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Articles:

'Treaties', 'Agreements', 'Contracts' and 'Commitments' – What's in a Name? The Legal Force and Meaning of Different Forms of Agreement Making

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The multi-dimensional nature of treaty and agreement making has assumed a central focus in the conduct of relations between Indigenous peoples and settlers in Australia and elsewhere. Whether as a means of resolving disputes, delivering government programmes, or establishing common understandings, agreement making, however defined and named, has become the key tool for engagement between Indigenous and non-Indigenous Australians. Agreements come in all shapes and sizes, ranging from registered Indigenous Land Use Agreements (ILUA) to Statements of Commitment, Memorandums of Understanding and Regional Agreements. In other jurisdictions these may be called 'treaties'. While agreement making in Australia has an important place in the evolving relationship between Indigenous and non-Indigenous peoples in Australia, it must also be examined for its practical outcomes, and whether these do indeed foster a fair and just relationship.

This paper examines agreements in Australia from the point of view of their enforceability, referring to the category of agreement and the status of the parties. The paper discusses various categories of agreement and the enforceability of each type. This discussion aims to provide practitioners and native title-holders and claimant's information to assist them choose the appropriate agreement type for their purpose, and to understand the language, meaning and consequences of particular agreements. The paper does not seek to provide an exhaustive legal analysis of the elements of each type of agreement. Rather, it highlights the significant characteristics of each type of agreement, including its common legal status and its most frequent applications. In doing so, the paper provides an accessible insight into the intersection between contract law and agreement making. Ultimately the paper provides some tools to help determine what might be meant by one party when it proposes to another the making of an agreement, with a view to avoiding the difficulties that can come from a clash of differing expectations. The paper also provides the discussion points that may help parties make a choice of agreement type that meets their needs and expectations.

A History of Negotiated Agreements in Australia

Jo FOX – is a former advisor on Indigenous Affairs to the Federal Opposition and has worked for Indigenous organisations.

Negotiated agreements between Indigenous and non-Indigenous people have been given many names in Australia over the last thirty years and in comparable overseas counties – they have variously been called a treaty, lasting agreement or settlement, compact or Makarrata. They all have a common meaning in that they result from direct negotiations, reaching a written and binding agreement, with obligations placed upon each party. The term 'treaty' itself is at the heart of the contemporary political debate on indigenous issues in Australia. To some people it has a clear meaning and to others it remains intangible, unknown and confusing. The term itself can sometimes be alienating and act to stall discussion and debate. The common label in this paper is 'negotiated agreement'. This issues paper provides a general overview of negotiated agreements between indigenous people and the State in Australia since colonisation. Although there were actions to secure rights, such as the Yirrkala Bark petition in 1963 and calls for a Treaty of Commitment by the National Aboriginal Conference in 1979, there were no formal negotiated agreements with legally binding obligations placed upon each party or measurable effect until agreements reached through the *Northern Territory Aboriginals Land Rights Act 1976*.

Principles of a Treaty Relationship

Stuart BRADFIELD – is Visiting Research Fellow, Native Title Research Unit, AIATSIS.

The importance of a treaty for Australia lies not in any particular document, but in the relationship it promotes between Indigenous and non-Indigenous peoples. This is not only a symbolic, but a profoundly practical matter. While treaties between peoples do not solve all problems overnight, they provide a new framework for engaging issues, remaking relationships, and promoting new norms of behaviour. A treaty is significant only to the extent that it facilitates a new relationship that translates a number of principles fundamental to both Western and Indigenous political discourses into concrete arrangements., this is done in such a way as to promote the unity of the newly-formed political association, while retaining the autonomy of individual parties. Exploring the work of the Canadian royal Commission on Aboriginal peoples (RCAP), political philosopher James Tully and other North American scholars, this paper identifies four key principles inherent to and promoted by, a treaty relationship: mutual recognition, equality, co-existence and self-governance.

Exploring the Treaty Settlement Process in Aotearoa/New Zealand

Jason DE SANTOLO – is a Research Fellow at Jumbunna Indigenous House of Learning, University of Technology, Sydney.

The Treaty settlement process is a key aspect of the Maori struggle for greater Treaty rights recognition in *Aortearoa*/New Zealand. This paper explores the New Zealand Government's Treaty settlement regime as one of the most prominent national agreement making frameworks in the world. The discussion provides the background to the development of these policies and outlines the processes involved in historical grievance settlement for Maori claimant groups. In identifying localised responses within the study, the paper aims to provide comparative insight into the regime, allowing the reader to make informed conclusions as to issues and strategies that my enhance agreement making in Australia for our Indigenous communities.

Dealing with Unfinished Business: A Treaty for Australia

Lisa STRELEIN – Visiting Research Fellow and Manager of the Native Title research Unit at the Australian Institute of Aboriginal and Torres Strait Islander Studies.

In 2000, a few days after Patrick Dodson's lecture on 'unfinished business', the elected chair of the Aboriginal and Torres Strait Islander Commission (ATSIC), Mr Geoff Clark, restated the call for a Treaty between Indigenous peoples and the Australian Government. Clarke argued for the recognition of Indigenous peoples' distinct rights and for fundamental constitutional reform. This appeal did not come as a surprise to the Prime Minister, whose address followed Clark, because a delegation of Indigenous people had raised the issue with John Howard in a meeting just a few days earlier. The Memorandum of Understanding presented at the meeting set out a framework for formal negotiations on a number of outstanding issues, to be resolved prior to Centenary of Federation.

