

Getting down to brass tacks on indigenous treaty

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Last Saturday 300 Canberrans put forward the idea of a treaty with Australia's indigenous peoples, our first nations. This emerged from the Canberra 2020 summit, a gathering of people from across the community to generate new ideas and new thinking for next weekend's national 2020 Summit.

The treaty idea had broad support, including from Chief Minister Jon Stanhope, who said that he had "no doubt that a treaty is the next step in the process of reconciliation". Australia is the only Commonwealth nation without a treaty with its indigenous inhabitants.

The notion of a treaty rises to the surface of public debate in Australia every few years. It does so because no legal settlement has yet been reached between governments and indigenous peoples. Even when Australia became a country in 1901, indigenous people were excluded from this moment of nation building.

The Constitution as enacted was imbued with the belief that Aboriginal people were a dying race and that governments should be able to make laws restricting the rights of racial groups. Today, a treaty is one way that fresh agreement about sharing the country can be reached. It could allow belated nation-building.

There is no constitutional reason why a treaty could not recognise a measure of sovereignty or self-government for indigenous peoples. As in other nations, this could be developed within the existing legal system. The Australian Federation already encompasses different laws coexisting at the federal, state and local levels. The High Court in *Mabo* in 1992 also gave legal effect to native title and has found that the content of this title is defined by indigenous legal and cultural traditions. This did not fracture Australia's existing system of law, but was accommodated within it.

The call for a treaty took on a new dimension since reconciliation became a central theme in indigenous affairs. The Council for Aboriginal Reconciliation, in its final report in 2000, recommended: "That the Commonwealth Parliament enact legislation to put in place a process which will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation can be resolved." In doing so it sought to promote practical measures to overcome disadvantage, and larger structural and symbolic changes.

The starting point for a treaty should be acknowledgment of our history, including that indigenous people were the prior occupiers of the land, the injustices done to them and that the settlers who came later are here to stay.

Acknowledgment should be followed by negotiation rather than just consultation. Consultation is what governments have been doing in indigenous affairs for many years, while negotiation is where parties agree on an agenda and work their way towards agreement.

Negotiation recognises that winner-takes-all processes are unlikely to endure or produce good policy. It allows tailored solutions to be worked out by the parties with a direct interest in the outcome. It builds relationships based on trust and regular communication. In short, negotiation can improve the quality of outcomes. Given the diversity of indigenous communities across the country and their lack of formal

representation in most of Australia's parliaments and its corridors of power, the sensible option for achieving that is round-table negotiations based on clear, well understood principles.

A treaty must produce outcomes in the form of rights, obligations and opportunities. Many people see the process of entering into treaty negotiations as a virtue in itself because it can develop relationships, build trust and enhance knowledge, skills and perspectives on all sides.

However, the negotiators, the constituencies they represent and indeed the whole country will want to see substantive outcomes. It is difficult to contemplate a viable treaty process in Australia that does not address the issue of indigenous rights and, as one of its outcomes, offer those rights some form of legal protection.

A treaty process in Australia, however, which only looked at rights and ignored the pressing social problems bearing down on indigenous communities every day, or the lack of opportunities for sustainable economic development, would be rightly criticised as a luxury we cannot afford.

The "rights agenda" and "practical reconciliation" the issues of health, housing, education and economic development are inextricably linked. Extensive research by the Harvard Project on American Indian Economic Development shows that, among North American indigenous communities, economic success occurs only where the right to make important decisions rests with indigenous peoples themselves.

Achieving one or more treaties in Australia would be a long, hard process. Nothing would come easily. However, the attempt could be more than worthwhile, with benefits that extend to non- indigenous Australians. A treaty process would allow them a way to come to grips with a challenging issue of great difficulty and complexity: how they relate to the indigenous peoples of the Australian continent. It could also bridge the gulf that has opened up between indigenous people and the rest of Australia over more than 200 years.

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