



Are we mates yet?

Agreement making between States and First Nations

What the literature & prior experience tells us

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Aboriginal and Torres Strait Islander readers are advised that this report contains references to people who have passed.

Opening thoughts

Few moments and images in Black-White relations in Australia have arguably captured the national imagination as much as when former Prime Minister Gough Whitlam poured red dirt into the hands of the late and great Aboriginal rights leader Vincent Lingiari on 16 August 1975; an image poignantly captured by renowned Aboriginal photographer Mervyn Bishop. The pouring of the dirt was a symbolic gesture to mark the historic transfer (in Western law at least) of Wave Hill station back to Lingiari's Gurindji people in the Northern Territory. In fact, one could now argue that it was not the White man's place to pour the dirt of the Black man back into the hand of the Black man in the first place. Nonetheless, this historical event, and the resultant politics that surrounded it, would make its way into Australian folklore in the form of the popular song 'From little things, big things grow' by Kev Carmody and Paul Kelly.

As McKeon (2016) more recently noted, the event also meant that 'the Gurindji became the first¹ Aboriginal community to have land returned to them by the Commonwealth Government and would be a turning point - the start of the Aboriginal land rights movement for the rest of Indigenous Australia, that continues even today.' It should be noted, however, that the Aboriginal land rights movement was several decades old before the Gurindji victory, including through the efforts of David Unaipon and many other leaders (Maynard, 2007). In any case, after Whitlam spoke on that historic day in 1975, Lingiari responded with the following:

Let us live happily together as mates, let us not make it hard for each other... We want to live in a better way together, Aboriginals and white men, let us not fight over anything, let us be mates.

Fast-forwarding some 44 years after Gurindji land ownership was recognised in Western law, are states and First Nations 'mates' in the way that Lingiari wished for? Or are things at a stalemate? What is the current state of black-white relationships in Australia? What are Australian states and other countries doing to transform their relationships – including through agreement making - with First Nations peoples? What forms can transformational relationships take, especially given that Australia is a signatory to the United Nations Declaration on the Rights of Indigenous Peoples? What is currently happening in Australia and abroad in terms of overarching agreements (including treaties) and settlements being negotiated and reached between First Nations peoples and colonial states? Can relationships transform, and if so, how? What are the lessons of agreement making to date, and what are the implications for jurisdictions such as New South Wales (NSW)? What can the literature and prior experience of others teach us?

¹ It should be noted however that 'The Block' in Redfern Sydney was granted to the Redfern Aboriginal community in 1973 and the Aboriginal Housing Company was formed to manage the grant in 1973.

About this paper

Purpose

This paper seeks to address these and related questions through a translational research approach (including through the use of diagrams and images). The paper has been developed for Aboriginal Affairs NSW (AANSW) to assist communities and policy developers in considering the topic of ‘agreement making’ between the State and First Nations peoples. Accordingly, it documents relationships and agreement making processes, outcomes and limitations between sovereign states and First Nations sovereign peoples both in Australia and internationally. The paper has been developed in response to a priority research area identified within the *Aboriginal Affairs NSW research agenda 2018-2023*, entitled ‘Transforming the relationship between Aboriginal peoples and the NSW Government’.

“Transforming the relationship between Aboriginal peoples and the NSW Government.”

Any transformation of relationships will ideally be guided by evidence, the prior experience of others, and lessons learnt from other parts of Australia and the world – both from historical and more contemporary perspectives. Transformed relationships would also need to be secured through ongoing conversations and building mutual understanding between the parties. At the end of the day, agreements will need to be fashioned and reached by Aboriginal communities and elected governments working in tandem.

This paper aims to document how relationships between First Peoples and governments are currently understood. It also examines:

- the purpose served by any changing of relationships
- the changes needed to support positive change
- the mechanisms and forms used to achieve the change
- how sovereignty, self-determination under the United Nations Declaration of the Rights of Indigenous Peoples, and self-government are understood and how these concepts support positive change
- the various geographical footprints at which relationships might be negotiated, and
- differences in views on the topics listed above between the major actors (e.g. government, First Nations community members, members of the wider public, academics).

This paper also provides the basis for complementary easy-to-follow resources and translational information, that can be disseminated to improve knowledge and to support and sustain community conversations about relationship change. The research project therefore comprises several elements including a review of existing literature and subsequent truth-testing, and information sharing. Together these elements aim to contribute to a bank of resources that enables a common understanding across NSW of how aspects of the relationship could change (including

potential agreement making arrangements between government and community). Further, the report seeks to identify learnings from the range of agreement making mechanisms enacted elsewhere (both in Australia and internationally) which potentially communicate findings to support dialogue between Aboriginal peoples and government in NSW.

The paper, in particular, has been attuned to the unique circumstances of NSW; national conversations about treaties (as a major form - if not gold standard - of agreement making) and constitutional reform; and Aboriginal self-determination, leadership and community ownership. In addition, this research acknowledges the diversity and uncertainty of views and does not seek to pre-empt any particular outcome as being preferable to others. For example, views can range from changing relationships at local/regional levels, state-wide or nation-wide (including potentially constitutional change).

Key definitions

From the outset, it is important to define what is meant by ‘state’, ‘First Nations’, ‘sovereignty’, and ‘treaty’. According to the Macquarie Dictionary (2010, p.1124) a ‘state’ refers to:

A body of people occupying a definite territory and organised under one government.

In Australia, ‘states’ under this definition therefore include the Commonwealth of Australia (as the federal government), as well as the states and territories within the Federation (including NSW). Therefore, federal, state and territory governments in Australia are all in a position to potentially form legally enshrined agreements - including treaties - with First Nations peoples.

‘First Nations’ refers to the hundreds of Aboriginal and Torres Strait Islander nations across Australia as the original peoples, custodians and owners of Australia, who have never ceded sovereignty.

Sovereignty can be understood as First Nations’ pre-existing and ongoing rights to land, law-making, and governance of their own affairs (Davis & Williams, 2015).

Megan Davis (2018, unnumbered), a Professor of Law and Cobble Cobble woman who has been at the forefront of scholarly and advocacy work in Indigenous rights for almost two decades, has described treaty or treaties in the following terms:

Treaties are foundational constitutional agreements between First Nations and the state that involve a redistribution of political power. Treaties are agreements aimed at settling fundamental grievances, and establishing binding frameworks of future engagement and dispute resolution. Treaties are legal frameworks, so there *will* be disputes over interpretation. Treaties are not blank canvases on which governments and overbearing bureaucrats can present the status quo.

Australian Constitutional law expert, George Williams (2001), defines modern treaties as negotiated agreements between parties which “talk about the past, but make commitments for the future.” These negotiated agreements cover such matters as apologies, reparations, resource and land rights, shared sovereignty, and cultural heritage.

Looking to lessons from history, including very recent history

It is impossible to fully understand the context and motivation behind present-day Aboriginal pursuits for transformational relationships and substantive agreement making, including the pursuit of treaties, without looking to history. When one looks to history, it becomes abundantly clear why First Nations peoples seek seismic shifts in their relations with the state and larger society. A quick scan of Australian post-colonial history points to an overwhelming case of injustice, unfinished business, unresolved conflict, and political discord.

A history of discord and broken promises

Aboriginal peoples in NSW - as with Aboriginal and Torres Strait Islander peoples across Australia, along with First Nations peoples throughout the world - have long called for a fundamental recalibration and transformation of relationships with states. As colonised peoples, First Nations communities have sought to overturn policy and politics that have been, far too often, patronising, marginalising, paternalistic, and racist and have, instead, pursued agendas of justice, recognition of sovereignty, land and sea rights, decolonisation, and self-determination. At an international level, such aspirations among First Peoples are reflected in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which includes the following provisions (United Nations, 2007):

Article 3: “Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

Article 4: “to autonomy or self-government in matters relating to their internal and local affairs as well as ways and means for financing their autonomous functions.”

Article 5: “to maintain and strengthen their distinct political, legal, economic, social and cultural institutions while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the state”.

Whilst the UNDRIP is not legally binding, signatories are nonetheless expected to honour and advance the provisions within it.

At the time of the Declaration’s advent, Australia was not supportive. Eventually Australia became a signatory to the Declaration in 2009, after several years of political resistance from conservative politicians and commentators. In explaining Australia’s refusal to sign the Declaration in 2007, the then Prime Minister John Howard justified the government’s decision in the following terms:

The Indigenous people of Australia have a special place in our community, but we also believe their future lies in being part of the mainstream of this country...We do not support the notion that you should have customary law taking priority over the general law of the country...it is wrong to support something that argues the case of separate development inside one country.²

² Retrieved on 16 October 2018 from <https://www.abc.net.au/news/2007-09-15/pm-defends-refusal-to-sign-un-indigenous-bill/670644>

This reluctance to put Australia's support behind the Declaration forms part of a broader resistance in Australian politics to special measures such as the right to self-determination, enshrining Indigenous rights at the apex of Australian law, and forming treaties between the State and First Nations. For instance, former Prime Minister Bob Hawke promised, and yet failed to deliver, a treaty with First Nations peoples as expressed in the Barunga Statement of 1988.

A number of more recent examples of resistance from the political mainstream are now briefly discussed, before an equally brief analysis of Australian post-colonial history and relations with First Nations.

In May 2017, Indigenous delegates at the First Nations National Constitutional Convention presented the *Uluru Statement from the Heart*. One of the core components of the Statement was a call for the establishment of a constitutionally enshrined First Nations 'voice' to the Parliament. The reaction from the political right, was swift and gave the proposal short shrift. The then Prime Minister Malcolm Turnbull stated a 'voice' to the Parliament would be akin to a 'third chamber' in the Parliament and would compromise the principle of equality.³

Prior to Turnbull's response to the Uluru Statement, another former Prime Minister Tony Abbott, joined John Howard in arguing against a treaty with Indigenous peoples. In 2016, Abbott stated:

A treaty is something
that two nations make
with each other, and
obviously Aboriginal
people are the first
Australians, but in the
end we're all
Australians together,
so I don't support a
treaty.⁴



And yet as Pemberton (2017, unnumbered) notes, the "consent" of First Nations peoples to English occupation of Australia was a decree of the Crown even before James Cook would set out on his ship to Australia. In reflecting back to the time of Cook, Pemberton (2017, unnumbered) writes:

... Captain Cook's royal instructions were that, if he found New Holland to be inhabited, he was to "take possession of convenient Situations in the Country in the Name of the King of Britain" and "with the consent of the Natives"; but, "if you find the Country uninhabited, you are to take possession of it for His Majesty ... as First Discoverers and Possessors".

