

## FOREWORD to “*Treaty*” by Professor Marcia Langton AM

One of the most important, and fascinating, aspects of the debate about Aboriginal rights in the last two decades revolves around the legal personality of the Aboriginal polity, by which I mean the recognition of that social complex that is sometimes called sovereignty. Aboriginal people in Australia have continued to argue that just as British sovereignty did not wipe away Aboriginal title, neither did it wipe away Aboriginal jurisdiction. This is the logic of the many Aboriginal proponents of a treaty or treaties between the modern Australian state and Aboriginal peoples.

The calls for a treaty go to the heart of the juridical denial in Australian case law of the existence of Aboriginal nations in Australia prior to the seizure of the land and consequent dispossession of Indigenous people by the British Crown. This denial has accorded Australia the status of an anomaly among the settler colonial states, such as New Zealand where the Treaty of Waitangi has considerable force and Canada and the United States of America where treaties are the bedrock of relations between the state and aboriginal peoples. In Australia, the denial at law of Indigenous sovereignty and, indeed, the very existence of Aboriginal polities has a peculiar history. Here, the doctrine of *terra nullius* – or empty land belonging to no-one – was applied to justify colonisation.

It seems to me that the concept of sovereignty developed in the western legal tradition to describe nation states is artificial if applied to the Aboriginal relationship to land that is at the core of the Indigenous domain. A more appropriate concept is reflected in the judgment of Judge Ammoun of the International Court of Justice in 1975 in the *Western Sahara Case*:

Mr Bayona-Ba-Meya, goes on to dismiss the materialistic concept of *terra nullius*, which led to this dismemberment of Africa following the Berlin Conference of 1885. Mr Bayona-Ba-Meya substitutes for this a spiritual notion: the ancestral tie between the land, or ‘mother nature’, and the man who was born therefrom, remains attached thereto, and must one day return thither to be united with his ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty.

It is this attachment with a place through ancestors and tradition that enables those of us who can claim a kind of sovereignty that predates the colonists to have a sense of place that is deeply emotional and also social and political at the same time. It is this attachment of blood and spirit that makes the sacrifices worthwhile, and makes it possible for one to believe in one’s own humanity.

Whether the recognition of this spiritual relationship to land is best reflected in the recognition of Aboriginal peoples constituting a fully-fledged nation or nations, is still for us to consider. Noel Pearson’s view is that it may be that we can reserve judgement on this question: recognition of this ‘local indigenous sovereignty could exist internally within a nation-state, provided that the fullest rights of self-determination are accorded’. And here we have the problem. The Australian state has consistently failed to understand and to accept the right of its Indigenous peoples to be allowed the fullest rights of self-determination. It is little wonder that calls for a separate nation find ready adherents in the Aboriginal community.

Noel Pearson also remarked that ‘*Mabo* has put to rest two gross fantasies. Firstly it has put to rest the fantasy that the blacks were not and are still not here. The fantasy of *terra* and *homo nullius*. Secondly, *Mabo* also puts to rest the fantasy that the whites are somehow going to pack up and leave. Co-existence remains our lot.’ The only possible expression of self-determination in postcolonial Australia was that which could be achieved through partnership.

The question of how to bring about constitutional amendment in Australia is another issue being debated by Indigenous leaders. In 2002, Noel Pearson and Richard Ah Mat argued that support from 80 to 90 per cent of the electorate is required to pass an amendment at a referendum. To achieve this level of community support would require

bipartisan political support, which in turn entails the need to secure support from electorates in rural, conservative and regional Australia. According to Pearson and Ah Mat, the Indigenous leadership should formulate and implement intelligent political strategies aimed at building alliances with conservative, rural and regional Australia: alliances grounded in mutual commitment to enabling regional social and economic advancement. The emerging culture of agreement making in Australia is one such process. If working economic structures grounded in strong Indigenous governance arrangements are established, a national agreement on the frameworks and principles necessary to guide Indigenous and non-Indigenous governmental engagement should be achievable.

As history has shown, for such a national agreement to be achieved, there must be some mutually pressing reason related to security or economic issues for both parties to abide by the terms. It is clear that, by itself, the 'battle of ideas' will not have the political force required to bring a treaty process to fruition. Nor would a moral victory lay the ground for strategic alliances and an ongoing, mutually beneficial relationship between the treating parties. My research with Maureen Tehan and Lisa Palmer has shown that, since the first agreements signed under the provisions of the *Aboriginal Land Rights Act* in the Northern Territory more than twenty years ago, there has been an astonishing proliferation of agreements between Australian Indigenous people and various corporations and branches of government aimed at achieving sustainable relationships and outcomes, whether the matter concerns the social licence to operate a mining company or government service delivery.

While the many attempts at treating with Aborigines in colonial times and in the early twentieth century were not translated into enduring outcomes, it is clear that the agreements negotiated since the 1970s are evidence of a willingness to do what the colonial settlers were unable to countenance: that is, to acknowledge that another group of people were the owners and custodians of the lands and waters of Australia; that their descendants have a right to possess, use and enjoy those lands and waters; to govern, within the limits of Australian law, their use and access by others, and to reap any benefits arising from that use and access by others, as would any other group of people in rightful possession of a place.

These developments have laid the groundwork for the matters discussed in this book. In *Treaty*, the authors guide the reader through the winding history of the debate, with its many strands, and weigh up the practical options for progress on a settlement between the first nations and the modern state. The moral legitimacy of Australia as a modern state will remain at issue while an honourable place for Indigenous Australians in the formal Constitution of the nation remains unresolved. This book examines the case for dealing with this fundamental issue by settlement of the outstanding grievances in a treaty or treaties.

Will agreements that settle the grievances between Indigenous and non-Indigenous Australians lead to a formal place for Indigenous peoples in the Constitution of modern Australia? That place – one that accords the first peoples their rightful status as the original peoples and acknowledges the need for restitution of what was taken from them – must be found beyond the limits of the legal framework. The political settlement of these issues is well overdue. These are just some of the profound issues dealt with by the authors in this lucid account of the legal, social and political aspects of the debate about treaty-like arrangements between Indigenous peoples and the Australian state.