

ISSUES PAPER No. 2

Treaty – What's Sovereignty Got To Do With It?

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'We recognise that this land and its waters were settled as colonies without treaty or consent.'

Prime Minister John Howard, 11 May 2000

'A nation ... does not make a treaty with itself.'

Prime Minister John Howard, 29 May 2000

The first statement by Prime Minister John Howard is a matter of fact. From it flows a sense of grievance, felt by many Indigenous people and shared by many other Australians, that legitimate political and legal authority – or 'sovereignty' – was never properly secured over the Australian landmass. The second statement is an assertion. It suggests that any attempt today by way of a treaty to remedy the way that the continent was settled and the Australian nation constructed is impossible. This issues paper explores whether 'sovereignty' is indeed a roadblock to a modern-day treaty or treaties between Indigenous peoples and the wider Australian community.

After examining the different meanings of the term and the different ways that Australia and other countries have wrestled with its dilemmas, we conclude that as a matter of law the concept of sovereignty itself poses no necessary barrier to moving forward with a process of treaty-making. Whether or not such a process is desirable, and what any treaty might contain, are separate questions of politics and policy for the community as a whole.

What Does 'Sovereignty' Mean?

At its most general, 'sovereignty' is about the power and authority to govern. On that much, at least, there is a rough consensus amongst those who seek to define the term. Beyond that, context becomes important and different interpretations emerge. From the many non-Indigenous definitions of the term, four key themes emerge:

- The first is a distinction between **external** and **internal** sovereignty. Roughly, this parallels the difference between foreign affairs and domestic politics, between international law and constitutional law. External sovereignty is about who has the power on behalf of the nation to deal externally with other nation-states. Internal sovereignty looks at how and where power is distributed within territorial boundaries, such as through a federal system or according to a separation of powers between the different arms of government (parliament, the government of the day and the courts).
- The second distinction is between definitions of sovereignty that focus on the power of **institutions**, and those that focus on the power of the **people**.
- A third distinction is closely related to the second. It contrasts the formal view of sovereignty, which emphasises **legal** authority, from the more fluid **political** understanding of the term.
- Fourth, there has been an evolution in meaning away from the view that a sovereign has **absolute, monopolistic and irrevocable** power – to a more **qualified** understanding of the term. Under this modern 'realist' conception, sovereignty is divisible and is capable of being shared or pooled across different entities or locations.

Indigenous Sovereignty In Australia

Indigenous Voices

It is often said by Indigenous people that they were sovereign before the colonisation of Australia and that their sovereignty was never extinguished (and thus remains intact today). According to Michael Mansell: 'Aboriginal sovereignty does exist. Before whites invaded Australia, Aborigines were the sole and undisputed sovereign authority. The invasion prevented the continuing exercise of sovereign authority by Aborigines. The invasion and subsequent occupation has not destroyed the existence of Aboriginal sovereignty'.

The thing called 'sovereignty' that Indigenous people had and, it is said, still retain is perhaps not an easy concept to grasp. It deals with authority at its most fundamental level. Irene Watson says: 'We were "sovereign" peoples, and we practiced our sovereignty differently from European nation states. Our obligations were not to some hierarchical god, represented by a monarch. Our obligations were to law and we were responsible for the maintenance of country for the benefit of future carers of law and country'. Others have expressed it in terms of the capacity effectively to do things across the range of political, social and economic life.

The word conveys a sense of prior and fundamental authority and draws attention to the widespread dissatisfaction felt by Indigenous people with the general explanation of British 'settlement'. For many, then, it is a verbal approximation of an innate sense of identity and of legal and political justice. But Indigenous uses of the term vary, just as they do in non-Indigenous contexts.

Some use the word to engage directly with the idea of external sovereignty, arguing for recognition as a separate and independent nation. In 1992, the Aboriginal Provisional Government proposed 'a model for the Aboriginal Nation – a nation exercising total jurisdiction over its communities to the exclusion of all others. A nation whose land base is at least all crown lands, so called. A nation able to raise its own economy and provide for its people'.