³ Retrieved on 1 December 2018 <https://www.theguardian.com/australia-news/2017/oct/26/indigenous-voice-proposal-not-desirable-says-turnbull>

⁴ Retrieved on 16 October 2018 from <https://www.abc.net.au/news/2016-09-08/conservatives-lock-in-against-treaty-with-indigenous-australians/7825298>

Conveniently for the Crown, however, the criteria for taking 'possession' of New Holland was narrowed to terminology such as 'uncultivated'. As Pemberton (2017, unnumbered) further recorded, the English would adopt the Swiss-Protestant argument that, "The cultivation of the land is ... an obligation, imposed by nature on man" and those who still lived only hunting or herding, used more land than they "would deserve with honest labor" and, thus, could not complain if "more laborious and overcrowded nations occupied it." The view that pre-colonial Australia was uncultivated is not supported by fact (Gammage, 2011, Pascoe, 2014). First Nations peoples had long and sophisticated practices of harvesting, fish trapping, and other technologies which provided food and medicine in a way that was environmentally sustainable.

As with the Crown's initial instructions to Cook, the Crown also documented its expectations of Arthur Phillip and the First Fleet before it set sail from England to 'settle' Australia, including the following Royal Order (Pemberton, 2017, unnumbered):

You are to endeavour by every possible means to open an Intercourse with the Savages Natives and to conciliate their affections, enjoining all Our Subjects to live in amity and kindness with them. And if any of Our Subjects shall wantonly destroy them, or give them any unnecessary Interruption in the exercise of their several occupations. It is our Will and Pleasure that you do cause such offenders to be brought to punishment according to the degree of the Offence. You will endeavour to procure an account of the Numbers inhabiting the Neighbourhood of the intended settlement and report your opinion to one of our Secretaries of State in what manner Our Intercourse with these people may be turned to the advantage of this country.

Seemingly, Phillip had a genuine intention to follow such directives from the Crown, initially at least. Fletcher (1967, unnumbered) makes the following observation:

One of the offences Phillip refused to tolerate was ill treatment of the Aborigines. In his Instructions he had ordered to establish contact and maintain friendly relations with them and he took these humanitarian injunctions seriously.

Regardless of Phillip's intent and decree, it did not take long for conflict to flare up, including a spearing of Phillip himself at Manly Cove. Fletcher (1967) further explains that Phillip sought harmony, while at the same time seeking to persuade Aboriginal peoples of the 'superiority of British civilisation'. Fletcher (1967, unnumbered) further notes that settlers 'who interfered with their [Aboriginal peoples'] pursuits remained liable to heavy punishment.'

In spite of such early edicts that the First Peoples of Australia were to be treated in a 'friendly and humanitarian manner' (Fletcher, 1967, unnumbered), it did not take long for the post-colonial place to descend into violent conflict whereby Indigenous resistance was met with 'extreme and disproportionate violence' (Reynolds, 1981, p.63). The First Nations of NSW, particularly, bore the brunt of colonisation and dispossession – including via forced removal onto missions and reserves - as extensively chronicled by Goodall (1996). The scale and speed of dispossession resulted in Aboriginal peoples now 'owning' less than one per cent of NSW land.

Paternalism and condescension

Any reasonable reading of the Australian 'balance sheet' when it comes to fair and just dealings between the colonisers and First Nations peoples, would indicate that First Nations peoples are firmly entitled to a sense of great grievance. To illustrate: the former Governor-General of Australia, Sir William Deane, would reflect on Australia's post-colonial history from two unique perspectives - firstly, as a Justice of the High Court of Australia and later as the nation's Governor-General. In the famous *Mabo* case, Deane as a High Court Justice would lament the 'unutterable shame' attached to much of Australia's post-contact history in light of the treatment of Indigenous peoples and the untruthful assertion that the Crown had every right to take 'possession' of Australia consistent with the fabricated and mendacious doctrine of 'terra nullius'. Secondly, Deane as Governor-General would become a champion of reconciliation between Australia's First Peoples and other Australians. Deane (2001, pp.14-15) argues:

In essence, that doctrine [of *terra nullius*] asserted that, for legal purposes, the territory of the Australian Colonies had been, at the time of European settlement, unoccupied or uninhabited with the consequence that full beneficial ownership of all the lands of the Colonies vested in the Crown, unaffected by any claims of the Aboriginal inhabitants. It was that doctrine that provided the basis of the dispossession, so often by force and killing, which underlay the devastation and degradation of the Aboriginal peoples of our continent.

Right-wing politicians and commentators over many years in Australia have been at the forefront of such derogatory attitudes, including the questioning of Aboriginal people's very humanness. For instance, former Minister for Aboriginal Affairs in the Fraser government, Peter Howson, offers the following scorn toward Indigenous peoples (in Austin-Broos, 2011, pp.90-91):

The state of barbarism which is now ubiquitous in every remote Aboriginal community in Australia is best described in the words of Thomas Hobbs in *Leviathan*: 'where every man is enemy to every man...wherein men live without other security than what their own strength...shall furnish them. In such condition is no place for Industry...no account of time; no Arts; no Letters; no Society; and which is worst of all continual fear, and danger of violent death; And the life of man, solitary, poor, nasty, brutish and short'.

Roger Sandall, a retired anthropologist, appears to share Howson's disdain (in Austin-Broos, 2011, p.91):

If your traditional way of life has no alphabet, no writing, no books and no libraries, and yet you are continually told that you have a culture which is rich, complex, and sophisticated, how can you realistically see your place in the scheme of things?


Against the backdrop of such callousness over the course of post-colonial Australia, it is not surprising that the *Commonwealth of Australia Constitution Act 1900* largely ignored the interests of the First Peoples. That is, Aboriginal peoples were largely out of mind, out of sight in framing the nation's premier legal framework. Such large scale contempt was consistent with what leading anthropologist W.E.H. Stanner (1969) would later call the 'Great Australian Silence' that had permeated a large part of the post-colonial period. Put simply, the 'silence' Stanner (1969)

writes about went to the fact that First Nations' interests, aspirations and rights received little to no political or media attention. The 1967 Referendum was to represent a major breakthrough in moving Aboriginal peoples and their rights out from the shadows of national life and discourse.

Australia has much to learn from post-colonial history when it comes to transforming today's relationships between First Nations and States. The wealth of Australia has come at great expense to the health, prosperity and wellbeing of First Nations peoples. Airbrushing history will only serve to damage Aboriginal peoples. Truth telling is therefore of paramount importance.

Australia has long been troubled by its relationship with First Nations peoples. As far back as 1842, barrister Richard Windeyer having just delivered a public lecture arguing against Indigenous rights and political recognition nonetheless found himself asking questions aloud that went to an unsettled national soul and conscience. Windeyer (in Reynolds, 2018) ponders, "How is it our minds are not satisfied? What means this whispering in the bottom of our hearts?"

In seeking to imagine, reimagine, reset, and transform relationships between First Nations and States into the future, this paper now moves from reflections on history to an exploration of current understandings of relationships between First Nations and States, including the critical role of public sector leadership in turning relationships around.



*What means this
whispering in the bottom
of our hearts?*

Capturing current concepts and differences

Current understanding of relationships between the State and First Nations

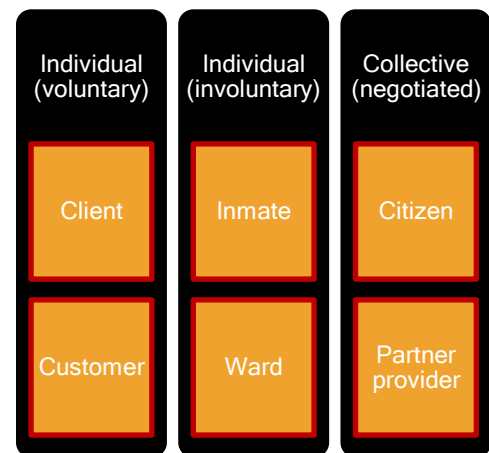
Aboriginal people, as with other citizens, engage in many and varied 'relationships' and interactions with the state. These relationships can be voluntary such as being a 'patient' of a public hospital, or a 'student' of a public training college, or a 'customer' of public transport, or a 'client' of a public legal service. The provision of services that are both equitable and non-discriminatory is therefore important. Some relationships, on the other hand, are involuntary or mandatory, including being an inmate of a public gaol, a ward of the State, or a student in compulsory schooling.

Again, as with other Australians, Aboriginal people are citizens and as such should enjoy rights, including the right to vote in democratic elections at local, state and national levels. As citizens of a democracy, First Nations peoples are also free to associate with like-minded people in influencing politics and policy. They can do this through churches, political parties, media, online campaigns, and community organisations.

Aboriginal community organisations have now developed into not only critically important outlets of community service delivery, but as agents of advocacy agendas that promote Aboriginal self-determination and rights. Such advocacy is mostly undertaken at a 'collective' rather than an individual level. This is a key distinction, as collective action goes to the heart of age-old Aboriginal governance models and decision making practices. To illustrate this point in a simple way, Aboriginal societies have never had kings, queens or chiefs (which is not to ignore the special place that Elders have always had in educational and decision making processes in societies). Although these traditional practices continue to shape Aboriginal approaches to governance and decision making, it is equally important to acknowledge the many outstanding individual First Nations leaders that have spearheaded social reform and political change in Australia, such as Unaipon, Lingiari, Perkins, O'Donoghue, and Mabo, to name but a few.

This simple diagram (Figure 1, *right*) has been designed to help illustrate differing relationships between Aboriginal peoples and governments.

Figure 1: Various relationships between the state and Aboriginal people



While Aboriginal people should ideally share the benefits by virtue of being Australian citizens, they fundamentally differ by virtue of their unique status as the First Peoples of the country. Langton and Palmer (2004, p.49) offer the following key distinction:

Aboriginal groups in Australia are yet to receive overt legal recognition of their polities by the Crown. Nevertheless, Aboriginal peoples have partially restituted Indigenous forms of governance in the interface with the nation-state, nor merely as subjects or citizens, but as unique polities based in ancient jurisdictions and expanded by recently recognised statutory and common-law recognition.

