

## The Treaty Project Gilbert + Tobin Centre of Public Law

The Gilbert + Tobin Centre of Public Law at the UNSW Law Faculty has a three-year commitment to the Treaty Project. In line with the Centre's expertise, the project will focus on the public law aspects and implications of a treaty or framework agreement(s) between Indigenous and other Australians.

The project has financial support from an Australian Research Council (ARC) grant and from the Myer Foundation. It involves partnerships with both the Jumbunna Indigenous House of Learning at the University of Technology Sydney (UTS) and the Australian Institute of Aboriginal & Torres Strait Islander Studies (AIATSIS) under the ARC grant, and with Reconciliation Australia, who secured the generous support of the Myer Foundation.

The project will combine academic research with community engagement and the Centre will provide a platform for informed public debate about the idea of a treaty, comprehensive settlements and framework agreements.

A number of discussion papers will be released over the course of three years. These papers, together with the research and community feedback gathered in the course of the project, will culminate in the publication of a major report in mid-2005 co-authored with our ARC project partners Professor Larissa Behrendt and Dr Lisa Strelein. That report will include potential public law models for achieving a treaty, comprehensive settlements or framework agreements.

### DISCUSSION PAPER No. 1

## *Why 'Treaty' and Why This Project?*

*Sean Brennan*

Australia currently has a 'treaty debate'. It is not the first time there has been talk of a treaty or treaties between Indigenous peoples and the rest of the Australian community, and this time round the debate has only just begun.

The debate has already taken off on a number of fronts. Who will negotiate a treaty or treaties? How long will it take? Does it involve constitutional amendment? What will it do for economic development within Indigenous communities? Where does the issue of sovereignty fit in?

All of these are important questions and they deserve vigorous public discussion.

But in this first Discussion Paper we want to examine three questions which need to be explored before we move on to some of those other important issues:

1. Why bother having a three year project devoted to the idea of a treaty or treaties?
2. What do we mean when we use the term 'treaty'?
3. Are we talking about a single treaty or more than one?

# Why a Treaty Project?

If Australia does enter a new era of treaty-making at a regional and/or national level, it will be because a significant majority of Australians has been persuaded that this is the wise way to proceed. The path to that conclusion will be a long one with a lot of debate and argument along the way.

The task of making the case for a treaty or comprehensive agreements is primarily one for advocates and community leaders. Our main job as public lawyers is to provide decision-makers and the community with credible relevant information about the treaty issue, to enhance public debate and facilitate good public policy decision-making. But is it a job worth doing?

There are three reasons why the Gilbert + Tobin Centre of Public Law has committed to a three-year Treaty Project.

The first reason is that the issue is firmly on the public agenda. With its final report in December 2000, the Council for Aboriginal Reconciliation drew the threads together on the decade-long formal reconciliation process. That report made the pursuit of lasting negotiated solutions between Indigenous and other Australians through treaty-like agreements a central priority for the short to medium term future.

In doing so it reinforced calls for a treaty or treaties from leading figures in the reconciliation movement such as Patrick Dodson, and echoed the ideas of earlier generations of both Indigenous people and their non-Indigenous supporters.

As Chairman of ATSIC, Geoff Clark has made the treaty issue a central policy focus and ATSIC has presided over extensive community consultations and education about the idea. Non-Indigenous organisations like Australians for Native Title and Reconciliation (ANTaR) have advocated a policy of formal, comprehensive negotiations. Reconciliation Australia, the successor body to the Council for Aboriginal Reconciliation, has made research and community education about framework agreements a top priority. The idea of agreement-making is gaining ground across Australia as a preferred method of doing business and progressing public policy in Indigenous affairs.

The Gilbert + Tobin Centre of Public Law exists to provide research and community education on issues of vital importance to the Australian community which have a public law dimension. By public law we mean particularly constitutional law and more generally law involving the role of governments, including native title and the formal reconciliation process. With the treaty issue now firmly on the political agenda, but with many legal questions yet unanswered, it is an obvious priority for the Centre over the next three years.

The second reason why the Centre thinks a public law investigation of the treaty concept is both timely and warranted is the obvious need for new ideas. Indigenous affairs is littered with past public policy failures. Much of that failure has been expressed in onerous legislation imposed from above, poor administration and haphazard, expensive and winner-takes-all litigation.