However, as Larissa Behrendt has pointed out, for many 'the recognition of sovereignty is a device by which other rights can be achieved. Rather than being the *aim* of political advocacy, it is a *starting point* for recognition of rights and inclusion in democratic processes. It is seen as a footing, a recognition, from which to demand those rights and transference of power from the Australian state, not a footing from which to separate from it.' This internal perspective on sovereignty explains much

of the current advocacy in Indigenous affairs, using the language of 'governance' and 'jurisdiction' as exercised by Indigenous 'polities'. It also corresponds with the long-term political campaign waged by Indigenous peoples and their supporters using another term borrowed from international law and Western political thought: 'self-determination'. Noel Pearson has favoured the use of 'self-determination':

a concept of sovereignty inhered in Aboriginal groups prior to European invasion insofar as people have concepts of having laws, land and institutions without interference from outside of their society ... Recognition of this 'local indigenous sovereignty' could exist internally within a nation-state, provided that the fullest rights of self-determination are accorded.

Many Indigenous people also frame their claim to sovereignty in popular, rather than strictly institutional, terms. In this sense, sovereignty is seen as something inherent. It is the basic power in the hands of Indigenous people, as individuals and as groups, to determine their futures. This echoes the view of self-determination put forward by Richie Ah Mat:

self-determination is about practice, it is about actions, it is about what we do from day to day to make changes, it is about governance. It is about taking responsibility for our problems and for our opportunities: because nobody else will take responsibility for our families, our children, our people. We have to do it ourselves.

A range of Indigenous views exist, and some seek to challenge authority in the external sense of the word sovereignty. But it is equally important to recognise that others adopt an internal perspective. They seek to re-negotiate the place of Indigenous peoples within the Australian nation-state, based on their inherent rights and their identity as the first peoples of this continent. That vision of an Australia where, in practical terms, sovereignty is shared or 'pooled' is, as it happens, consistent with the way the concept has evolved in Western thought – the original absolute and monolithic sovereign is a myth, the reality today is qualified sovereignty.

The Commonwealth Government

The Howard Government's position on the use of treaties between Indigenous and other Australians is clear. It is not willing to negotiate or to enter into such agreements. This was stated several times by Prime Minister Howard



on 29 May 2000 in interviews that took place a day after a quarter of a million people took part in the People's Walk for Reconciliation across the Sydney Harbour Bridge. For example, in an interview with Alan Jones, the Prime Minister stated: 'I mean nations make treaties, not parts of nations with each other'.

Rather than mentioning any form of Indigenous sovereignty, the Government prefers to speak of Indigenous people being 'equal' members of the Australian nation. For example, the *Executive Summary of the Commonwealth Government Response to the Final Report of the Council for Aboriginal Reconciliation* speaks of 'a sincere desire to see Indigenous people not just treated as equals, but to experience equity in all facets of Australian life'. This would require recognition that Indigenous people, like all other Australians, share in whatever form of sovereignty is said to underpin the Australian nation. However, it does not necessarily recognise any other distinct form of authority continuing to inhere in Indigenous peoples as the first peoples of the nation.

The Government does acknowledge the 'special' place of Indigenous people within Australian society. While the Government has indicated that one of its priorities is 'increasing opportunities for local and regional decision making by Indigenous people', it has steered away from using words like sovereignty and self-determination, preferring terms such as 'self-management' and 'self-reliance'.

The High Court on Sovereignty

The High Court has examined the concept of sovereignty in a number of contexts. For example, its judges have recognised the idea of popular sovereignty. Justice Deane, later Governor General of Australia, said that the present legitimacy of the Constitution 'lies exclusively in the original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people'. Some support for this idea of popular sovereignty is found in section 128 of the Constitution, which provides for amendment of the Constitution by the Australian people voting at a referendum.

Popular sovereignty means that Indigenous peoples, collectively and individually, like all of the Australian people, provide part of the constituting force of the Australian nation. It is also relevant for another reason. As expressed in section 128 of the Constitution, it illustrates that Australia's constitutional future rests in the hands of its people and their politicians. It is possible to alter the Constitution to bring about a treaty, or even more profound changes to our system of government.

Such changes might include the aspirations of Australia's Indigenous peoples and might reflect and recognise their own understandings of sovereignty. Of course, this does not mean that this process is easy to invoke. Of the 44 referendum proposals put to the Australian people over more than a century, only eight have been passed.

The High Court has addressed the issue of Indigenous sovereignty more directly. In 1992 in the *Mabo Case*, it found that the acquisition of sovereignty by Britain over Australia with white settlement in 1788 could not be contested in Australian courts. However, the High Court also acknowledged:

1. The courts can say what are the *consequences* of this acquisition of sovereignty by Britain over Australia.
2. Sovereignty over a territory does not necessarily mean full ownership of that territory. Across the continent of Australia, the land rights of Indigenous peoples under their traditional systems of law survived the acquisition of British sovereignty.
3. This left room for the continued operation of some local laws or customs among Indigenous people to be recognised under Australian law.