The creation of Aboriginal medical services, media agencies, legal services, education consultative bodies, and land councils serve as examples of First Nations groups as unique polities pursuing not only vital services, but also collective pursuits for self-determination, voice, and community control. These types of community organisations have also provided governments with a meeting point for consultation and negotiation. This in turn has led to

‘partnership agreements’ whereby Aboriginal organisations are partnering with governments to deliver social outcomes through ‘partnerships’. Examples in NSW include:

- Partnership Agreement 2010-2020 between the NSW Department of Education and Training and the NSW Aboriginal Education Consultative Group Inc.
- NSW Aboriginal Health Partnership Agreement 2015-2025 between NSW Health and the Aboriginal Health & Medical Research Council of New South Wales, representing the non-government, Aboriginal Community Controlled Health Services sector, and
- NSW Aboriginal Land Agreements – whereby the NSW Government and Local Aboriginal Land Councils can enter into voluntary and legally binding agreements to resolve land claims, under the *Aboriginal Land Rights Act 1983 (NSW)* (ALRA).

Whilst these partnership agreements – along with the more recent formation of Local Decision Making (LDM) models - provide meeting points for coproduction and cooperation between government and communities in certain sectors (such as education, health, and land), a key outstanding and overarching question remains – are such arrangements sufficient in scope, breadth and depth in meeting the complex, multifaceted, intergenerational, locational, and sizeable structural problems that First Nations confront? Also, do current arrangements sufficiently meet well-established Aboriginal aspirations of self-determination? In answering these questions and advancing a case for change and transformed relationships, what would be the purpose of such change?



The purpose served by any changing of relationships

In spite of many years of concerted effort, Australia is still not reconciled. And despite the emergence of various Indigenous political orders (such as the former Aboriginal and Torres Strait Islander Commission (ATSIC) and the New South Wales Aboriginal Land Council (NSWALC)) coupled with strong Aboriginal resistance and protest against paternalism, post-colonial Australia has engaged in far too much unilateral action whereby the ‘state’ has done things to, and not with, First Nations. Moreover, the state has generally not accorded equal power to Aboriginal sovereign peoples. This is reflected in policies and State-sponsored regimes against Aboriginal peoples such as dispossession of lands, assimilation, stolen generations, denial of democratic vote, forced removal to reserves, subjugation of languages, and ‘permits’ to marry or move off reserves.

Such top-down imposition from the state are not experiences in post-colonial Australia's distant past. It can be seen in more recent years in the form of the *Northern Territory National Emergency Response Act 2007* (Cth) and related *Stronger Futures in the Northern Territory Act 2012* (Cth), federal Shared Responsibility Agreements, and the notion of 'mutual obligation' (McCausland, 2006). In addition, Indigenous policy frameworks have – and continue to be – structurally and institutionally flawed when they systematically ignore the status of Indigenous Australians as First Peoples of Australia. First Nations peoples therefore seek a transformed relationship with government which means greater recognition of sovereignty, self-determination, ancient polities, social justice, land repossession from the Crown, as well as radically improved service delivery.

A positive transformation of current relationships between First Nations and the wider public (via the state) is likely to be beneficial both parties. For Aboriginal peoples, transformed relationships would ideally lead to greater empowerment and agency. For the state, bolstering Aboriginal agency and wellbeing is likely to reduce the cost (both financial and social) of current inequities. In addition, a reconciled Australia is likely to be of appeal to the broader public, by settling upon a national identity and society that is united and at peace with itself.

In NSW, AANSW is seeking to recalibrate and transform relationships with Aboriginal peoples. Agreement making between Aboriginal groups and states is well underway in public administration of Aboriginal affairs in NSW and Australia more broadly. One of the centrepieces of current reform in NSW has been the Local Decision Making model which looks to devolve negotiation and decision making power to regional and local levels, as opposed to it being centralised in Sydney. In addition, AANSW's aspiration is reflected in 'Transforming the Relationship: Aboriginal Affairs NSW Research Agenda 2018-2023' (AANSW, 2018). The Research Agenda outlines the objectives behind such transformation, including the following key points (AANSW, 2018, pp.8-9):

- If we listen to Aboriginal people, a vital first step towards alleviating disadvantage is to close the space between us.
- There is clearly a strong Aboriginal yearning for a different relationship with the NSW Government that includes a genuine commitment to shared decision-making, a willingness to listen and clear accountability.
- Now, after 10 years of policy based on deficits and control, there is near-universal agreement that this top-down approach has failed Australia's First Peoples.

Against this backdrop in NSW, along with developments in others states and territories, Aboriginal communities and policy makers are giving increasing thought to – or actively pursuing - large scale and substantive agreements that empower Aboriginal communities and transform relationships between the State and First Nations. The following passages provide a precis of treaty developments in Australian jurisdictions as sourced from 'Treaty discussions in Australia: an overview' compiled by the Victorian Parliamentary Library (Petrie & Graham, 2018).

Developments in other Australian jurisdictions

South Australia

The former Weatherill Labor Government commenced negotiations with a number of First Nations including the Ngarrindjeri, Narungga and Adnyamathanha communities. This followed a previous policy of Aboriginal Regional Authorities in South Australia. In February 2017, the government appointed a Treaty Commissioner – Roger Thomas - to advance the work. Dr Thomas's appointment was the first of its kind in Australia. The Commissioner undertook consultations with community groups to garner their views and aspirations regarding treaty/treaties. Dr Thomas's role concluded following a state election in March 2018. Before the election however, the South Australian government and the Narungga Nation Aboriginal Corporation entered into a pact called the Buthera Agreement 2018. The Agreement was signed on 19 February, 2018, and sought to establish the foundations for a future treaty, including capacity building and social service measures. The Weatherill Government was defeated at the March 2018 state election and the incoming Premier Stephen Marshall announced that treaty negotiations were not a priority for the new government.

Northern Territory

The Gunner Labor Government elected in 2016 immediately announced its intention to enter into treaty agreements with Aboriginal communities in the Territory. A Cabinet Sub-Committee was established to progress treaty processes as well as deliver greater local decision-making capabilities in economic development, social empowerment, land and water rights, community safety, local government, and housing. A Working Group comprising the government and four Land Councils in the Northern Territory (NT) was to be established to develop a Memorandum of Understanding which would address negotiation principles, consultation processes and a roadmap for treaty/treaties. The NT Government has stated that a treaty or treaties will 'set the foundation for future agreements between Aboriginal peoples and the Northern Territory Government' (DCM, 2018, unnumbered). The government has added that 'discussions with Aboriginal people will determine how they are represented in the Treaty-making process' (DCM, 2018, unnumbered). The NT Government has also flagged that there may be more than one Treaty and more than one Aboriginal group as signatories to treaties. The government foresees that treaties will form the basis for negotiation and agreement on rights and responsibilities, and the establishment of long-lasting relationships.

Western Australia

The South West Native Title Settlement package (more commonly known as the Noongar Agreement) was agreed between representatives of the Noongar Nation and the Western Australian (WA) government in 2015 through *Native Title Act 1993* (Cth) processes. The agreement is arguably Australia's first 'treaty' between a government and community in Australia. Legal experts Hobbs & Williams (2018) believe that the Noongar Agreement has both the form and content to constitute a treaty. The agreement included funds of \$1.3 billion with annual payments of \$50 million into a Noongar Future Fund over 12 years, and a handover of 320,000 hectares of land to Noongar ownership.



The South West Native Title Settlement package was subsequently disputed in the Federal Court by a number of Noongar native title claimants who argued that their interests were excluded in negotiations between the South West Native Title Council and government. This case highlights the importance of consultation processes and intra-community agreement. The incoming Labor Government in WA, elected in 2017, indicated that it may consider a similar Treaty in the Pilbara region, although as at June 2019 there has been no further announcement.

Victoria

Of all of Australia's jurisdictions, Victoria has arguably made the most progress in treaty making. The Advancing the Treaty Process with Aboriginal Victorians Bill 2018 (Vic) passed the Victorian Parliament in 2018, and in so doing, establishes a legislative path for formal treaty negotiations with Aboriginal peoples in Victoria. These developments in Victoria followed both the formation of the *Traditional Owner Settlement Act 2010* (Vic) and the Right People for Country process.

The Victorian government has reported that the consultation process in developing the Advancing the Treaty Process with Aboriginal Victorians Bill 2018 (Vic) involved more than 7,500 Aboriginal community members. The government has placed the following special caveat with regard to definitions of 'treaty' (MAAV, 2018, unnumbered):

Consistent with the policy of self-determination, the Bill does not specify who Treaty is with or what it will be about. Rather it requires an independent Aboriginal Representative Body and the Victorian Government to work in partnership to facilitate future treaty negotiations.

A Treaty Advancement Commissioner in Victoria has been appointed to work with community groups to establish an Aboriginal Representative Body that is able to lead community negotiations with government. A public awareness campaign, called Deadly Questions (DPCV, 2018), was also commissioned to support the wider community's understanding of the issues surrounding treaty, including via provocative billboards such as the one on the right.



National level in Australia

At a national level, the then Coalition Government led by Malcolm Turnbull rejected the Uluru Statement from the Heart of 2017, which included a proposal for a Makarrata Commission to supervise a process of healing, truth telling, and agreement making between First Nations and governments. The recently re-elected Morrison government however has allocated \$7.3 million to pursue co-design work with First Nations communities on the issue of Constitutional recognition and a 'Voice' to the Parliament.

Other Australian jurisdictions

In Queensland, the Labor Party State Platform of 2017 included a commitment to formalise treaties between First Nations peoples and the next term of government, although that this commitment has seemingly not materialised as yet. In Tasmania, the Labor Opposition has signalled an intention for dialogue on the subject of treaty.

International jurisdictions

In a number of ways, it is difficult to compare Indigenous Australia with other First Nations peoples overseas. Whilst the process of colonisation in Australia shares many features with other First Nations (such as dispossession, assimilation, and exclusion), a sizeable power imbalance in Australia means that First Peoples in Australia do not carry as much political weight and bargaining power (Gussen, 2017). For example, Indigenous Australians comprise around 3 per cent of the population compared to, for example, New Zealand at 17 per cent (Gussen, 2017). At the other end of the spectrum, clear majorities of Indigenous peoples in countries such as Guatemala and Bolivia (62 per cent), mean that First Peoples enjoy comparatively significant political power. Comparative studies substantiate the view that numerically smaller minorities (including in Canada at 3.5 per cent) face a greater struggle for recognition of their rights in these relationships with the State (Gussen, 2017). This issue magnifies the need for 'transformational leaders' who can effectively make the case that beyond numbers, a new relationship must put the heritage and future wellbeing of the First Peoples as the central issue of Australian social justice. An enhanced status as perhaps the world's most successful society built on ancient cultural diversity is an additional argument for transformational leadership towards a new relationship.

