

# An Australian Indigenous Treaty: Issues of Concern

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Might I first acknowledge the traditional owners of this land where our new building stands, the Ngunnawal people, and also might I extend a welcome on behalf of the members of the Institute Council, the members of the Institute and our staff to our wonderful new building.

Around the middle of last year, the Aboriginal and Torres Strait Islander Commission, ATSIC, established a Treaty Advisory Group under s.13 of the ATSIC legislation. At about the same time they established a think-tank to advise the Treaty Advisory Group and, in turn, the board of ATSIC. I am a member of that think-tank which is made up of Indigenous community members, lawyers and academics and scholars. It is hoped that the think-tank will provide some philosophical and intellectual underpinning to the treaty process.

In November of last year I was employed by ATSIC for two months, along with a number of others, including my business partner, Tony Bauman, to advise on a number of things. We compiled a strategy document, a list of frequently asked questions, a pamphlet, and an issues paper. The issue paper is what I want to refer to today. The final version of the issues paper will be available on the Treaty Now website.

The issues paper, perhaps I should say, was written in some haste. The main concerns that might influence the treaty process are raised but not in-depth, but I think that the important point is that they are raised and that they will form the foundation, in part, for the pursuit of research and discussion and dialogue, in forums such as this one, well into the future.

## **What is a treaty?**

So where do you start with the treaty or treaties? I guess it is useful to try to define what you are talking about, in other words, what is a treaty? A treaty is essentially a settlement or an agreement arrived at by treating or negotiation. It always gets me that, when you look at the simplest definitions of these things, you find that, 'Oh, it's what you arrive at by treating a topic, or to treat with people.' This doesn't really take you very far, because a treaty, of course, gives rise to binding obligations between the parties who make it. It acts to formalise a relationship between the parties to the agreement.

In international law the word 'treaty' has been used to cover a variety of international agreements.

The Vienna Convention on the Law of Treaties of 1969 is the codification of the practice of international treaty-making, which was previously regulated by the customary rules of international law.

The Convention, to which Australia is a party, defines a treaty in the international context as an agreement whereby two or more nation states establish, or seek to establish, a relationship between themselves imposing binding obligations on themselves and governed by international law.

The term 'treaty' has also been used in the domestic context on occasions to describe arrangements between individuals, for example, in conveyancing for the sale and purchase of property. A domestic treaty, perhaps by description, would be bound by domestic law alone and not be subject to international scrutiny unless, of course, the parties agree otherwise.

The word 'treaty', therefore, covers a broad range of concepts, including contract or compact, a covenant, an agreement, a settlement, or international arrangements between nation states. In so doing, it acts to regulate a variety of relationships, depending on the nature of those relationships. The treaties in North America between First Nations or First Peoples, sometimes referred to as Indians, and the British go back almost five centuries. In the prevailing legal discourse they are not considered to be international treaties in the sense of agreements between independent and sovereign nation states. This view, of course, is very vigorously contested by the Native Americans and Aboriginal Canadians, who were and are parties to these treaties.

What should be remembered about these treaties is that most of the treaty documents did express the notion that the Indians constituted separate and sovereign peoples who had their own laws and were capable, as nations and tribes, of forming and breaking their own alliances with others, including colonial powers, and who also had national or tribal territories under their control. This, I think, acknowledges that there is or was a distinct relationship between the two groups that were defined in those agreements, those treaties.

This legal discourse has arrived at its present place in a journey over several centuries in what Martinez describes as 'the process of domesticating relations with Indigenous peoples'. I'll come back to this briefly later.

This process was and still is essentially part and parcel of the colonisation process. The European colonising powers and their successors sought to transform the status of Indigenous sovereign nations into domesticated state entities. This was attempted in various ways. One way they did it was to divest Indigenous peoples of their sovereign attributes. The main weapon they used to do this was to strip Indigenous peoples of their jurisdiction over their ancestral lands and to refuse to recognise their societal organisation and status as subjects of international law.

Whatever the accepted legal position comes to be, wherever this discourse ends its journey, if it is a domesticated version, it certainly will not be a position that will be shared by the Indigenous First Nations who are parties to these treaties.