In 1993 in *Coe v Commonwealth (No 2)* it was argued that the Wiradjuri people are a sovereign nation in the external sense and, in the alternative, that they enjoy a subsidiary or internal form of sovereignty as a 'domestic dependent nation, entitled to self government and full rights over their traditional lands, save only the right to alienate them to whoever they please'. However, Chief Justice Mason rejected these arguments. He found the *Mabo Case* to be 'entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are "a domestic dependent nation" entitled to self-government'.

In its 2002 decision in *Yorta Yorta*, Chief Justice Gleeson and Justices Gummow and Hayne found that Aboriginal rights to land, including to native title, continue to exist only because they are recognised by the Australian legal system that came into effect after white settlement. The judges recognised there may be some alterations and development in traditional law and custom after 1788, but insisted 'what the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty. To hold otherwise would be to deny the acquisition of sovereignty and ... that is not permissible.'

Indigenous Sovereignty In Other Nations

Below, we examine how governments and courts in other like nations have viewed Indigenous sovereignty.

Canada

Treaties were entered into when the British arrived in North America, and since the 1970s Canada has had a modern-day treaty process for resolving issues of land, resources, service delivery and self-government.

The Canadian Constitution, as amended in 1982, provides some protection for the interests of Indigenous peoples (First Nations, Métis and Inuit). Section 35 states that 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed'. The *Federal Policy Guide: Aboriginal Self-Government* of the current Canadian Government recognises the right of self-government as a protected right under section 35:

Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.

The Federal Policy states, however, that this right does not confer sovereignty upon Aboriginal peoples in the external, international law sense. The Government does not recognise the existence of independent Aboriginal nation-states. Instead, Aboriginal people remain subject to Canadian law, although Aboriginal and Canadian laws will co-exist.

The Supreme Court of Canada is yet to rule conclusively on the Aboriginal right to self-government, but Canadian courts have looked at the issue. In 2000 the British Columbia Supreme Court in *Campbell v British Columbia (Attorney-General)* was asked to review the validity of the treaty signed in 1999 by the Nisga'a people and the provincial and national governments. The Court held that self-government is protected under section 35 and that 'after the assertion of sovereignty by the British Crown ... the right of aboriginal people to govern themselves was diminished, it was not extinguished'. The Court confirmed the place of Indigenous self-government within the Canadian nation.

United States

Under the Bush Administration, there are 562 federal recognised tribal governments in the United States. Treaties with Indian (Native American) nations were commonplace in American history. Indian tribes maintain power and authority over their own communities and, like Canada, the United States has given some effect to the right to self-government. It has also gone further, at least in its use of language, in recognising the sovereignty of the Indian tribes.

The Supreme Court of the United States has recognised Indigenous sovereignty since the early 1800s. For example, in 1832 in *Worcester v Georgia*, Chief Justice Marshall found that, prior to contact, the Indian tribes were sovereign nations. He stated: 'America ... was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws'. This view has been followed in later decisions of the Court. In 1978 in *United States v Wheeler*, Justice Stewart accepted that 'The powers of Indian tribes are in general, "inherent powers of a limited sovereignty which has never been extinguished".' He found that the sovereignty of Indian tribes exists at 'the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers'.

Even though the Indian tribes have no specific constitutional protection of their right to self-government, there are similarities between Canada and America. While the power and authority of Indigenous peoples in both countries are not identical, governments and courts have recognised their right to self-government. In both nations, this is recognised as an inherent right not extinguished by the assertion of British sovereignty.



New Zealand

Unlike Australia, New Zealand never laboured under the fiction that the land was terra nullius (the notion of land inhabited by no one) before the arrival of the British. The British Colonial Office instructed the would-be first Governor of New Zealand to enter into a treaty with the Maori. The Treaty of Waitangi, signed by over 500 chiefs over eight months in 1840, deals with fundamental issues of government authority, property rights and the application of British law.

For a long time, the Treaty was officially regarded as almost irrelevant. Today, its influence is pervasive. Laws are made subject to its principles. Decision-makers must take it into account. Judges use it in shaping the common law.

There are two versions of the Treaty of Waitangi, one in English and one in Maori. Both versions are official, recognised statements of the Treaty's terms. A third version, which translates the Maori text back into English, is also treated with authority. This third version illustrates how, from the time of its signing, different views could be taken of what the Treaty says about sovereignty. The English version provides that Maori yielded up absolute sovereignty without reservation, with the Maori guaranteed undisturbed possession of their lands and estates, forests, fisheries and other properties (subject to the sole right of purchase by government).