The following information regarding constitutional recognition and political representation of Indigenous peoples in New Zealand, Canada and the United States and Sweden is sourced primarily from a Background Paper developed by Dow and Gardiner-Garden for the Australian Parliamentary Library in 1998, followed by more recent analysis by Mulholland (2016), Kastner and Trudel (2016), Maddison (2016), and Trudel, Heinämäki and Kastner (2016) provided in a special series compiled by The Conversation (online Australian newspaper) in 2016.

New Zealand

Dow and Gardiner-Garden (1998) reported that Māori peoples "... are not mentioned in the New Zealand constitution, and the section of the *New Zealand Bill of Rights Act 1990* which was to incorporate the 1840 Treaty of Waitangi into New Zealand law as a constitutional fact, was dropped from the final legislation. Although the Treaty of Waitangi is recognised as the founding document of New Zealand and is part of the constitutional basis of the New Zealand system of government Māori and the Crown have had different

conceptions of the meaning and legal status of the Treaty.” Mulholland (2016, unnumbered) states that the Treaty includes three articles which recognise “Māori retaining their mana (authority) and allow the British Crown to govern its own people; protect Māori resources and culture; and require Māori to enjoy equal rights with British citizens.” In spite of these provisions, Mulholland (2016) contends that successive governments have pursued policies that have adverse outcomes for Māori. As with other colonised nations, Māori have suffered from dispossession, exclusion and disadvantage.

More positively, Dow and Gardiner-Garden (1998) report that New Zealand’s proportional representation system has resulted in Māori representation in the political system over the past couple of decades (far exceeding First Nations representation in Australian parliaments). In spite of this representation and the Waitangi treaty, Mulholland (2016) argues that Māori peoples have experienced significant loss of power and resources. However, Mulholland (2016, unnumbered) also notes that in New Zealand there has been recourse for Māori peoples, by pointing out that the government has...

... established a forum to hear treaty-based grievances, known as the Waitangi Tribunal, in 1975. The current framework for settling historical grievances focuses on the restitution of Article II rights: the taking of resources including land and the absence of protective measures regarding Māori culture. According to the Office of Treaty Settlements, the government entity responsible for negotiating agreements with iwi (tribes), 51 claims were settled between 1990 and 2014; three others dealt specifically with resources rather than being solely iwi-based; and another 35 are at various stages. Each settlement contains financial and commercial redress, cultural redress and an apology for the offending acts.

Notwithstanding criticism of the process that Mulholland highlights – namely in the form of government determining parameters of the settlement framework and the question of whether settlements equate to actual losses suffered by the iwi (that is, Mulholland contends that a settlement of NZ\$170 million was well shy of an estimated actual loss of NZ\$20 billion) - Mulholland (2016, unnumbered) nonetheless points out that the process has resulted in an “increasingly powerful Māori economy, with iwi [or Māori] such as Tainui and Ngai Tāhu estimated to be worth NZ\$1 billion in assets” through successful iwi property investment.

Canada

Dow and Gardiner-Garden (1998, unnumbered) notes that Canada’s *Constitution Act* of 1867 “assigned exclusive legislative authority to the Federal Parliament over ‘Indians and lands reserved for Indians’.” Furthermore, the authors report that Canada’s *Constitution Act 1982* sought to enshrine First Nations rights in the Constitution, thus stipulating that governments (both federal and provincial) are required to consult Aboriginal peoples prior “to making any legislation that relate directly to them” (Dow and Gardiner-Garden, 1998, unnumbered). Such constitutional enshrinements in the Act of 1982, however, have not necessarily translated into desired outcomes for First Nations peoples. Kastner and Trudel (2016, unnumbered) for instance, contest that:

The relationship between Canada's Aboriginal peoples and non-indigenous population has never been an equal one, even though the 1982 national constitution recognises Aboriginal rights. In fact, the process of revealing what's probably the darkest chapter of the country's history has only just begun.

Kastner and Trudel (2016, unnumbered) also report that:

Nearly 100 treaties form the basis of the relationship between the government and most of today's 1.5 million Canadians who identify as Aboriginal (roughly 4 per cent of the population). These treaties were concluded from 1701 onward, when France and more than 30 First Nations signed what was called the Great Peace of Montreal to stop violence between the French and Aboriginal peoples and to share the land.

As far back as 1763, the British Crown proclaimed it would seek the permission of Canada's First Nations before allowing settlements in their territories (Kastner and Trudel, 2016). The authors, however, further note that in spite of the presence of treaty, coercion and implementation failure have been often features at the level of implementation. Nonetheless, Kastner and Trudel (2016, unnumbered) report that on the positive side:

recent land claims agreements have secured some benefits. One of them led to the establishment in 1999 of Canada's newest administrative entity, the territory called Nunavut, or 'our land' in the Inuit language. This enhanced Inuit political autonomy and control of their land in Canada's Arctic region

That said, Kastner and Trudel (2016) find that treaty negotiation processes tended to be both too lengthy and costly.

The United States

Unlike Australia, which only recognised native title in the 1990s, Dow and Gardiner-Garden (1998) have documented a long history of native title recognition in the United States. Dating back to the first treaty with the Delawares in 1778, the United States Senate went on to ratify 370 Indian treaties up until 1871. Since 1871, Dow and Gardiner-Garden (1998) note that relations with Native American groups have been grounded in Congressional Acts, Executive Orders, and Executive Agreements. Dow and Gardiner-Garden (1998) also reported that approximately 22.6 million hectares of land are held in trust for various Indian Tribes and individuals.

Maddison (2016) has helped to document the 'nation to nation' relationships and assertion of sovereignty between First Nations and the federal government in the United States. However, such relationships (or treaties) are not without their faults and inadequacies. As Maddison (2016, unnumbered) argues:

Despite significant shortcomings in the negotiation, content and subsequent honouring of treaties – and although the recognition of native sovereignty and treaty rights don't match the aspirations articulated by representative bodies, such as the National Congress of American Indians – treaties continue to define the nature of the relationship between most Native Americans and the US.

Maddison (2016, unnumbered) also notes that the relationship between First Peoples and the federal government is reflected in the US Constitution; namely, *Article 1, Section 8, Clause 3* of the Congress states:

The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

As Maddison (2016) argues, the clause submits that the United States has recognised a form of ongoing and unbroken sovereignty among America's First Nations. Of note, Maddison (2016) also reflects on the idea of 'constitutional trifederalism' in the US whereby First Nations are recognised along with federal and state government as 'constitutionally recognised sovereigns'.

While Australia has developed native title legal recognition, Australia (unlike the US) does not recognise Indigenous sovereignty. Both sides of politics in America (as reflected in the presidencies of George W Bush and Barack Obama) have recognised tribal sovereignty and stressed its importance to economic advancement (Davis & Williams, 2015).

Saami peoples and Nordic nations

The First Nations peoples of Nordic countries such as Norway, Sweden, Finland, and Russia are known as the Saami (or Sami). While the Saami First Nations footprint cuts across these countries, the jurisdictions have developed varying policies, laws and constitutional provisions, from no constitutional recognition in Russia to Saami parliaments in Finland (1973), Norway (1989) and Sweden (1993) (see Trudel, Heinämäki, & Kastner, 2016).

Dow and Gardiner-Garden (1998) have traced various policy developments in Sweden and Norway as they relate to the Saami peoples. In Sweden, the first elections of Saami Parliament were conducted in 1993. Dow and Gardiner-Garden (1998, unnumbered) report that:

The Parliament's main duty is to promote Sami culture and to a lesser extent Sami economic development. It is responsible for allocating resources from the Sami Fund to support Sami culture and organisations.

Meanwhile in Norway, Dow and Gardiner-Garden (1998, unnumbered) note that in 1988 the "Norwegian Parliament passed an amendment to the Constitution recognising Saami constitutional rights. Article 110a in the Constitution states: 'it is the responsibility of the authorities of the State to create conditions enabling the

Sami peoples to preserve and develop its language, culture and way of life” (Dow and Gardiner-Garden, 1998, unnumbered).

Trudel et al. (2016) note that in Norway (unlike Finland in 1995, and Sweden in 2010) constitutional recognition of the Saami as a First Nations peoples has not occurred. That said, Trudel et al. (2016, unnumbered) further note that Norway “added legal protection by ratifying the 1989 Indigenous and Tribal Peoples Convention of the International Labour Organisation and by adopting the Finnmark Act in 2005.” The authors suggest that the latter Finnmark Act recognises that (Trudel et al., 2016, unnumbered):

Saami have – collectively and individually – acquired rights to land in the north-eastern part of the country. Still, some of the constitutional protections given to the Saami lack implementing legislation, and there are no comprehensive guarantees regarding cultural self-determination. The provision in the Swedish constitution is considered to be particularly weak. And the Russian constitution says nothing about the Saami at all.

Trudel et al. (2016, unnumbered) also argue that Saami parliaments represent a “positive step towards self-governance, and play an important advisory role for governments. But problems remain: the parliaments have few decision-making powers, and many Saami don’t participate in elections.” The authors argue that while developments in the Nordic states outpace Australia, legal protections for the Saami are nonetheless “far from satisfactory”. Furthermore, Trudel et al. (2016, unnumbered) contend that the Saami “don’t have any real self-determination, and they still lack adequate protection of their culture and lifestyle.” To overcome such shortcomings, the authors note that (Trudel et al., 2016, unnumbered):

efforts have been made in recent years to adopt a Saami Convention. This could become the first regional treaty concerning indigenous peoples and would enshrine various rights, including the right to self-determination, Saami language and culture, and land and water, endorsing the principle of free, prior and informed consent.

The changes needed to support transformed relationships

Successful agreement making in NSW and Australia, at the end of the day, will be ultimately determined through either political will (civil discourse, political leadership, major policy reform, or legislative action) or via the will of the people (including through a referendum at the national level to potentially amend the Constitution in such a way that it enshrines positive benefits for First Nations). Success will also depend upon continual good faith negotiations between governments and communities by shifting more power and decision making capacity to people on the ground. Equally important is recognition that Aboriginal peoples should be deciding for themselves ‘what matters’. This means mechanisms and forms of deciding on and enacting agreement making that are culturally safe as a first step, and then states responding by negotiating and co-designing (with community) transformational mechanisms. A number of critical success factors are required in bringing about such positive change, beginning with the question of ‘why’.