The Centre has a focus on law reform—if past practices have failed to deliver social justice then we believe that, intelligently used, law can frequently help in crafting new and better solutions. An alternative public law focus, which puts negotiation and agreement-making centre-stage, is a timely and sensible response to the situation in Australia today.

The third reason the Centre has committed to three years of research and community education on the treaty issue is that the idea of a treaty or treaties is not pie-in-the-sky. Countries similar to Australia, in particular New Zealand and Canada—with Indigenous populations and a strong British common law and parliamentary tradition—have already been putting these ideas into practice.

Australia will need to find its own solutions in Indigenous affairs. But it always helps to know how other people have tackled similar problems. The Treaty Project will draw on comparative research and help broaden the Australian treaty debate by pointing to some of the lessons and pitfalls of that overseas experience.

Closer to home, agreement-making is rapidly gaining ground in Indigenous affairs. Literally hundreds of agreements have been made in recent years, involving State governments, local authorities, mining companies, ATSIC Regional Councils, native title holding groups and many others.

This new approach to the issues of reconciliation, at a practical and a symbolic level, is based on some important understandings. In particular it recognises Indigenous groups as peoples with rights and with the legal capacity to make binding agreements. The Treaty Project will investigate this array of local agreement-making initiatives, look at factors which contribute to success and try to draw lessons for the broader treaty debate.

In short, the Gilbert + Tobin Centre of Public Law has committed itself to the Treaty Project because:

- as an issue of contemporary social and legal concern, the treaty debate is squarely within its charter
- it is obvious that we need new approaches in Indigenous affairs including public law alternatives, and
- agreement-making has already proved itself a viable approach both here and overseas, and contains many valuable lessons.

# What Do You Mean, a 'Treaty'?

The word 'treaty' is at the heart of this debate we are now having in Australia. Some people have a very clear idea of what it means to them. Many do not.

For some the word 'treaty' induces anxiety and confusion, or even hostility. They worry, for example, that it has a technical meaning that they don't really understand, or implications that cause them concern.

For others it suggests something welcome: a strong statement about the respective rights of different people, or the chance to bring some 'closure' to a long period of disputation and open a new era built on better relationships. Perhaps these sentiments explain the remarkably high 'off-the-cuff' support for a treaty (53%) recorded in the AC Neilsen AgePoll in November 2000.

The word 'treaty' is certainly useful. It provides a simple and convenient label for a debate which at this early stage must necessarily range over a wide expanse of ideas and possibilities.

But because it carries different baggage, good and bad, for different people it is also important to spend a little time unpacking what it means before we get ourselves too enmeshed in the detail of the debate.

As we hope to make a useful contribution to the 'treaty debate' in Australia over the next three years, it makes sense for us to clarify at the outset what we mean when we use the term 'treaty'. Our understanding of the term is based on consultations and discussions in the first few months of the project. Because the treaty debate is an unfolding one, we recognise that over time we may need to adapt our understanding in light of new developments. We do not seek to impose this definition on others and recognise that others bring their own political and legal understandings of the term to the current debate.

We look at the treaty concept as having three key elements: a starting point and underlying principle, a preferred way of proceeding forward and a result or set of results at the end. In other words when we look at the treaty idea we see:

- a premise
- a process, and
- an outcome.

*We see the treaty concept as carrying certain basic ideas in terms of premise, process and outcomes: acknowledgement, negotiation, rights and opportunities.*



# *The Premise: Acknowledgement*

The premise, or starting point, for a treaty or treaties in Australia is a recognition that the Indigenous peoples of this country, the people who were already here in 1788, have a special status in our society, today and into the future. It also involves a recognition of history and a recognition that the legacy of our past is some unfinished business between Indigenous and other Australians.

The treaty push points to a fundamental flaw in the legal logic by which we govern ourselves in Australia, a flaw that was there from the beginning, and a flaw which Prime Minister John Howard himself has acknowledged: this land and its waters were taken as colonies without treaty or consent.

So the premise for treaty talk in Australia is *acknowledgement*. Acknowledgement of the special status of Indigenous Australians and acknowledgement of our history.