On the other hand, the Maori text, translated back into English, grants the British Crown the power of government (*kawanatanga*) in the context of Crown protection for the unqualified exercise of Maori chieftainship (*rangatiratanga*) over their lands, villages and all their treasures (subject to the Crown's sole right of purchase). Did the Maori chiefs hand over absolute sovereignty, agree to share it, deliberately withhold it, or grant some lesser degree of authority while holding onto the power of self-government? The debate about what the treaty actually says has not been finally resolved, and appears likely to continue. Meanwhile, the Treaty provides an acknowledged framework for the ongoing negotiation of the relationship between Maori and government.



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Objections To Treaty-making In Australia

Too Late in the Day?

Perhaps the most difficult thing to accept for those opposed to a treaty or treaties in Australia is the idea that, more than two hundred years later, a society can do something that might be thought to normally occur at the outset of settlement or colonisation. There is a simple factual answer to that concern. Canada took the step in the mid-1970s to recognise the capacity of its Indigenous peoples to enter into modern day treaties with its national and provincial governments. It was a *political* decision by the democratically elected government of the day. Treaty-making has been policy and practice in Canada for more than a generation. Certainly there have been issues, setbacks and problems with the process. Indeed, the same can be said of most political processes that address serious issues affecting the lives of ordinary people. However, Canadians can also point to many benefits from the recognition, from the commitment to negotiation and from the outcomes of the modern treaty era.

While Canada and Australia differ in some important respects, they share many of the same fundamental features. Both inhabit a large continent, originally occupied by many separate peoples whose society and culture is a living contemporary reality. Both are also former British colonies with a parliamentary and common law tradition, modified by a federal structure. Both are also making belated attempts to come to terms with their history and to start down the path of including within the nation the Indigenous peoples who, for many decades, have been excluded by law and government action.

It is true that Australia was taken without treaty or consent. It is also true today that many Australians view that event very differently from how we once did. Times have moved on and perceptions have changed. Australia's most basic legal assumptions have been recently revised. In effect, the High Court has recognised that sovereign authority over the continent was, prior to 1788, exercised by the separate Indigenous societies that occupied it. The High Court, Australia's parliaments and governments have all recognised the rights of Indigenous peoples over the lands and waters they occupied, and that those rights survived the acquisition of British sovereignty. Inevitably the recognition of these

basic facts, that Indigenous societies hold land and govern their societies according to their law, strengthens calls for sovereignty to be re-examined – to re-evaluate how legitimate political and legal authority comes to be exercised over this continent.

Obsessed by the Past?

There is another common objection to re-visiting the legitimacy of British authority over *all* the people of the Australian continent, including the Indigenous peoples descended from its original occupiers. Some people say that a treaty is backward-looking in travelling over old ground and that it fixes on the past when the real problems confronting Indigenous communities are in the present and the future. Again, behind this objection is a frame of mind that sees sovereignty as a once-and-for-all-issue, rather than the continuous working out of agreed principles and values for the legitimate exercise of authority by government over people.

In other words, the terms of the political 'settlement' in a society at a given moment in time (for example, at the planting of the flag at Sydney Cove by Governor Arthur Phillip or the Federation of the nation in 1901) are not only about the past, they are also about the present and the future. History shows that exclusion from the 'settlement' gives rise to grievance, but that political choices can be made to address that grievance by revising the terms of the settlement and seeking to bring them into closer alignment with fundamental assumptions and values. When societies make that choice, a new inclusive settlement may lay the foundations for future social and economic development.

The recognition of native title is another example of how structural and legal change can be about both the past *and the future* at the same time. To clear the way for recognition of Indigenous rights to land, the High Court had to address past understandings. In particular it had to re-examine assumptions behind the acquisition of British sovereignty. The key assumption that supported past understandings was the idea of Australia in 1788 as terra nullius – land inhabited by no one. The High Court identified the discriminatory world-view at the heart of terra nullius and said it was no longer an acceptable assumption upon which to base ownership of the



continent of Australia. Indigenous groups who lodge a native title claim pursue recognition of their rights today in order to build a future for their families and the generations to come. To get to that point, Australia as a nation, through its highest court, had to return to the events of 1788 when the British asserted sovereign control of the continent. Those events had to be re-examined in light of contemporary knowledge of the facts, and contemporary standards of political morality.

Australian Law Forbids It?