Beginning with ‘why’

For positive change to occur both the Aboriginal and wider polity will ideally settle upon a shared understanding of the ‘case’ for change. That is, all peoples will agree to the *moral purpose* of change. Put simply, the public will want to be satisfied about ‘why’ change is necessary and what benefits it could potentially bring. In the minds of First Nations peoples, the ‘why’ question has been firmly answered over many decades, including in recent years through the ‘Uluru Statement from the Heart’, which included the following pleas:

With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia’s nationhood.

We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

...our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.

...a process of agreement-making between governments and First Nations and truth-telling about our history.

In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.⁵

The Uluru Statement has to be seen along a longer timeframe of Indigenous activism for treaty, including (but not limited to) the Barunga Statement 1988 and ATSIC’s Treaty Think Tank (see ATSIC, 2003).

In NSW more specifically, the NSW Coalition of Aboriginal Regional Alliances (NCARA) (2018, p.1), calls on government to commit to ‘an unwavering continuation along a path that empowers communities at local and regional levels, by giving them more say about policy formulation across government services, more involvement in program design across government, and by providing communities with additional resources for desperately needed locally-delivered services.’ NCARA (2018, p.9) also affirmed the message of placing communities at the heart of their own affairs, and for governments to ‘let go’ and give communities ‘a greater go’ in delivering services and building communities socially, economically and culturally.

In South Australia, the former Treaty Commissioner, Dr Roger Thomas, in his publication called ‘Talking Treaty’ outlines a number of reasons why South Australia might enter into treaty, including (Thomas, 2017, unnumbered):

- enabling reconciliation between Aboriginal and non-Aboriginal people of South Australia and providing recognition of Aboriginal people and/or Aboriginal nations
- a way to re-set the relationship between Government and Aboriginal people of South Australia for future generations, and a way to make amends for past wrongs and the impacts of colonisation.

⁵ https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF

In South Australia, treaty was further explained as:

- An Agreement between two or more groups.
- Basically a contract or deal, where groups sit down together to negotiate and agree on certain rights and responsibilities.
- Agreements in line with limited (constitutional) powers.

In Victoria meanwhile, a significant distinction is made between conventional agreements (such as service agreements, partnership agreements, Memoranda of Understanding (MoUs), etc.) and treaties. According to *Fact Sheets* produced by Aboriginal Victoria in 2016 (as reported by NITV News⁶), ‘treaty’ is:

an agreement made between Indigenous peoples and governments ... [as a document with] “considerable legal and moral force”.

The Victorian Government’s *Fact Sheets* further stated that:

Aboriginal people must first agree on the purpose of a treaty before deciding if and how to make one, and what it should contain. Since there is no history of treaty- making in Australia, Victorians have a unique opportunity to craft their own treaty suited to their needs and desires, and their own concepts of justice.

Intra-community engagement

Gaining agreement within and between First Nations is unquestionably the first and most critical step in advancing agreements. Australia’s Aboriginal nations are not a homogenous group (as illustrated in the map *below*). In addition to this diversity across First Nations boundaries, languages and cultural identity, the Aboriginal population in NSW, and in Australia more broadly, is young, growing fast, and mobile.



⁶ <https://www.sbs.com.au/nitv/nitv-news/article/2016/12/13/victoria-treaty-one-step-closer>

According to data compiled for AANSW (2017), in 2016, 216,176 Aboriginal people resided in NSW, representing 2.9 per cent of the total NSW population and 33.3 per cent of the Aboriginal population in Australia, thus making it the largest state in terms of Indigenous population share. These data illustrate the diversity of NSW's Aboriginal population, which in turn highlights the need for community engagement strategies that are inclusive, comprehensive, and tailored (as opposed to 'one size fits all'), and with sufficient timeframes.

The potential negotiating environment for agreement making in NSW is a complex one. To illustrate:

- NSW has a land rights system and existing legislated Aboriginal land owning governance bodies in the form of Land Councils (which do not exist in all states).
- Many NSW First Nations people live off Country which can present challenges in establishing and maintaining representative bodies and getting intra-community agreement when Traditional Owner interests may differ from those who now reside in communities that live off Country.
- Many First Nations peoples in NSW come from outside of NSW, which again could potentially present challenges in terms of representing their interests in any representative body and agreement making.
- NSW's First Nations have been impacted by colonisation for the longest period, and as a consequence, native title has delivered very little by way of outcomes to date for NSW First Nations.

Aboriginal communities are actively negotiating and implementing agreements with the three tiers of government in NSW. By way of example, at a local government level, Local Aboriginal Land Councils (LALCs) have entered into an agreement with the Port Stephens Council. At a state level, the Local Decision Making (LDM) model is resulting in 'Regional Accords' with the NSW Government. At a federal level, two NSW regions are involved in the Commonwealth's *Empowered Communities* program. Whilst none of these agreements are 'treaties', they nonetheless provide examples of active agreement making in NSW.

In addition to the existence of Land Councils in NSW (which develop Aboriginal Land Agreements under the *NSW Aboriginal Land Rights Act 1983*), the emergence, in more recent years, of Aboriginal 'regional alliances' under the LDM model represents another layer of community engagement on agreement making. A recent evaluation of LDM found that the model is viewed by "many participants to be very progressive and in some ways the furthest towards actual expression of self-determination in Australia" (Katz et al., 2018, p.h). The evaluation further found that the "ongoing open dialogue between Aboriginal communities and government should be viewed as a success. The model allows Aboriginal communities', with their nominated representatives, and government to build a relationship and to better understand each other's needs" (Katz et al., 2018, p.h).

In navigating the diversity and complexity of Aboriginal NSW and in shaping future agreement making processes, then recent lessons from Victoria may be instructive. Before any Victorian treaty or treaties will be negotiated, Victoria has over the past several years focused on engagement with Aboriginal communities.

Koorie community leader, Jill Gallagher AO, was appointed as Victorian Treaty Advancement Commissioner in January 2018. Over the past year and more, the Commission's charter⁷ has been to:

⁷ <https://www.vic.gov.au/aboriginalvictoria/treaty.html>

strengthen independence for the Victorian Aboriginal community on the path to treaty. It will engage with Aboriginal Victorian communities across the state throughout the development of the Aboriginal Representative Body to ensure community voices are heard and remain at the heart of the process. Once established, the Aboriginal Representative Body will work in partnership with the Victorian Government to develop a framework to support future treaty negotiations.

Legislation was passed in the Victorian Parliament in 2018 providing the basis for treaty making. The legislation was 'the culmination of the work of more than 7,500 Aboriginal community members who have been engaged in work to further the treaty process in Victoria. The Government has listened to Traditional Owners, clans and family groups across the state about aspirations for treaty or treaties.'⁸

As with Victoria and previously South Australia, the Northern Territory Government has stated that a Treaty Commissioner (announced in February 2019 as Mick Dodson) will spearhead community engagement over the course of twelve months. This would be followed by a discussion paper, to be translated into Aboriginal languages, for community feedback, before a report is tabled in the NT Parliament 18 months after the consultation period. Dodson has already flagged that compensation and 'practical benefits' could be on the negotiation table.⁹

In Western Australia, the Noongar Agreement (as earlier noted) came under challenge from a number of native title claimants who argued in the federal court that they had been excluded from negotiation processes. The court found in their favour, only for that decision to be overturned by a procedural change at the federal level which enabled the Noongar Agreement to proceed. This case highlights the critical importance of intra-community agreement.

On a positive note, the *Uluru Statement* is arguably a showcase for large scale engagement and negotiation between and within First Nations groups. More than 250 Aboriginal and Torres Strait Islander people from around Australia were delegates at the 2017 First Nations National Constitutional Convention where the Uluru Statement was adopted. Notwithstanding that a small delegation walked out of the Convention out of concern for potential loss of Indigenous sovereignty, the final statement was met with a standing ovation from the vast majority of delegates. The Statement was the culmination of several years of engagement. The body charged with that consultation, the Referendum Council appointed by the Prime Minister and Leader of the Opposition, convened 12 First Nations dialogues in late 2016 and early 2017 including in Adelaide, Hobart, Darwin, Broome, Dubbo, Brisbane, Torres Strait, Sydney, Melbourne, Cairns and Alice Springs.¹⁰

Both the Victorian and national experiences once again highlight the need for community engagement strategies that are inclusive and tailored (as opposed to a 'one size fits all' approach), and with sufficient timeframes for proper engagement and dialogue with and between First Nations. Any treaty or other agreement making process has to begin within, and be carried throughout by, First Nations communities.

⁸ *ibid.*

⁹ <https://www.abc.net.au/news/2019-02-18/possible-compensation-on-the-table-for-nt-treaty;-mick-dodson/10823096>

¹⁰ <https://www.pmc.gov.au/sites/default/files/publications/referendum-council-communique-201016.pdf>

Developing literacy of historical truths & contemporary realities

There's an old saying in politics, "if you don't understand, then don't vote for it." A public information campaign which builds understanding of agreement making between governments and Aboriginal communities is therefore vitally important. As previously noted, Victoria has invested in a campaign that includes online, media, billboards and public forums to promote the process of treaty. The broader community, in Victoria and the nation more broadly, will ideally understand how a significant agreement (be it Treaty, treaties, an accord, settlement, or compact) can result in both practical measures (such as stronger families and children) and improved social relations (reconciliation). In looking to history, it appears that there are two significant conceptual or ideological hurdles within (especially conservative) sections of the broader public, which might be summarised as:

- *How can we have a treaty with ourselves?*
- *And, how is this practical?*

Recent events in media reporting on the issue of changing the date of Australia Day have thrown these questions into full light. For instance, media personality Kerri-Anne Kennerley sparked a debate which seemingly (and incorrectly) conflated the progression of Indigenous rights with child abuse.¹¹ In progressing an agenda of Indigenous rights, it would be worthwhile to point out to all stakeholders that empowering and sufficiently resourcing First Nations on the ground is more likely to lead to stronger families and children.

In seeking to inform the broader public about the merits of treaties or truly transformational agreements that are both substantial and substantive, then a campaign based on honesty and truth is vitally important. Such a campaign might outline how Australia is an outlier when compared to other colonised nations such as the US, Canada, New Zealand and Nordic countries that have either entered into long-standing treaties that recognise Indigenous sovereignty, or sought to establish 'voice' mechanisms to Parliament. In addition, such campaigns in Australia might ideally and truthfully acknowledge that despite many decades of earnest attempts to bridge socio-economic inequities and disparities between First Nations peoples and the rest of Australia, these attempts have resulted in either marginal or ineffective results. Put another way, social justice represents big unfinished business in Australia.