If a treaty really is an agreement between two parties who seek to have their relationships with each other spelt out, it would be recognised by the specific, binding principles that are agreed to by the parties. I can not over-emphasise the words 'agree' or 'agreement'. Nothing in the treaty-making process is imposed upon either party. Some of the principles that might underlie a treaty in Australia could include the recognition of Aboriginal and Torres Strait Islander Peoples as the First Peoples of Australia and the distinct rights that flow from this. It might also include agreements on the reforms required to reach a more just society. It might also set national standards that would inform local and regional treaties and agreements.

I should add that my preference, my personal preference, is that if we are to embark on treaty-making in Australia it can never be achieved as one single treaty. I think we are talking about a number of treaties.

The international legal meaning of treaties is used by the present Australian Government to unequivocally reject calls for a treaty. It is obvious that in light of such entrenched attitudes the term 'treaty' must be viewed in the broadest possible sense and efforts made to build confidence on all sides in the process and its ultimate objectives. As Martinez, whom I mentioned earlier, said in his treaty study, one should avoid making oneself a prisoner of existing terminology. What really is required is innovative thinking. To put Martinez another way, a Eurocentric historiography of treaties must be put to rest if we are to progress to new treaty-making.

### **Why do we need a treaty or a new way of making treaties?**

The three like jurisdictions that are generally mentioned in this context are Canada, the United States and New Zealand. Unlike them, Australia has never had a formally recognised treaty with Indigenous peoples. There were some attempts made by people such as Augustus Robinson and Batman. These, of course, were never formally recognised nor upheld by the British colonial powers at the time.

Aboriginal and Torres Strait Islander Peoples did have recognised customs and power structures, and still do, that recognise treaties in a variety of forms. This was clearly noted by Augustus Robinson, who answered an advertisement in the local newspaper to negotiate with the Tasmanian Aborigines. Clearly this establishes a link to the type of relationship that existed at the time of first contact between Aboriginal people and the foreign settlers. It drew attention to the need for defining the relationship between Aboriginal people and settlers. The settlers recognised as early as 1820 that a treaty might have been of value to the relationship because they believed that in Tasmania a treaty would stem the violence and deprivation that Aboriginal people there were suffering through first contact.

As I said, the basis of our rights have never been formally recognised by the settlers or past governments. Worse, our rights have been affected by this one sided relationship. History shows that Aboriginal people have been painted in a certain light, often portrayed as native savages with no concept of civilised customs or societies or governments. This, I think, has been misleading both to Indigenous people of the past and those of the present. History, in a sense, has been the victimiser, for want of a better word, of Aboriginal people simply by maintaining the notion of Aboriginal people as native savages. Arguably a treaty could have recognised and protected Indigenous rights and led to a just constitutional basis for the Australian federation.

Aboriginal and Torres Strait Islander Peoples were completely overlooked as relevant parties in the formation of the Australian federation. If a treaty had been in place and constituted by those principles I have already noted, the structure of federation would, no doubt, have incorporated Aboriginal rights and position in the federal system.

It was not until the Mabo decision that the government recognised the property rights of Aboriginal and Torres Strait Islanders. The British, with the exception of Australia, recognised these rights in all of its other colonies across the world. Here the basis of British sovereignty, up until the Mabo decision, relied on a ruling in 1889 of the Judicial Committee of the Privy Council which said that Australia was not occupied by conquest or secession. These issues, which I presented in the issues paper for ATSIC, are important for questions of sovereignty. The Privy Council said that Australia was not occupied by conquest or secession but rather it was, practically speaking, unoccupied, without settled inhabitants or settled law and that it could be peacefully annexed. This is essentially

the doctrine of terra nullius, which the High Court in Mabo overturned.

But the Mabo decision has not delivered a just settlement of the historical grievances. Last week I heard a High Court judge say an appalling thing. Speaking in the Miriuwung Gajerrong appeal, he asked ‘Well, isn’t the Native Title Amendment Act a Treaty?’ I do not know how he arrived at that conclusion; it astounds me! You know, there are only seven justices; he is one of seven and that is his attitude and understanding of law. It’s frightening!

As I said, the Mabo decision did not deliver a just settlement either through the decision itself or through the Native Title Act and its amending Act. It did not address the legitimate historical grievances of Aboriginal and Torres Strait Islander Peoples. It should be remembered that these grievances, these claims, are not only defined in terms of meeting our physical needs as Indigenous peoples, but they have for us a moral dimension. This moral component will never be met by better informed government policies of service delivery which focus on things like health, housing, education, the so-called practical reconciliation.

