote—and potentially require—good faith negotiations.

**How to overcome these barriers – support the Uluru Statement from the Heart**

The UNDRIP constitutes the ‘minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world’.[[14]](#footnote-14) The rights expressed therein are not bargaining chips. However, the UNDRIP is not legislated in Australian law. This means that it cannot act as an enforceable framework to guide government approaches and policies in treaty-making. It is vital then that Aboriginal and Torres Strait Islander peoples take a leading role in the design and development of treaty negotiation frameworks.

The Uluru Statement understands this. Aboriginal and Torres Strait Islander peoples’ sophisticated proposals envisage a First Nations Voice supervising the development of a national Makarrata Commission. A national Makarrata Commission could monitor and facilitate treaty negotiations across the continent, ensuring that each treaty is negotiated under fair procedures and results in a similar settlement that recognises and protects Aboriginal and Torres Strait Islander peoples’ rights and interests. A national Commission will also signal Commonwealth support for the treaty process, helping to guarantee that negotiations can cover areas under both federal and state responsibility. Finally, a national Makarrata Commission can help maintain momentum for treaty, by providing research and advice on the process, keeping all Australians – Indigenous and non- Indigenous – informed about the process, and build support for treaty. It is through a First Nations designed Makarrata Commission that Aboriginal and Torres Strait Islander peoples can retain the necessary political power to ensure that the treaty processes across Australia lead to meaningful and effective agreements.

The success of Australia’s treaty processes relies on a constitutionally entrenched First Nations Voice.

Thank you again for the opportunity to provide a submission. I would be happy to discuss any aspect of my submission or my research on Indigenous-State treaty-making.

Yours sincerely

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1. Mick Dodson, ‘We Dare to Hope: Treaty-Making in Australia’ in Harry Hobbs, Alison Whittaker and Lindon Coombes, *Treaty-Making 250 Years Later* (Federation Press, 2021) 203, 209. [↑](#footnote-ref-1)
2. Patrick Dodson, ‘Navigating a Path Towards Meaningful Change and Recognition’ in Megan Davis and Marcia Langton (eds), *It’s Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) 180, 181. [↑](#footnote-ref-2)
3. For more detail see George Williams and Harry Hobbs, *Treaty* (Federation Press, 2nd ed, 2020). [↑](#footnote-ref-3)
4. *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) ss 21-25. [↑](#footnote-ref-4)
5. Aboriginal Victoria, *Advancing the Treaty Process: Annual Report and Plan 2018*–*19* (2019) 18. See further Harry Hobbs and Stephen Young, ‘Modern Treaty-Making and the Limits of the Law’ (2021) 71(2) *University of Toronto Law Journal* 234. [↑](#footnote-ref-5)
6. For more details see 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* 174-192. [↑](#footnote-ref-6)
7. Jill Gallagher, ‘The Work of the Victorian Treaty Advancement Commission to Bring Us Closer to Treaties in Victoria’ in Harry Hobbs, Alison Whittaker and Lindon Coombes, *Treaty-Making 250 Years Later* (Federation Press, 2021) 220, 224. [↑](#footnote-ref-7)
8. First Peoples’ Assembly of Victoria*, “Tyerri Yoo-Rrook” (Seed of Truth): Report to the Yoo-rrook Justice Commission from the First Peoples’ Assembly of Victoria* (June 2021) 33. [↑](#footnote-ref-8)
9. Jasper Lindell, ‘Funding for First Indigenous Treaty Process in ACT Budget’ *Canberra Times* (7 February 2021) <<https://www.canberratimes.com.au/story/7115029/funding-for-first-indigenous-treaty-process-in-act-budget/>>. [↑](#footnote-ref-9)
10. Lucy Shannon, ‘Tasmanian Government Commits to Time Frame for Truth-Telling, Treaty Talks with Indigenous Community’, *ABC News* (23 June 2021) <[https://www.abc.net.au/news/2021-06-23/tasmanian-aboriginal-truth-telling-treaty-discussions/100235634](about:blank)>. [↑](#footnote-ref-10)
11. See Harry Hobbs and George Williams, ‘Treaty-Making in the Australian Federation’ (2019) 43(1) *Melbourne University Law Review* 178. [↑](#footnote-ref-11)
12. On the problem of an ‘uncoordinated pursuit of treaty across the federation’ see: Megan Davis, ‘Voice, Treaty, Truth’, *The Monthly* (July 2018) <[https://www.themonthly.com.au/issue/2018/july/1530367200/  
    megan-davis/voice-treaty-truth](https://www.themonthly.com.au/issue/2018/july/1530367200/megan-davis/voice-treaty-truth)>. [↑](#footnote-ref-12)
13. Kirsty Gover, ‘The Honours of the Crowns: State—Indigenous Fiduciary Relationships and Australian Exceptionalism’ (2016) 38(3) *Sydney Law Review* 339. [↑](#footnote-ref-13)
14. UNDRIP art 43. [↑](#footnote-ref-14)