Finally, public campaigns to promote the merit of treaties or substantive/substantial agreements between states and First Nations would accept that if human occupation of Australia were likened to a 24-hour clock, then Aboriginal occupation is the full 24 hours compared with milli-minutes - if not milliseconds - of colonial occupation within that 24-hour cycle.



¹¹ <https://www.news.com.au/entertainment/tv/morning-shows/yumi-stynes-cancel-studio-10-appearance-not-my-problem/news-story/630554e40289b4e0e82ced293361dbf7>

Again, educating all stakeholders about the purpose of, and potential benefits from, agreements with First Nations is vital. Such educational campaigns are also important in overcoming misconceptions that Aboriginal peoples have already been ‘given’ self-determination including through native title. Such misunderstandings overlook the fact that First Nations peoples are often powerless in determining their economic, social, environmental, and cultural priorities and being insufficiently resourced to implement those priorities.

In Victoria, the publication of a series of factsheets is helping explain the benefits of treaty or treaties to the wider public, such as:

- to recognise past wrongs and make apology for those wrongs
- to recognise Indigenous land rights and sovereignty
- to recognise Indigenous self-government within a state
- to exchange land rights for financial and other benefits, and
- to create a relationship or partnership for an ongoing dialogue.

Reaching shared definitions and meanings among all parties is also a critical success factor in agreement making. Ambiguity or debates around semantics are likely to be enemies of progress. It may be that the word ‘Treaty’ is problematic in the minds of some. For example, in his recent memoir Warren Mundine reflected on conversations he had with former prime minister Tony Abbott who appeared initially receptive to the concept of treaty. Mundine suggests that Abbott could live with ‘treaties’ as long they were called something else. Mundine (2017, pp.405-406) explains:

In fact, Abbott came around to my idea of treaties with Aboriginal first nations (although to keep the peace with his conservative caucus he suggested that, if pursued, we could come up with a different name).

Transformational leadership

Transforming relationships will require transformational leadership. As the international youth movement for change *Association Internationale des Etudiants en Sciences Economiques et Commerciales* (AIESEC)¹² highlights, transformational leadership tends to be proactive; places a premium on innovation and daring; involves leaders that motivate and empower; is underpinned by action that appeals to higher ideals and moral values; and involves action that transcends self-interest to shared interest.

In Australia, the pursuit of social justice, reconciliation, equity, and truth-telling are challenges that require transformational interaction and collective ownership within the broader Australian community, as opposed to being carried solely by Aboriginal peoples.

As with the leadership shown during the *Native Title Act (NTA) 1993* debates in the 1990s, Aboriginal communities will need support from industry, media, politicians, commentators, and the legal community in advancing the rights of First Nations in 2019 and beyond. Former federal Aboriginal Affairs Minister, Fred Chaney recently reflected upon

¹² <https://www.aiesec.nl/blog/personal-development/transformational-leadership-vs-transactional-leadership/>

the leadership shown by industry in the lead up to the *NTA* and compared it to the more recent industry leadership shown by Rio Tinto and BHP with regard to the *Uluru Statement*.¹³ On the question of treaty with First Nations, legal leaders such as Robert French, former Chief Justice of the High Court, have argued that agreements with First Nations could:

... recognise and acknowledge traditional law and custom of indigenous communities across Australia, their historical relationship with their country, their prior occupancy of the continent and that there are those who have maintained and asserted their traditional rights to the present time.

Empowering, resourcing and listening to Aboriginal leaders is crucial in transforming relationships into the future. As McMullen (2017, p.98) acknowledges:

Capturing attention for the First People's agenda has required political imagination and ingenuity.

Such Indigenous ingenuity and imagination can only be supported and sustained through transformative leadership not only within First Nations communities, but across government, media, industry, and legal circles.

Agreement of scope & footprints of change

Jurisdictions seeking to transform relationships with First Peoples will need to give deep consideration to scope (that is, 'what's in' and 'what's out') of agreement frameworks, along with the footprint/s for implementation. To date, states that have sought or entered into treaties or substantive agreements with First Nations peoples have included apologies and recognition of past wrongs, coupled with a commitment to never repeat past injustices; acknowledgement of Aboriginal sovereignty; mechanisms for ongoing negotiation and dialogue; financial and other benefits; return of lands; and decision making powers. Each of these goals, for example, are stated commitments of the Victorian Government. In the Northern Territory, the Government has explained that it will be engaging with communities about what might be included in a treaty. According to the Chief Minister's Department (2018), treaty could include a number of different items, including:

- acknowledgement of the First Nations people of the Northern Territory, including the deep connection to land and the significant contributions Aboriginal people have made to our society, culture, and prosperity
- truth telling process around the history of the Northern Territory, teaching about the displacement, the trauma, and the massacres
- rules around how Aboriginal groups and the Northern Territory Government should work together. This may include a formal group that provides a voice to government
- protection and support for Aboriginal language and culture

¹³ <https://www.abc.net.au/news/2019-01-31/the-drum-thursday-january-31/10768442>

- land and sea matters which will vary based on location
- potential reparations for past injustices and for the dispossession of Aboriginal people from their resources and land, and
- mechanisms for accountability so that all parties to a Treaty live up to the commitments they make.

Governments seeking substantive and transformational change could also give consideration to substantial social justice packages in light of current levels of locational, intergenerational and multifaceted social and economic Aboriginal disadvantage. This is a particularly important consideration for Aboriginal peoples – including in NSW – who have been forcibly removed from their lands and therefore are not always factored into land rights packages. During the native title legislation debates in the early 1990s, the Commonwealth Government at the time was being urged by Aboriginal leaders to invest in a sizeable social justice package.

“Aboriginal people are attaching high importance to the development and implementation of a social justice package,” cabinet was told. “The central message is as understandable as it is unequivocal; without the achievement of true social justice for Indigenous Australians, it will not be possible to achieve lasting reconciliation.”¹⁴

The package never came to fruition as a result of the defeat in 1996 of the Keating government. Given current and persistent inequities between Aboriginal and non-Aboriginal peoples in health, education, income, home ownership, and employment, a revisitation of social justice measures in agreements will be crucial; without them agreements are unlikely to be either substantive or substantial.

Footprints of change: nation-building or community-building or both

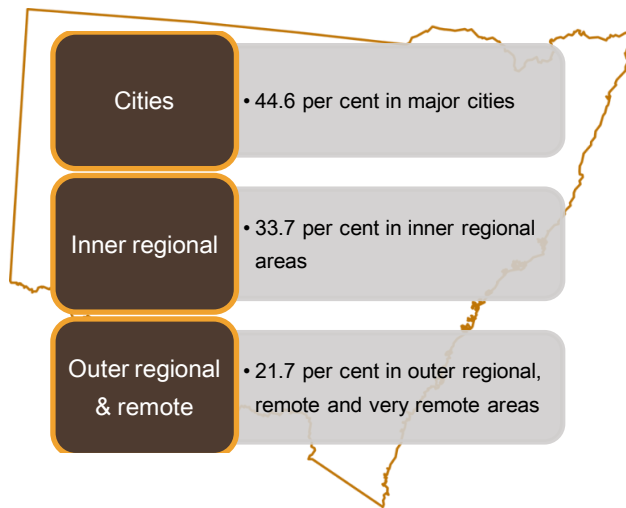
In seeking to advance agreement making, governments will need to give consideration to the level at which they seek to engage and build agreements. That is, agreements both in Australia and internationally can be developed at either a ‘community’ level (i.e. a geographical location such as a city, town or region) or at a ‘nation’ level (i.e. within a First Nations boundary). For example, in Western Australia the state government has entered into a major agreement with the Noongar ‘nation’. Meanwhile, in NSW the Bowraville Solution Brokerage Plan is an example of ‘community’ level negotiated and agreed action.

A state such as NSW will need to be mindful of the potential for state-wide, regional and local footprints of action and interaction. The Aboriginal population of NSW is fast growing and geographically dispersed (see Figure 2, below). By 2026, the NSW Aboriginal population is expected to grow to 282,962 people. Of the Aboriginal population in NSW in 2011, 44.6 per cent lived in major cities, 33.7 per cent in inner regional areas, 17.2 per cent in outer regional areas, 2.9 per cent in remote areas and 1.6 per cent in very remote areas. In addition, in 2015, 79 per cent of NSW Aboriginal babies were born to mixed partnerships.

¹⁴ <https://www.theguardian.com/australia-news/2018/jan/01/keatings-struggle-to-implement-mabo-decision-revealed-in-1994-95-cabinet-papers>

Current agreements between First Nations in NSW and government provide examples of both ‘nation building’ and ‘community building’. For instance, the Port Stephens Council agreement with the Worimi and Karuah Local Aboriginal Land Councils is an example of ‘nation building’. Meanwhile, the *Empowered Communities* program (a Commonwealth Government sponsored initiative) is an example of ‘community building’ as it seeks to serve all Aboriginal and Torres Strait Islander people residing in the Central Coast and inner Sydney regions.

Figure 2: Dispersed nature of Aboriginal population of NSW



The Aboriginal population of NSW is geographically dispersed.

Whilst Sydney and neighboring cities represent a big slice of the Aboriginal population, more than 50 per cent of Aboriginal people in NSW reside in inner regional, outer regional, and remote areas.

Footprints of agreement making would need to be equitable across Aboriginal geographies and demographics, as well as Aboriginal nations potentially. As with the United States, governments may wish to seek agreements with Aboriginal nations such as the Tharawal, Wiradjuri and Kamilaroi to name just a few by way of example. Were government to proceed this way, they will need to be mindful of the many thousands of Aboriginal people who now live ‘off Country’.

Another, potentially complicating, overlay when it comes to footprints for negotiation and agreement making in NSW are the boundaries of Local Aboriginal Land Council (LALC) areas. As Norman (2017, p.28) observes:

As Western Australia, South Australia and Victoria enter negotiations for treaties with Aboriginal peoples, the stage is set for a more active response from the New South Wales Government. A central feature is consideration of the defining features of the Aboriginal polity. Central to the Aboriginal polity in New South Wales is the ways in which the predominant land recovery regimes have constituted Aboriginal groups (the boundaries of LALC areas, for example, are not necessarily aligned with cultural or traditional associations with Country) as well as competition for scarce resources and benefits.