To cater for this moral dimension there has to be a recognition, an acceptance by government of two things, in my view. First, the Aboriginal and Torres Strait Islander Peoples have been injured and harmed throughout the colonisation process and just recompense is owed. Second, Aboriginal and Torres Strait Islander Peoples as First Peoples have distinctive rights and special status based on prior occupation of land. Essentially, these two facts have to be acknowledged, recognised by government, if we are to have progress in the process of treaty-making. Intensive government programs directed at bringing about equality with other citizens will not, of themselves, provide justice for Indigenous Australians.

The time is right to talk about a treaty, at this, the Centenary of Federation. Even the word ‘federate’ derives from a Latin word meaning to make a treaty. The Australian Constitution is essentially a treaty between the former colonies and the Imperial Parliament of Britain. Also there is some support in the community for treaty-making. An A.C. Nielsen Age poll showed that 53 per cent of Australians are ready to embrace the concept of a treaty. A similar figure was returned regarding reconciliation.

I think a national treaty is important because it will reflect a people who have matured as a nation. Also, as I said at the outset, a national treaty does not stop Indigenous communities and other local regional State and Territory stakeholders from signing treaties with each other at those levels.

Finally, one of the things that a treaty or treaties will do, something that white fellas seem more concerned about than black fellas, a treaty will deliver the ultimate certainty of the relationship between Aboriginal and Torres Strait Islanders and the rest of the country’s population.

## **Negotiation within a Legal Framework**

I want to talk briefly about how a treaty might be negotiated within a legal framework. The issues paper talks about a number of broad ways in which a treaty might be negotiated legally in Australia. First, a treaty can be an agreement under international law. I have spoken about that. Second, it can be an agreement that is supported by the constitution. Third, it is an agreement that is supported by legislation; and finally, it can be a simple agreement.

Let me take each of these in turn. First, the document as an agreement under international law in the form of a treaty: I have briefly mentioned this already, but implicit in this approach is the continued existence of Aboriginal and Torres Strait Islander sovereignty, some residual sovereignty. This question, as I have mentioned, is discussed in the issues paper, but it gives a recognition that

Aboriginal and Torres Strait Islander sovereignty has survived in some form, if not wholly.

This option proposes that two sovereign parties, the Commonwealth of Australia and the Aboriginal and Torres Strait Islander Peoples, enter into an agreement that is enforceable under international law. This poses some difficulties in the Australian domestic political context because not only do the parties have to have the capacity to conclude treaties under international law, but they must also be sovereign entities possessing an international personality. The Commonwealth of Australia is obviously regarded as an entity that possesses international personality and is a sovereign entity. But can this, as a matter of reality, be said to describe the status of Indigenous Australians? I don't have an answer to this question, I merely raise it.

The second way we could make a treaty is as an agreement that is supported by the Constitution. One way we could do this legally is to include the entire text of a treaty document in the Australian Constitution. I hasten to repeat that I do not favour a single treaty approach. Embodying the treaty document in the Constitution could set the basis of relationships between the Commonwealth and Aboriginal and Torres Strait Islander Peoples and describe how these relationships would be conducted in the future as its main objectives. Rather than going into too much detail, let me say simply that I think you would never get an agreement on such an approach.

While it could provide certainty, it also could prove to be inflexible – difficult to change or even to remove from the Constitution. Approval for such a proposal would be very difficult, in my view. Perhaps a bare statement of principles, providing a framework for future relationships, might more easily gain approval, not only from the electors but from the Parliament. Realistically, I think any detailed text would be next to impossible to get into the Constitution, particularly given the history of the failure of referenda in Australia's constitutional history. Again, agreeing on the wording and the content is a most confronting and daunting task.

I would prefer to insert a section into the Constitution which would give a broad enabling power to the Commonwealth Parliament to negotiate a treaty or treaties with representatives of Aboriginal and Torres Strait Islander Peoples. (This model was proposed in 1983 in *Two Hundred Years Later* the report of the Senate Standing Committee on Constitutional and Legal Affairs.) This model is based on the existing s.105A of the Australian Constitution. Like the Senate Committee, I suggest we have a s.105B.

What s.105A essentially does is to enable or empower the Commonwealth to make agreements with the states with respect to their public debts. The Commonwealth, under this section, can take over those debts. They can manage those debts. They can pay the interest on those debts. They can consolidate those debts. They can review them. They can convert them. They can redeem them, by agreement, with the states.