How that history and that special status of Indigenous peoples is formally acknowledged is one of the questions for public debate, and ultimately for negotiation by parties to any treaty or treaties. Some of our public institutions (State Parliaments, local governments etc) have already taken significant steps in this direction. Inquiries and community consultations have turned up a number of interesting proposals on what else could be

done to acknowledge the place of Indigenous peoples in Australia and we can expect more to emerge in the coming years. Public law offers one obvious vehicle for giving effect to these ideas, in practical and symbolic ways.

The unhappy experience of the recent referendum proposal for a new Preamble to the Constitution demonstrates the importance of a healthy and transparent process for negotiating acknowledgement of history and of the special place of Indigenous peoples in the Australian community. In the midst of the debate over an Australian republic, Prime Minister John Howard announced that a second referendum question would be put before the Australian people in November 1999. He then, without public or Indigenous involvement, drafted a new preamble. After encountering strong opposition, the Prime Minister produced an amended version. Again it was not the subject of public consultation and was not widely embraced by the Indigenous community. Like the vote on the republic, the preamble was defeated nationally and in all six states.

This underscores the importance of identifying good processes for achieving desired public law outcomes, something we intend to focus on throughout the life of the Project.

*This new approach recognises Indigenous groups as peoples with rights and with the legal capacity to make binding agreements.*



*acknowledgement*

# negotiation

## The Process: Negotiation

The process, or more accurately, the preferred process when we talk about treaties is *negotiation*. The key idea is of governments and Indigenous peoples sitting round the table and negotiating their way to an agreement.

There are other processes for achieving outcomes in Indigenous affairs in Australia. Parliaments can legislate. All kinds of parties can go off to court and litigate. Governments administrate, delivering services and implementing policies every day.

A treaty or treaties would not eliminate these other processes from the landscape. In fact all of them will probably be harnessed in the course of putting an agreement into practice and sorting out the details of what it means.

When we refer to treaties in the Australian context we are saying that negotiation is the *preferred* process for achieving outcomes in Indigenous affairs and the *primary* means of resolving outstanding issues from the past and challenges for the future. Negotiation is, of course, not just consultation. 'Consultation' is something governments have been doing in Indigenous affairs in Australia for years, but it is very much a 'top-down' process. Negotiation is where parties sit around the table as equals and work their way towards agreement. Consultation is one-way, negotiation is two-way.

There are many reasons—pragmatic reasons as well as ones of principle—for entrenching negotiation as the process of first resort in Indigenous affairs. Legislation is framed in parliament, often a long way from the people whom it will affect. Party politics and cross-trading on issues can produce arbitrary and sometimes incoherent results. Litigation can be fiercely adversarial: it does little to build better relationships between people who must

co-exist well after the result of any single court case is decided. Usually someone wins and someone loses.

By contrast negotiation reduces the risk that the rights and interests of any significant group will be ignored. It brings relevant information and perspectives to the decision-making process in a direct way. It recognises that winner-takes-all processes are unlikely to endure or produce good policy. It allows sophisticated and 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 public policy. It is rational and efficient. It also reflects a basic ethic of fair dealing and respect for other points of view.

The simple point we make here is this: the process follows from the premise as a matter of logic. Australia has already begun to show that it is prepared to acknowledge the injustice of past policies and the special place of Indigenous peoples in our present and future. For example

Australian law has belatedly recognised Indigenous groups as holders of significant constitutionally-protected legal rights, such as native title.

It follows as a matter of common sense, legality and basic human respect that the same people must be involved in making the decisions which affect their lives. Given the diversity of Indigenous communities across the country and their lack of formal representation in most of our parliaments and our corridors of power, the sensible option for achieving that is round-table negotiations based on clear principles well understood on all sides.



*Agreement-making is gaining ground across Australia as a preferred method of doing business and progressing public policy in Indigenous affairs.*



# opportunities

## The Outcome: Rights & Opportunities

Many people see the process of entering into treaty discussions, the act of engaging in negotiation, as a virtue in itself – developing relationships, building trust, enhancing knowledge, skills and perspectives on all sides.

But we all need to see substantive outcomes as well.

More than 200 years after the British brought their system of law and government to this country, the first Australians, peoples whose cultures go back tens of thousands of years, still have only a precarious place within it.

For much of that time the law ignored the rights of our Indigenous inhabitants, or recognised them only so as to discriminate against them. Our Constitution is silent on the existence of Indigenous peoples. Past references merely confirmed their vulnerability to racial discrimination.