As Norman (2017) further notes, the pursuit of agreement making in NSW will need to be contextualised both in terms of NSW’s colonial history (i.e. the place of initial invasion) and in light of the NSW *Aboriginal Land Rights Act 1983* and formation of the NSW Aboriginal Land Council. Furthermore, government will need to actively consider how LALCs and other community bodies (be they local, regional, or state) are adequately resourced (including through

community capacity building measures) to participate in future negotiations, joint planning, and relationship building with the state. Norman also pointed out (p.29) the importance of governments enabling Aboriginal peoples to pursue their own 'nation-building' by placing Aboriginal peoples at the heart of their own 'development and planning and conservation'.

Hunt (2017) similarly highlights the importance of policy recognition of Aboriginal approaches to self-determination through 'nation building'. Hunt (2017) draws upon Australian and international literature to illustrate First Nations building approaches that are, more often than not, founded on self-determined economic and community development that sustain culturally unique and distinct communities. Hunt (2017, p.86) explains that nation building depends on ...

... Aboriginal people collectively identifying as a nation group. It may also require them to consider relations with other Aboriginal people living in their region who do not identify as members of their nation group to determine how they will be accommodated in these arrangements. Matters of 'Country' or cultural heritage and matters of service delivery in relation to issues such as housing, employment, aged care etc. may be treated differently in terms of decision-making.

Mobility of Aboriginal people is an important consideration in policy and program planning in NSW. Abbott et al. (2015, p.6) finds that "movement within NSW of the Aboriginal population has the potential to change the geographic distribution of the population." Abbott et al. (2015) also report that according to 2011 Census data, 4,591 Indigenous Australians moved from other parts of Australia into NSW. Equally important to mobility is demography, including the fact that a number of towns in NSW are becoming increasingly 'Aboriginal' so to speak. Demographic data and projections show that in some parts of NSW, such as towns in the north-west, the proportion (or share) of Aboriginal people residing in certain towns is increasing.¹⁵

Capacity building

As Palmer notes back in 2004, there has been a 'proliferation of agreements' involving First Nations peoples in Australia. Palmer (2004) points out that:

These include agreements with resource extraction companies, railway, pipeline and other major infrastructure project proponents, local governments, state governments, farming and grazing representative bodies, universities, publishers, arts organisations and many other institutions and agencies.

Against this backdrop of a proliferation of agreement making, Strelein (2001) has argued that this accelerating process necessitates 'a national framework and protection for those agreements.'

The introduction of the *Native Title Act 1993* (NTA) – especially through Indigenous Land Use Agreements (or ILUAs with approximately 1,274 registered across Australia¹⁶) – has been a major catalyst for agreement making between

¹⁵ Refer to various demographical research by John Taylor at CAEPR ANU for example

¹⁶ <http://www.nntt.gov.au/Pages/Statistics.aspx>

industry, government and First Nations. Both the NTA and ILUAs have meant that all parties have had to build capacity both in terms of negotiation, agreement, and implementation. A Joint Working Group on Indigenous Land Settlements developed a set of guidelines in August 2009 to assist parties in building capacity. Called ‘Guidelines for Best Practice Flexible and Sustainable Agreement Making’¹⁷, the guide includes the following advice to government agencies (p.6):

Prepare thoroughly prior to commencement of a negotiation. Prior to the commencement of negotiations, government parties should endeavour to: (a) ensure all parties are authorised to commence negotiations; (b) identify and complete necessary research; (c) outline outcomes sought so that relevant policy parameters can be defined and understood by all parties; (d) agree on the broad structure, timeframes, parameters and purpose of the negotiations; (e) agree on roles and responsibilities of all parties; and (f) seek to assist with the resolution of inter and intra-Indigenous conflict, where possible and appropriate.

Despite a proliferation of agreements before, at the time of, and post-NTA, Aboriginal disadvantage in NSW and Australia more widely is alarmingly high, especially when locational and intergenerational disadvantage is more closely examined.

Legislative frameworks

Over the past five years NSW has established a number of program and policy measures consistent with the aspiration of self-determination and agreement making between First Nations and government. These include (but are not limited to) the formation of Aboriginal Languages legislation and initiatives under the *OCHRE* strategy, principally the LDM model. Whilst the languages reforms are legislatively based, the *OCHRE* strategy is policy and program based – meaning it is easily subjectable to change depending on the priorities and preferences of the government of the day. To this end, the NCARA (2018, p.9) has urged government to work ...

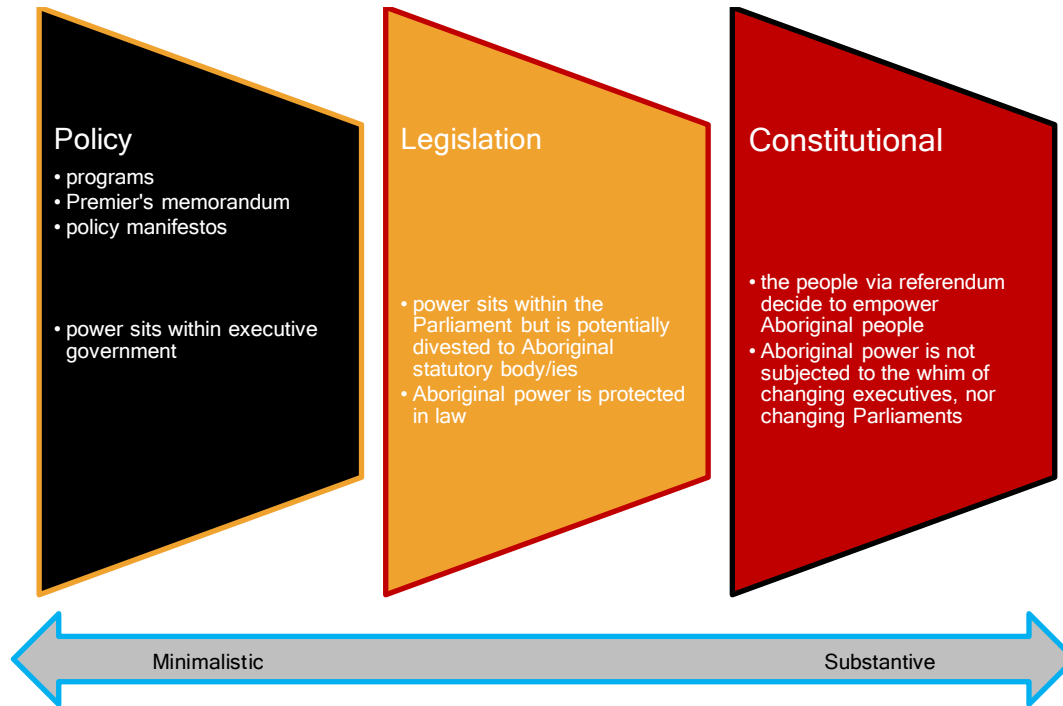
... with community in developing legislation, a state-wide overarching agreement with First Nations, and a 10-year investment strategy to fortify local decision making models which includes preferencing of Aboriginal community controlled organisations in service delivery and adopts an affirmative action agenda to government procurement which bolsters Aboriginal community enterprise in key sectors such as health, community services, employment, economic development, and cultural affirmation.

In their response to the *OCHRE* evaluation, NCARA (2018) expresses concern that policies and programs are unlikely, by themselves, to safeguard and indeed, expand and devolve local decision making powers to community. Governments come and go, while an Act of Parliament would need the majority of Parliament to agree to its repeal or amendment. The following schema has been produced to illustrate that policy (including the Premier’s Memorandum regarding LDMs) can be a ‘minimalistic’ approach (as illustrated in Figure 3, *below*) to Indigenous rights in so far as it is often subjected to differing interpretations, lax enforcement, can be easily changed by an executive government, and too readily fail at the stage of implementation without consequences. Paradoxically, policy and programs can often

¹⁷ https://aiatsis.gov.au/sites/default/files/products/handbook_research_outputs/2009-ntru-best-practice-guidelines-agreements.pdf

provide governments with more flexibility and greater scope for reform and policy experimentation without the constraints of legislative reform (which is often hotly politically contested). Nevertheless, legislative (and even more so, Constitutional) protections enshrined in law could potentially help with codifying, protecting, and fortifying Indigenous rights. Morris (2015) argues that only Constitutional enshrinement can protect the Indigenous right to be consulted by parliaments when making laws in Indigenous affairs.

Figure 3: Policy, Legislative, and Constitutional potential approaches to transformational change



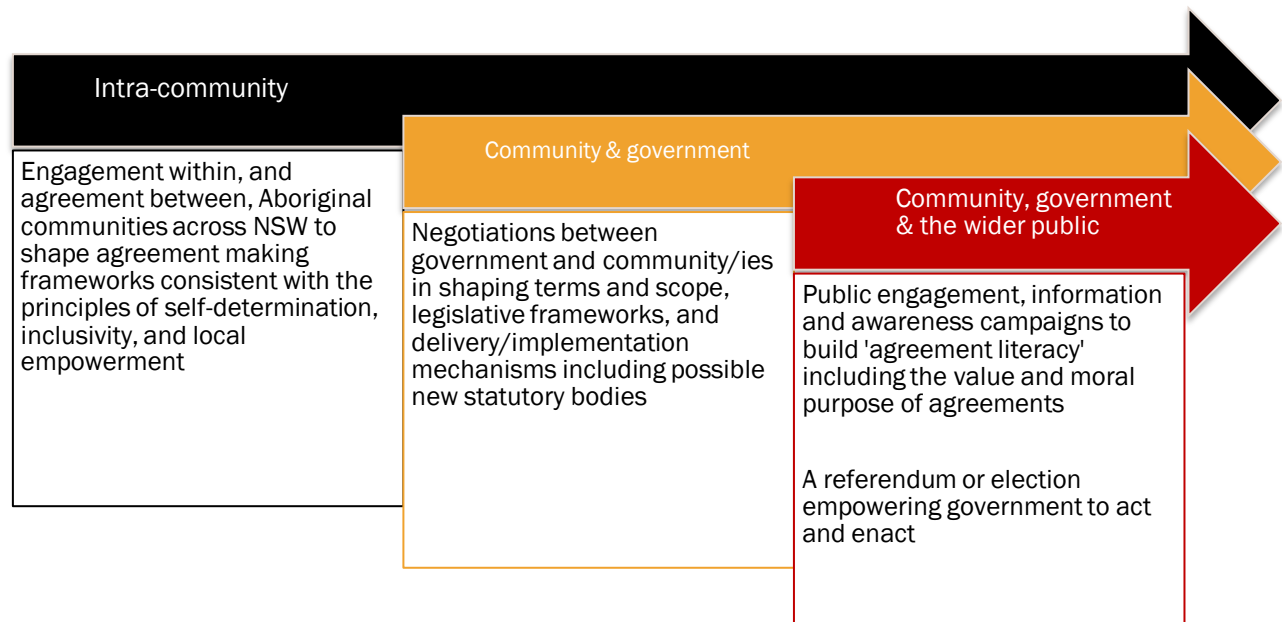
The co-design (between government and communities) of a legislative framework on Aboriginal decision making and agreement making could also lead to shared definitions, negotiated perimeters, the codification of relationships, and greater legal protections.