The important thing about s.105A is subsection (5). It makes these agreements binding on all Parliaments notwithstanding the Constitution of the Commonwealth, the laws of the Commonwealth, the Constitutions of the various states, the laws of the states. Having Constitutional force, such agreements, I think, are the way to go in relation to treaty-making in Australia.

If such a proposal receives support from the electors it would give the Commonwealth Parliament the plenary power to enter such treaties. Potentially it would give great security to Aboriginal and Torres Strait Islander Peoples. While desirable, it would not require the support of the states and territories. It would also avoid the need for the Commonwealth to rely on some other uncertain enabling powers that presently exist in the Constitution, such as s. 27 and s.51.

As the draftsman, obviously I would strengthen s.105B to enable the Commonwealth to have the power to make the treaties, as presently spelt out in the first paragraph of s.105A without a great

deal of limitations. Section 105A says that the Commonwealth can make agreements to manage debts, as I mentioned.

Section 105B would simply say that the Commonwealth has the power to make agreements or treaties with the representatives of Aboriginal and Torres Strait Islander People, full stop. That first paragraph would then be followed by a non-inclusive list of those things that might form the content and substance of treaties in very broad terms. Of course, the terms of the treaties, which ultimately have Constitutional force, could set other requirements, for example, forms of dispute resolution and the power to vary the treaties by the parties. The Parliament would also need the power to make laws for validating or implementing the treaty or treaties entered into prior to this section's adoption and for implementing treaties under this section. This new s.105B could also require a validation of treaties entered into before the law. Some of those agreements are already being entered into under native title procedures, for example, regional agreements. There could also be a power for parliaments to pass laws enabling them to carry into effect the terms of the treaty or treaties. This could mean that the Commonwealth could authorise the states, in agreed circumstances, to exercise Commonwealth power. In that regard, there would have to be some limitations on the legislative interference in the intent of the parties to the agreement. As well, I would require that the law could not be altered, amended, rescinded or appealed by the Parliament without the free and informed consent of the Aboriginal and Torres Strait Islander party to the treaty or treaties and would require a two-thirds majority vote of the members of both houses of Parliament entitled to vote. In the end, the terms and conditions as agreed between the parties would have Constitutional force. Any Act of Parliament that implements or enforces the terms of those treaties would also require some agreement by the parties, particularly the Aboriginal and Torres Strait Islander party.

The section would have the same force as subsection (5) of the present s.105A. I think negotiating a set of principles that might be included in the Constitution removes a lot of the complexity of trying to incorporate the entire text of a treaty into the Constitution.

There are another two measures that might give legal effect on a treaty to treaties through legislation or agreement. These last two options, I should say, are not preferred because any legislation passed by the Commonwealth Parliament must fall within a scope of power given to the Parliament by the Constitution itself. There are two potential heads of power in the present Constitution, the so-called 'races power', s.51(26), and the external affairs power, s.51(29).

Under the races power the Commonwealth has already passed many laws that relate to Aboriginal and Torres Strait Islander Peoples, including the ATSIC Act, the Northern Territory Land Rights Act, the Native Title Act and the Native Title Amendment Act. It essentially says that the Parliament shall, subject to the Constitution, have power to make laws for peace, order and good government of the Commonwealth with respect to the peoples of any race for whom it is deemed necessary to make special laws.

Prior to the referendum in 1967 the Commonwealth Parliament had no specific power under the Constitution to make laws for the Aboriginal and Torres Strait Islander races. Since then, the power has sometimes been used in a discriminatory fashion, for example, in the Hindmarsh Island legislation and the Native Title Amendment Act. It should be noted that the Council for Aboriginal Reconciliation has recommended that there ought to be a new section inserted into the Constitution that says it would be unlawful to enact legislation under s.51(26) that discriminates against people on the grounds of race.

The external affairs power, s.51(29), gives power to the Commonwealth to make laws for peace, order and good government with respect to external affairs. I will come back to this briefly because I think a legislative approach to treaty-making can also be captured under that section. First, I want to say that there is an obvious political limitation in the use of either of these constitutional powers

which was most glaring in the recent use of the race power by the present government to pass racially discriminatory amendments to the Native Title Act. The vulnerability of this approach arises because of the capacity of later Parliaments, controlled by a temporary majority, to substantially repeal or amend such legislation.