This paper examines the reasons for the re-emergence of the Treaty debate, and its relationship to the reconciliation movement, and the fundamental principles at the heart of the idea of a Treaty between a national government and Indigenous peoples. It briefly examines recent comparative developments that are unavoidable in this context and the relationship between the proposed national Treaty had the kinds of local, regional and state agreements that are currently under negotiation. Finally, it looks at the suggestions that have been put forward for the content of a Treaty

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Treaty Project Issues Papers

Sean BRENNAN – Director of the Treaty Project at the Gilbert + Tobin Centre of Public Law and a Lecturer, Faculty of Law, UNSW. The Treaty Project was undertaken in partnership with Jumbunna Indigenous House of Learning at the University of Technology Sydney and the Australian Institute of Aboriginal and Torres Strait Islander Studies, funded by the Australian Research Council and the Myer Foundation, through Reconciliation Australia.

Why 'Treaty' and why this project?
Examines the word 'treaty' and how it is understood; what 'baggage' it carries. The paper looks at the 'T-word' as embodying three key elements: a premise (of acknowledgement): a process (of negotiation); and an outcome (of rights and opportunities). Brennan outlines how the Project will explore ways in which public law can be used to ensure that comprehensive agreement-making delivers outcomes to Indigenous communities in the form of opportunities as well as rights. He also proposes that a treaty process offers the possibility of better mutual understanding, better public policy in Indigenous affairs, better results from the expenditure of money in areas like health, housing and education.

What's sovereignty got to do with it?
In this paper, Brennan, with Brenda Gunn and Professor George Williams, explores whether sovereignty is indeed a roadblock to a modern-day treaty or treaties between Indigenous people 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 the dilemmas, the authors 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.

Native title and the treaty debate: What's the connection?
Brennan looks at one of the main areas of the law where Indigenous groups are engaged right now in pursuing their rights and aspirations, and asks: what is the connection between native title and the treaty debate?

Could a treaty make a practical difference in people's lives? The question of health and well-being.
Brennan addresses the key question of whether a treaty or treaties between Indigenous peoples and Australian governments would make any practical difference to the daily lives of Indigenous people. This Issues Paper approaches that question from the perspective of health and well-being, rightly identifying that there can be few more urgent issues confronting Indigenous communities and the Australian nation than the state of Indigenous health. This issues paper draws on presentations and discussion at the Treaty project's national forum, held in Sydney in September 2004.

National Forum on Indigenous Health and Treaty Debate: Rights, Governance and Responsibility

This national forum was held as part of the Treaty Project at the University of New South Wales on September 11, 2004, included people who came from overseas and around Australia, from Aboriginal community-controlled health organisations, from government and academia, from business, law, medicine and public health, from reconciliation organisations and the general community. Some of the key papers include:

The Social Determinants of Health and a Treaty or Treaties
Olga HAVNEN - is an Indigenous rights advocate and former Indigenous Program Manager, The Fred Hollows Foundation.

Olga speaks of the potential of negotiated arrangements or treaties to play a constructive and useful role in addressing the substantive issues that underpin Indigenous socio-economic disadvantage and powerlessness.

Indigenous Jurisdiction and Daily Life: Evidence from North America
Stephen CORNELL – is Professor of Sociology and of Public Administration and Policy and Director of the Udall Centre for Studies in Public Policy at the University of Arizona. He co-founded the Harvard project on American Indian Economic Development at Harvard University in the late 1980s, and continues to co-direct that project today.

According to Professor Stephen Cornell, the North American evidence suggests that self-determination is one of the keys to improved welfare in Indigenous communities, and that equality between Indigenous and non-Indigenous Australians is unlikely without it.

Treaty and /or Health
Larissa BEHRENDT – is Professor of law and Indigenous Studies and the Director of the Jumbunna Indigenous House of Learning at the University of Technology, Sydney.

Professor Larissa Behrendt proposes that poor health experienced by Indigenous communities can only be combated through a holistic approach that involves interventions through policy making to address problems as they arise, and structural and institutional changes to prevent those problems from arising in the first place.

Indigenous Health and the Treaty Debate

Fred CHANEY – is co-Chair of Reconciliation Australia.

Fred Chaney puts forward the view that there is a real opportunity being offered by the current Council of Australian Government (COAG) trials to achieve treaty-like outcomes that will benefit Indigenous health, rather than in attempting to win a theoretical debate about the relevance of treaties to Indigenous health.

The Health of Our Children

Jeff McMULLEN – is a Director of Ian Thorpe's Fountain for Youth Trust.

For Jeff McMullen, the cluster of chronic illnesses known as 'Syndrome X' afflicting so many of the 460,000 Indigenous Australians has long been a front-page story begging to be written.

Book Review – Achieving Social Justice by Larissa Behrendt

Nerida BLAIR – is an Associate Professor at the Umulliko Indigenous Higher Education Centre, Acting Head of Wollotuka School of Aboriginal Studies and Acting Director of Umulliko, Indigenous Higher Education Centre, University of Newcastle.