Asking the High Court the international law question – whether the British Crown gained sovereignty over the continent in the external sense of the word – raises an obvious problem. The authority of the High Court depends on the validity of this sovereignty. It is not well placed to judge the issue because, as itself a creation of the Australian Constitution, it is not a disinterested party. Not surprisingly, the Court has refused to examine the question, calling it a ‘non-justiciable’ issue for Australia’s courts.

The position regarding internal sovereignty is less obvious. History demonstrates that courts can deal rationally with the idea that, internally, power and authority is shared between ‘polities’. Disputes about federalism, for example, commonly raise questions about the internal allocation of authority between the national government and the States. These are disputes where the language of sovereignty is not unknown in the courts. In the United States, the Supreme Court has maintained for 170 years that Indian nations enjoy a subsidiary degree of sovereign authority, inside the American nation-state.

When the High Court of Australia recognised the prior ownership of land by Indigenous peoples in *Mabo*, it raised new possibilities for the formal recognition of Indigenous forms of governance and authority. Yet on the occasions this internal sovereignty question has been put to the High Court, the answer has been a brisk no. In preserving the perceived status quo about this most fundamental question, the Court arguably overlooked two key aspects of the decision in *Mabo*:

1. Systems of traditional law and custom survived the acquisition of British sovereignty and they operate into the present day to regulate the rights enjoyed by native title holders and to govern their decision-making.
2. Although the question whether a territory has been acquired by the British Crown cannot come before Australian courts, those courts can determine the consequences of the acquisition under the law.

The High Court has developed its own ‘working definition’ of sovereignty and Australia’s legal system continues to operate accordingly. The judiciary is only one arm of government, however, and questions of settlement and legitimacy continue to be agitated in parliament and in discussion with government and in the public arena.



Conclusions

There are no easy answers when addressing basic questions about Indigenous peoples and sovereignty. However, the concept is not a roadblock to moving forward with innovative new settlements, including the idea of a treaty or treaties. The following aspects of the Australian legal system demonstrate how these issues might be tackled:

- 1. The acquisition of external or State sovereignty over the Australian continent is a matter for international law.** It is up to Indigenous peoples and Australian governments to make their decisions about where they go in that regard. Obviously, though, there are limits to what can be asked of each of our institutions (courts, parliament and government), and it is a matter of which questions do we address to which institutions.
- 2. The consequences of that acquisition of sovereignty, for the internal distribution of authority and rights, is a matter for the domestic legal and political sphere.** This much is established by the High Court's decision in *Mabo*.
- 3. Whether popular sovereignty is now the intellectual underpinning to Australian constitutionalism or not, there is one undeniable fact: the Constitution can be changed by a referendum of the people.** The Court can have its say on Indigenous sovereignty (and to some extent it has). Despite this, section 128 of the Constitution ultimately puts the terms of the Australian settlement into the hands of its politicians and people. This shifts our focus from a legal conception of sovereignty towards a political one.
- 4. Canada and New Zealand show that in countries like Australia debates over sovereignty can go on (and given its elusive nature, they will go on) and in the meantime the choice can be made to re-negotiate or revisit the fundamental settlement between peoples.** Australia can get on with tackling the rules of co-existence. Sovereignty in the external sense of the word need not be seen as an impediment to treaty-making in modern-day Australia.

With these principles in mind, it is possible to move forward to consider other questions. These might include whether a treaty is an appropriate way of achieving reconciliation between Indigenous and other Australians, and, if that is the case, the form any such treaty should take. These and other questions can be addressed at the same time as Indigenous peoples continue developing their own conceptions of sovereignty and self-determination.

Issues Papers Series

This series contains papers for a general audience on issues relating to the idea of a treaty or treaties between Indigenous peoples and the wider Australian community.

Paper No 1 - *Why Treaty and Why This Project?* is accessible in electronic form on our website at www.gtcentre.unsw.edu.au (under publications) or as a hard copy by emailing gtcentre@unsw.edu.au.

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

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The Treaty Project

The Treaty Project is part of a larger collaboration between the Gilbert + Tobin Centre of Public Law and our two Australian Research Council partners. **Professor Larissa Behrendt** is Director of the Jumbunna Indigenous House of Learning at the University of Technology, Sydney. Our other partner is **Dr Lisa Strelein**, Manager of the Australian Institute of Aboriginal and Torres Strait Islander Studies' Native Title Research Unit.

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The Project maintains a resource page of treaty materials, which can be found at www.gtcentre.unsw.edu.au.

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