You might wonder how does the capacity to make treaties fall under the foreign affairs power? This is a very broad power, and generally the conduct of foreign affairs does not require legislative action because these matters are usually accomplished by executive action. An executive action, for example, made Australia a signatory to the Convention for the Elimination of all Forms of Racial Discrimination. The Parliament was not involved until the Convention was implemented domestically through the Racial Discrimination Act.

Arguably, this power enables the Commonwealth Parliament to make laws on an indefinite array of subjects as long as those subjects can be defined as an external affair. A treaty or treaties with Indigenous peoples of Australia could fall into such a description.

For example, the poor socioeconomic circumstances of Aboriginal and Torres Strait Islanders are of concern to many other countries around the world. They have said so in the United Nations, and their committees with oversight of the human rights regimes have said so, and many countries who have strong links with Australia have said so. If the reason for passing legislation to enact treaties is to allay the concerns of these countries, then the treaty or treaties it could arguably be described as an external affair and given domestic effect. All you need to demonstrate that is that the subject matter of the legislation or any legislation in this regard is of international concern.

Finally, we could make a treaty or treaties by simple agreement. We could negotiate a treaty or treaties in the form of a contractual agreement that is placed in the realm of the statutory and common law. A contract or agreement could create legally enforceable rights and obligations. This is essentially the way that the United States of America dealt with Native American tribes between 1788 and 1842. That was a disaster, and a story for another time. Thank you.

## Questions and Answers

**RUSSELL:** Ladies and gentlemen, we might give Mick about 30 seconds to have drink of water, catch his breath.

But I will let you ask some questions. Do we have any?

**JOHN ELDRIDGE:** Mick, You mentioned the Robinson and Batman treaties. What about the treaty which Wiradjuri and Governor Macquarie signed, I think, in about 1824?

**DR MICK DODSON:** You just pointed out the inadequacy of my research. I must confess, I'm not familiar with a treaty between Macquarie and the Wiradjuri, but the consensus is that these arrangements didn't have the characteristics of international law that were required at the time. I'm sorry I can't help you on this particular treaty, but I'll certainly get myself acquainted with it.

**DAVE MARTIN:** I'm wondering what thinking have you and others in this process done about who constitutes the entity, or how it will be constituted for the purposes of the treaty that will be dealing with the states.

The other side of the equation is straightforward enough, it's government. But given the complex system within the Aboriginal world – including things like ATSIC itself and the a whole set of other

kinds of local and regional bodies – who would be the party signing such a treaty in your view, at least in terms of your preliminary thinking?

**DR MICK DODSON:** Before I answer your question I want to preface it by saying that in the work I've been doing with ATSIC on this issue, ATSIC has made it absolutely, abundantly clear that they are not negotiating a treaty. They are not purporting to negotiate on behalf of anybody. Their objective is to promote dialogue, discussion, debate about the issues of treaties and to encourage institutions like the Institute to be part of promoting that debate, hence our Seminar Series. When we were working on the frequently asked questions - and more importantly the frequently given answers - the question that came up persistently was, 'Well, who's going to negotiate it?' It's a little trite, perhaps, to say, 'Well, that's a matter for the Aboriginal and Torres Strait Islander Peoples'. Obviously, it has to be. It can only be. One of the reasons why I say there cannot be one single treaty is because we're never going to agree on that.

Aboriginal and Torres Strait Islander People will never ever agree on one single treaty to cover all our concerns. I don't think it's possible. That's why I think it's better to have a framework approach through the Constitution that allows for the negotiating treaties at the regional, local, State by State, even national level.

There are a number of other steps that need to take place, in my view, before we can answer this question. What I would propose is that we do it in five year chunks. Spend the next three to five years on the processes, this discussion, this conversation, this dialogue between Australians, Indigenous and non-indigenous. More importantly, creating opportunities for Indigenous Australians to have a dialogue amongst ourselves, to have a debate, to work through these issues so that we can sort things out, as it were.

That would culminate, say in three years time, in a series of local and regional conventions which could combine to form larger conventions, either on the State basis or in whatever other way Indigenous people want to organise it within their regions or within their political geography, but however people decide that they're going to get to a stage where you have a national convention. Those conventions all the way along will authorise a number of things. At the local level they may authorise who will negotiate on their behalf, who will sign on their behalf, and the same all the way up the ladder.