More recently, Indigenous peoples have seen that even when they eventually secure a degree of recognition in the law, for example in the concept of native title, those hard-won rights are vulnerable. The Wik peoples in 1996 persuaded the highest court in Australia that native title can coexist with pastoral leases, but the Federal Government committed itself to winding back the rights only recently gained in Parliament and from the High Court. The legal system proved itself unable to shield Indigenous peoples from racial discrimination. Indeed it was the law itself which was used to diminish their position.

It is no coincidence that the treaty debate has revived in Australia partly because Indigenous peoples have again seen that their legal rights enjoy such a fragile place in our constitutional system.

It is difficult, then, to see a viable treaty process in Australia which does not address the issue of Indigenous *rights* and, as one of its outcomes, offer those rights some form of legal protection sufficiently robust to withstand the shifting winds of political change.

A treaty process in Australia, however, which only looked at rights and ignored the pressing social prob-

lems 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 challenge for treaty advocates, then, is to demonstrate that the ‘rights agenda’ and what the Federal Government calls ‘practical reconciliation’ – the issues of health, housing, education and economic opportunity – are not mutually exclusive but indeed inextricably linked. That is a political argument. But it is also an empirical one: the impressive research from the Harvard Project on American Indian Economic Development shows (see

[www.ksg.harvard.edu/hpaied/](http://www.ksg.harvard.edu/hpaied/)) that economic success occurs only where the right to make important decisions rests with Indigenous peoples themselves.

We aim to find out how the tools of public law (constitutions, legislation etc) can be used to ensure that comprehensive agreement-making can deliver outcomes to Indigenous communities in the form of *opportunities* as well as *rights*? Opportunities, that is, to craft the best kind of solutions to the problems in their communities, whether they be retention rates at school, substance abuse, family violence or barriers to generating non-welfare income in a sustainable way.

A treaty process also offers important opportunities for non-Indigenous Australians. It allows 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. A treaty process can begin to bridge the gulf that has opened up between Indigenous people and the rest of Australia over 215 years, after this land was taken without treaty or consent. It can offer better mutual understanding, better public policy in Indigenous affairs, better results from the expenditure of money in areas like health, housing and education. It can help in building a better nation, more secure in its identity, its symbols and its values.

*Research from the Harvard Project on American Indian Economic Development shows that economic success occurs only where the right to make important decisions rests with Indigenous peoples themselves.*



# A Single Treaty?

Many people, including ourselves, have already grown accustomed to referring to a 'treaty debate'. Other people understandably draw the conclusion that this debate is about a single national agreement. But is it?

That is not our question to answer. Our job is to hear what people are saying in the debate, particularly their questions, their anxieties and their aspirations, spend some time on the necessary research and bring back relevant legal information for the community and its decision-makers. Ultimately we hope to provide some public law options for how to get from where we are now to where people are saying they would like to be, in 5, 10 and 20 years time, and some analysis of how the outcomes of a comprehensive agreement process would sit with existing legal rights and responsibilities.

But on this question of 'is it treaty or treaties' we make a couple of early observations:

1. What we have heard so far is that people are still talking about a range of possibilities and are keen not to rule anything in or out at this stage.

2. We also understand that many Indigenous people identify with each other primarily at the local or regional level, just as many non-Indigenous Australians identify primarily at a local or regional or perhaps State level. It seems sensible to have processes which sit comfortably with how people most readily think of themselves as a group.

3. A treaty will have important symbolic and moral dimensions because it will deal with the fundamental relationships between peoples. But it also needs to be something concrete and practical that people can recognise, not something abstract located on some forever-receding horizon. A treaty process in Australia should sensibly build on what we have already, and what we do have already is a steady accumulation of experience with agreement-making at the local, regional and sometimes State level.

4. While many people see common sense in having the treaty idea brought down to a level which ordinary people can relate to, they also see a national dimension to the issue. For Indigenous peoples, State boundaries for example can cut through the middle of cultural groupings. The non-Indigenous legal system carves up powers between the Commonwealth and the States so that sometimes only the Commonwealth speaks with legal authority in Indigenous affairs. Obviously if a treaty process ultimately led to *constitutional amendment*, the Federal Parliament and other Commonwealth institutions must be involved.