You might get to a national convention where Indigenous people say, 'Well, the way we want to go is the constitutional change approach where principles are embodied and the Commonwealth is empowered to make agreements with representatives of Indigenous peoples.' 'We want organisation X to negotiate those constitutional arrangements,' or 'We want ATSIC to do it,' or 'We want this group of white lawyers to do it,' or 'We want this group of Aboriginal lawyers to do it,' or whoever. But you have to have a set of national principles that enables the Commonwealth to share that power with the states, and which also would allow local government to enter into treaties. How to make the legal arrangements, I'm not quite sure yet, but I'm sure it can be done.

If you have that national framework, it need not close off the capacity for local and regional arrangements. I mean, people locally might say, in New South Wales, for example, 'We are going to have a number of treaties. We want a treaty with the State in which the local land council will negotiate to deal with our land issues. We are going to have another treaty with the Commonwealth and the State that's a combined treaty that's going to deal with our health, housing, legal aid, and a whole range of other things'. So it opens up the capacity locally and regionally to negotiate treaties according to a nationally set framework.

**SPEAKER:** Along these same lines, I would like to know what Aboriginal and Torres Strait Islander People can be doing now in the local, regional, State or community level. A lot of us have

been going through negotiations with other parties. Does that help to sort some of this out, talking to particular groups in a business environment where you identify who are to negotiate?

**DR MICK DODSON:** Yes, I think this gets back to what I mean. Talking about ‘sorting things out’ wasn’t a flippant remark, you know. We’ve got a lot of things we’ve got to sort out amongst ourselves. If one thing has demonstrated that more clearly than anything else, it is the bullshit we have to go through with the Native Title Act, and what that does to our communities and our societies and our groups, and our relationships with each other, and what it does to families even.

One thing it does say to me is that a Native Title Act approach, a legislative approach, is hopelessly inadequate. It just puts all the pain onto us. I agree with you. A lot of us are working through it because we’re forced to deal with this Native Title Act. And people who have had to confront it perhaps have an advantage over those who haven’t. We need to start talking about it. We need to be given time. I’m suggesting lots of time. You know, we can’t do this tomorrow. I think we’ve got a 20 year time frame here, because we have to get it right. The ATSIC slogan says, ‘Let’s get it right’, and time is of the essence for us to get it right.

This conversation today, if you like, putting aside my awful stumbling presentation, is the sort of thing that we need to be doing. No doubt you will go away from here and say, ‘Well, look, I went to that seminar’, and you’ll talk to one of your Aboriginal friends or a number of them, or talk to members of your family and say, ‘Well, what do you think?’ Once the conversation starts, people start turning their minds to it.

ATSIC has done some work on surveying target groups to find out what is required essentially, what information do Indigenous people require to make informed decisions about this. What do we need to do? How do we need to promote the dialogue, the discussion? In terms of practical things, turning up to one of these seminars is doing something really. As I said, you’ll probably go away and talk to others about it.

I have some preferences, that’s all I’ve said. My mind isn’t closed to other ideas about this. I’m talking as a lawyer more than anything else, you know, and lawyers are probably the last people you want involved in these things.

**RICH BEVIS:** Part of what you have been speaking about in terms of treaty encompasses some thing like self-determination and cultural continuity, but to my way of thinking essentially none of that can occur unless there is economic assurance of independence. The assessment I’ve done in terms of processes leading to mature economic independence for Aboriginal people, Indigenous people in Australia, in my way of thinking is appalling. It’s very much Eurocentric and doesn’t take into consideration the myriad of cultural needs and so forth. Would you consider that a process of economic independence building will go into a treaty?

**DR MICK DODSON:** Well sure, it has to be one of the items that make up the content of the treaty. You know, I don’t know how to guess this, but if our right to self-determination and our sovereign status had been recognised 212 years ago, do you think we’d be economically impoverished now? I mean, I don’t see how self-determination and sovereignty can be thought of apart from economic independence.

We were economically independent before the place was invaded and colonised. Our economic independence, our political independence, our right to self-determination was ignored because of economic forces more than any other. Those attributes that we had as sovereign peoples, as self-determining nations and groups, described particular political entities; the hundreds of them that existed in the country had all those attributes. These are the things that Martinez talks about. It’s the domestication of those attributes that’s been part of the problem. It’s the history of denial of those

attributes, the 'native savages' approach that makes it necessary today for us to be calling for a treaty, and not just today, it has been going on for a long time.

**RICH BEVIS:** If I could add, particularly about those attributes you were talking about, the economic independence, social product content, my observation is that essentially European settlement assured those resources were denied to the Indigenous people. What I have observed over my lifetime is that Indigenous people have had to bow and scrape to the whim of governments in order to get some form of share of.

Now, what I'm saying essentially is, recognising the sovereign position of Indigenous people in this country gives them a sovereign right to a share of GDP not by some whim of the government or the tap being turned off in DETYA, but built into a form of recognition that a percentage of that GDP is appropriated by way of a treaty on a perpetual basis to Indigenous people of Australia in order that they can reach that level of cultural continuity and self-determination to economic surety.

**DR MICK DODSON:** Nothing ought to be off the table. This is an issue that people who will oppose a treaty, particularly conservative political forces, will use to scare people. But, you know, the arrangements for the self government of Western Australia, self government from Britain, the first Constitution had such a provision in it. The Aboriginal people of Western Australia were entitled to, I think, 2 per cent of Western Australian GDP. I think it was expressed some other way, but that sharing was largely ignored. No, these are not issues that are off the table, as far as I'm concerned. Everything's on the table. Whether we agree on them or not is another issue.

Back in the late 1970s early 1980s the National Aboriginal Conference were involved with the Makarrata. One of their demands, and this is a lesson from history, was for a share of GDP which, in my analysis, was responsible, in part, for it going off the rails. What we need to concentrate on isn't, at this stage, so much of the content. If we can go into this openly and transparently and say, 'Look, nothing's off the table but let's talk about the idea. Let's talk about this concept. Let's build confidence with each other about this concept. Let's see if the 53 per cent of Australians who feel comfortable about the concept, let's see if we can't get that up to 83 per cent so we feel comfortable about this, see that this isn't something unusual.'

One of reasons why it shouldn't be unusual is because, although we've tried everything else, we haven't been able to bring to closure our differences. We haven't been able to bring to closure the outstanding business. The Reconciliation Council recognised this. They said that there has to be a treaty or an agreement. After ten years of work by some very smart people in this country from all sectors of society they said, 'Well, look, there's got to be closure. The way to do it is a binding agreement.' We have to get comfortable with that idea. Either we're going to be here, and our grandkids are going to be here doing the same thing, or we are going to bring it to a close.

**WILL SANDERS:** Three or four months ago I seem to remember there was a little bit of talk about the possibility, in terms of process, about actually providing a chance to vote on demands, on processes. Does that still seem to be part of the budget?

**DR MICK DODSON:** Well, the suggestion is that there will be a plebiscite. I would urge ATSIC to proceed with that idea for a number of reasons. Firstly, let's be absolutely clear that the concept, the idea of a treaty is supported by Aboriginal and Torres Strait Islander Peoples. If it's not, we ought to give it up and try something else. If it is, and if it's overwhelmingly supported, you know, if there's a 90 per cent return or something like that in favour, that gives powerful support to the process. It would be the clearest expression and the first national expression of Indigenous self-determination. How we do it is another issue. But certainly the plebiscite is vital, I think. Also crucial to the plebiscite is to make sure people are making informed decisions. So there has to be an awareness and education campaign, if you like, that precedes such a plebiscite.

**DAVID NASH:** The Maori have insisted that their language be one of New Zealand's national languages. Given the large number of Indigenous languages, don't you think presenting the debate in Indigenous languages would be infeasible here? Would it be necessary to ensure the broadest involvement in the communities? Or even to have the treaties in the local languages?

**DR MICK DODSON:** Not if you're familiar with the Maori experience. Certainly I think that particularly at local and regional levels, if you are negotiating treaties of that level, it is not unreasonable. A demand by Aboriginal people of a region or locally that the treaties be in their language and negotiated in their language isn't an unreasonable one. Why shouldn't the government come along and pay for interpreters to assist in the treaty making processes?

**SPEAKER:** Mick, I just wondered if you could elaborate a little bit more on your position for the need of multiple treaties. Also do you feel there are any difficulties in convincing the non-Indigenous community, considering that the dominant discourse still homogenises Indigeneity?