5. One early way of thinking through this issue that we have found useful is to imagine tracing the outline of a shape, like a pyramid. Perhaps a treaty process will commence close to the ground, steadily building up as it takes on more and more dimensions. At some point those involved might agree that it makes sense to take the best practice from all the activity that has been steadily building up from the grassroots level and encapsulate it in a set of national minimum principles. That might also be an opportunity to give constitutional recognition to the growing practice of agreement-making with Indigenous groups. But that point of national coalescence is not the end of the process. Instead, we might then have a national framework, an umbrella under which most processes return to the local, regional or State-wide level, so the benefits of local best practice can be spread across the country while respecting the rights of everyone to craft solutions that are meaningful to them.

We will continue to listen to this aspect of the debate. For the moment we will make a point, as often as possible, of referring to a treaty or treaties, recognising this issue has a long way to go and the important thing is for Australians to get it right in the end, not to prejudge the outcome now.

*Is it treaty or treaties?*



# Conclusion

This is the first of a series of Discussion Papers from the Treaty Project at the Gilbert + Tobin Centre of Public Law, as part of its wider collaboration with its ARC partners and Reconciliation Australia. We are very interested in any feedback on the content of this paper. We plan to release several Discussion Papers over the next two and half years and will have a website (go to [www.gtcentre.unsw.edu.au](http://www.gtcentre.unsw.edu.au) for directions). In the run-up to the publication of the final report in mid-2005 by the ARC project partners, we will canvass a range of public law issues including: the lessons to be drawn from recent Canadian experience with comprehensive settlements, where the questions of sovereignty and self-determination fit in the Australian treaty debate and the relationship between treaty and native title.

We will continue to participate in public forums and events about the treaty issue and we are keen to engage with interested groups and individuals, with decision-makers and with the academic community.

**We welcome your comments or suggestions, which should be forwarded to**

**Sean Brennan**  
Director, The Treaty Project  
Gilbert + Tobin Centre of Public Law  
Faculty of Law, UNSW  
Sydney NSW 2052  
or by email to [s.brennan@unsw.edu.au](mailto:s.brennan@unsw.edu.au)

*A treaty will have important symbolic and moral dimensions because it will deal with the fundamental relationships between peoples. But it also needs to be something concrete and practical that people can recognise, not something abstract located on some forever-receding horizon.*

## *The Centre Project Team*

**Professor George Williams** is the Anthony Mason Professor and Director of the Gilbert + Tobin Centre of Public Law at the Faculty of Law. He teaches in the areas of public law and human rights and is the author of books on constitutional law and human rights and is co-editor of the *Oxford Companion to the High Court of Australia* (2001). Professor Williams also practises as a barrister and has appeared in High Court cases, such as the *Hindmarsh Island Bridge Case*, raising issues such as freedom from racial discrimination. He has been employed as a consultant by organisations including the Australian Broadcasting Corporation, the Federal Parliament, the Council for Aboriginal Reconciliation and ATSIC.

**Sean Brennan** is the Director of the Treaty project at the Gilbert + Tobin Centre of Public Law and has worked on native title, Indigenous legal issues and public law for the last 8 years. He worked with Cape York Land Council, the National Indigenous Working Group and other Aboriginal organisations between 1994 and 1998. From 1999 to 2002 Sean worked in the Commonwealth Parliament's research service, specialising in Indigenous legal issues and public law.

## *Project Partners*

The Gilbert + Tobin Centre of Public Law Treaty Project is part of a collaboration with our two ARC Project Partners. **Professor Larissa Behrendt** is the Professor of Law and Indigenous Studies and the Director of the Jumbunna Indigenous House of Learning at the University of Technology, Sydney. We work with Larissa and with her colleagues at Ngija, the National Institute of Indigenous Law Policy and Practice, **Mark McMillan** and **Lisa Briscoe**. Our other ARC project partner is **Dr Lisa Strelein**, Research Fellow and Manager of the Australian Institute of Aboriginal and Torres Strait Islander Studies' Native Title Research Unit.

The Gilbert + Tobin Centre of Public Law Treaty Project also has a partnership with **Reconciliation Australia** and we acknowledge the generous financial support of the **Myer Foundation**.

Graphic Design by Helena Brusic (Ref: 27915)  
UNSW Publishing & Printing Services. Tel 9385 2840.

January 2003