**DR MICK DODSON:** We might be able to fragment that popular notion by this discussion. I don't know how I can elaborate on it, but as I said before, I don't think we can agree on one single document. I don't think that's possible. I do think we can agree on principles. That's what I'm saying. Let's put some principles in the Constitution. I think we can agree on those. That's a lot easier to do because it frees people up to do what they want to do. It says, 'All right, well my mob, we can go and deal directly, if we wish to, with the Commonwealth and say, "Look, we want a treaty with you"'. We don't have to delegate our consent, which I think is a real issue with certain Aboriginal and Torres Strait Islander People. I can't talk about Torres Strait Islanders. You know, the democratic principles of representatives and delegated authorities, particularly when it comes to land issues, don't always work for us.

The approach I'm advocating also frees up that potential; it can be done in an Aboriginal way, in a way that we're comfortable with. It doesn't have to be the suited lawyers around the table doing your negotiations. We can get, as David Nash suggests, people under a tree talking in the local language. That's how it's being done because that's the way we want it done.

I am trying to think of an example where this works. I don't think there really is any, I guess, apart from ATSIC and the organisations that ATSIC funds. This is about the only provision in this country where Indigenous people at a local - with limitations obviously - and a regional level can do what they want to do through their organisation, through their local organisation, through their regional organisations. They have a reasonably free hand in comparison to anything else.

We don't have a free hand when it comes to the education department. We don't have a free hand when it comes to the health department. All the other governments are there delivering their programs. We do have a bit of a say on what our local housing association, our local legal aid service and local medical service do. We have some control, some autonomy over those, but nothing like what I'm proposing. Essentially, the local land council can deal directly with the Commonwealth and say, 'Well, this is how we are going to do it. This is what we want. These are the financial arrangements. These are the ways in which we do things in the future. This is how we deal with land. These are the protocols for health and housing.' You know, all of those sorts of things. The sky's the limit. Imagination's the only limitation.

**SPEAKER:** So Mick, giving an agreement Constitutional validity seems to me to give it permanence; we won't be able to change it readily.

**DR MICK DODSON:** Why not. I mean, a lot of the problems with humans is that, you know, we make mistakes. One of the mistakes we make is that we think what suits now is going to suit

forever. Some things you do, you have to undo, you know. For that reason alone the process ought to be ongoing. I mean, the changes can only be done by agreement. It can't be done unilaterally by one of the parties. If change has constitutional force it makes it harder to get out of your promise.

But why not be prepared for changes? You know, it'd become less frequent over time, but why close it off? People change. Requirements change. Aspirations change. Visions change. Needs change. New generations come along who have totally different ideas.

**PAT BRADY:** I think it's a good idea to see those continuing processes. Although people still want to think that they've got to a certain point, saying, 'Oh, we've made an agreement. Everything's going to be all right now.' But it's not the way things are. So I think it's an ongoing process.

**DR MICK DODSON:** Yes, if you agree with that process and you reach an agreement doesn't it give you some sense of security and certainty knowing that, if you've made a mistake or you've missed something, you can go back and fix it up? Not being able to undo it would be worse, I'd say.

**SPEAKER:** Mick, did you see the resolution of support at the convention on the republic as realistically representing non-Aboriginal people, as the line which places reconciliation support for a treaty as well as support amongst that group of the community who were not there, the public. And if so, what can Aboriginal people do to tie in those other areas of the national discussion and awareness to the process of gathering support for the treaty.

**DR MICK DODSON:** I think it's very significant that the Nielsen Age poll found that 53 per cent of people have no problem with the concept of a treaty, the idea of a treaty. Look at what happened at the deliberative poll on reconciliation during the convention, knowing who was at the deliberative poll at old Parliament House. And at the beginning, I think it was 37 per cent were in favour; at the end of discussion it was 53 per cent. You know, they weren't all republicans and they weren't all monarchists. They were a mixture of both.

Obviously you use those people in a campaign to help build a number. I suggest, though, that you need to get that number up, consistently up into the high sixties or low seventies. You have to structure a campaign to do that. It's about confidence building, about people being comfortable with this idea so you can move to the next step.

If you can get that number up and rising steadily over the next three or four years, nobody in power is going to ignore those figures. That's how you get the political side of the country to move, you know, to get the major parties to move.

And, you know, it might sound strange, but polls seem to influence parties, and particularly political leaders. They manage to have the capacity to somersault and do all sorts of gymnastics. I'm speaking with some irony here, but that is how you deal with it politically, just show that its totally unacceptable to oppose treaty making because the people are speaking about it. If the people are comfortable with it, if the people are confident about it, then the politicians have to act. But it has to come from the people so that it would be a disaster for any political party to run against the wishes of the community. Thank you.