Sustained and broad-based community engagement

Much like the commitment of the NSW Government to 'continuing conversations' with communities on the *OCHRE* initiative, any positive change in relationships between First Nations and the State (and the wider public) will necessitate sustained and broad-based engagement. When one looks to Indigenous-settler relationships through an historical lens it is clear to see that a sizeable change to the national psyche is required in a country that had long adopted a 'White Australia' policy.

A program of engagement needs to be at scale and could include the following elements illustrated in Figure 4:

Figure 4: Levels of engagement - Aboriginal communities, government, and wider public



How sovereignty and self-determination are understood under UNDRIP

The United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) articulates a number of ambitious goals, many of which colonial states are likely to find problematic if not challenging. As previously noted, Australia was initially reluctant to sign the Declaration.

One of the fundamental principles of UNDRIP is the rights of Indigenous peoples to 'self-determination'. Article 3 of the Declaration reads:

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

However, as Hunt (2017) notes, interpretations of 'self-determination' differ. Hunt (2017, p.83) draws upon research from Victoria where the following term helps explain Aboriginal peoples' aspirations with regard to self-determination, including "long-term strategic planning, cultural integrity, equality and non-discrimination, identity, economic development, and partnerships with government and the private sector." Hunt (2017) further notes that future research in NSW would be useful in gaining stronger insights into what self-determination means for Aboriginal peoples in NSW. UNDRIP (in Article 4) also refers to Indigenous peoples' right "to autonomy or self-government in matters relating to their internal and local affairs as well as ways and means for financing their autonomous functions." How the notion of 'self-government' practically manifests itself in NSW could be conceptually challenging. But as Jonas (2002) argued, the implementation of UNDRIP articles in Australia need not be seen as an "oppositional form of sovereignty, but recognition that under International Law Indigenous peoples are legitimate actors."

With three tiers of government already established in the Australian federation – namely, federal, state, local – it is unclear where Indigenous self-government could sit. That said, there are prior and ongoing structures and models

that need to be borne in mind, including the idea of ‘trifederalism’ in the United States (see Maddison, 2016). In NSW and Australia more specifically, three existing structures/arrangements are important to consider. Firstly, the LALC network in NSW is firmly established under the *ALRA*. Secondly, NSW has a number of regional alliances and assemblies that are supported under the LDM model. Thirdly, Australia had invested in models such as the Aboriginal and Torres Strait Islander (ATSIC), whereby the independent evaluation of ATSIC recommended the retention of ATSIC regional councils. In Victoria, treaty-making processes will be undertaken between government/s and a legislatively-backed Aboriginal Representative Body. Meanwhile, at the national level currently, there is a call for a First Nations constitutionally-enshrined body (or ‘voice’) to the Parliament to advise on Indigenous policy matters. Since ATSIC however, governments at a federal level have been reluctant to support national Indigenous bodies such as the National Congress of Australia’s First Peoples which has struggled financially and is now likely to be placed into administration. And yet, as Hunt (2017) notes, the ‘Indigenous community sector’ has been an important feature of the Aboriginal self-determination agenda, particularly in lieu of government policy and programs that proactively invest in self-determination measures, including at a national level. Hunt (2017, p.85) explains the community sector model in the following terms:

In general, this model has involved governments setting policy and program frameworks, though with some consultation with Aboriginal and Torres Strait Islander communities which varies in quality and impact. Within these frameworks, Aboriginal organisations have delivered a range of services and programs to their people in ways which they determine. Competitive contracting policies have reduced the proportion of Indigenous funding going to such organisations. Those that remain funded have been constrained by detailed accountability mechanisms which reflect government priorities. These mechanisms tend to transform them from expressions of self-determination to service delivery mechanisms accountable to governments for precise program outcomes.

Such purchaser-provider approaches to the relationship between state and First Nations are hardly transformative. Aboriginal self-determination is more likely to be in a stronger position when Aboriginal communities are empowered beyond ‘provider’ to ‘owner’ and ‘producer’ of services and goods of which they prioritise. Davis (2018) argues for a bolder approach to the relationship between First Nations and government. In arguing for treaty, Davis (2018) issues the following challenge:

But treaties are not service-delivery agreements. They are not a means to rubber stamp the status quo.

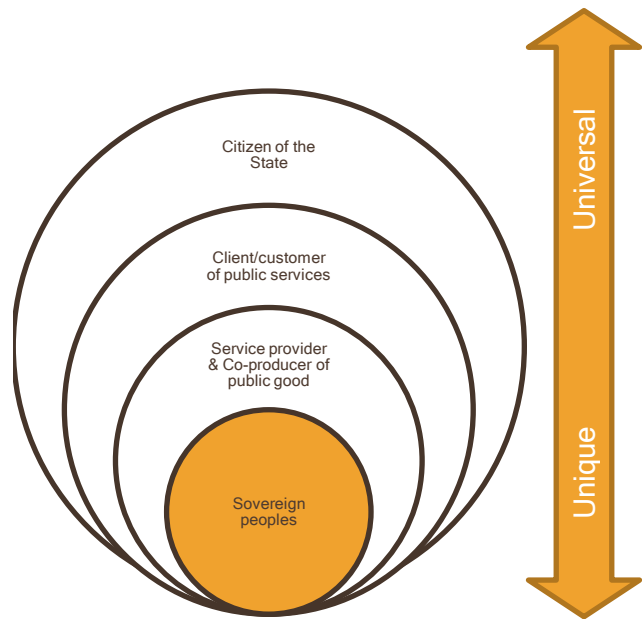
Langton (2000) contends that the denial of sovereignty of First Nations Australia, and a lack of ‘consent’ and treaties, “is the chief obstacle to constructing an honourable place for Indigenous Australians in the modern nation-state.”

In 2019 and beyond, there are a number of important principles and concepts that governments and communities will need to jointly consider to move relationships to the honourable place that many seek.

Moving forward: what needs to be borne in mind

As noted at the outset of this paper, Aboriginal people can have many and varied relationships with the state - as illustrated in Figure 5, *right* - from mere clients and end users of public services (which are transactional in nature as reflected at the outer realms of the diagram) right through to recognition of Indigenous Australians as sovereign peoples (which is transformational in nature and therefore sits at the middle of the diagram or at the heart of desired relationships). Figure 5 has been produced to help illustrate the point that Aboriginal people are entitled to 'universal' relationships with the state, by being virtue of their citizenship. At the same time, Aboriginal peoples can have 'unique' relationships with the state by virtue of being sovereign and collective peoples.

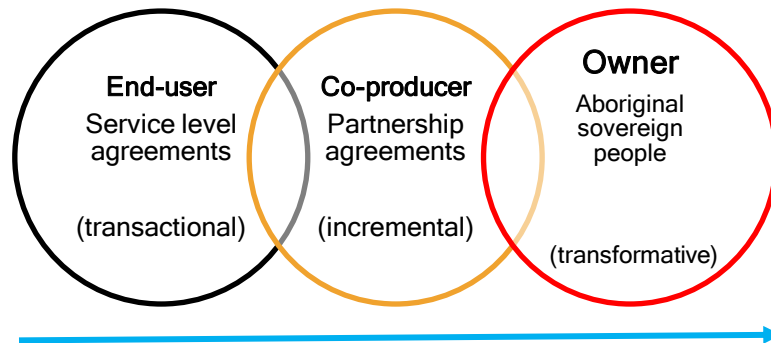
Figure 5: Placing Aboriginal peoples as sovereign peoples at the heart of relationships with the state



In considering how relationships between states and First Nations can be *transformed* into the future, as opposed to merely maintained or consolidated, this paper finds that governments will ideally embrace and empower Aboriginal aspirations of being seen as, and respected as, self-determining sovereign peoples. As such, relationships will need to move from a passive mode which limits Aboriginal peoples as mere clients and customers of public services (as important as this is on equity grounds) to a proactive mode which enables Indigenous production and ownership of services, products, and goods.

While much policy attention in recent decades has increasingly focused on partnership agreements between governments and First Nations, particularly in the provision of public or community services, such approaches could be viewed as simply 'safe' and incremental. Data from policy regimes such as *Closing the Gap* clearly indicate that progress is simply not at the pace nor scale that many are hoping for. In order for relationships to be truly transformative, then, relationships with the State may require greater and faster power transfer toward Aboriginal agendas of greater self-determination, community control and ownership (as illustrated in Figure 6).

Figure 6: Power transfer



Agreements between states, industry, and First Nations are increasingly ubiquitous (Langton & Palmer, 2004). Aboriginal groups have been negotiating with states and industries for more than thirty years. An analysis of truly successful agreements (as drawn from across the literature referenced in this paper) points to a number of shared features, including the following:

- negotiated in good faith
- clear communication, feedback loops, processes and procedures to ensure fair and transparent negotiations
- prior and fully informed consent
- culturally competent and safe spaces for exchange and negotiation
- substantive, substantial and sustainable agreements (as opposed to piecemeal Memoranda of Understanding)
- inclusive approaches to engagement across the diversity of Indigenous peoples and interests, and
- sufficient lead times and timeframes for proper engagement and negotiation.

With regard to successful agreement making into the future in NSW, a number of mechanisms are critical including capacity building, inclusive engagement, and legislation; which are now summarised.

Ultimately, what form agreements take between the State of NSW and the First Nations peoples of NSW is a matter for community representatives and elected officials.

Based on this author's synthesis of the literature and experience of other jurisdictions both in Australia and internationally, a number of pertinent ingredients of substantive and transformative agreement making both emerge and resonate, including whether they:

- recognise past pain and pledge to never repeat (and are broadcast across the wider public)
- are set in legislative and/or constitutional stone
- have strong moral and legal force
- enable greater decision making power and Aboriginal governance structures
- celebrate the significant achievement and assets of First Nations prior to and post colonisation, by avoiding 'deficit discourse'
- actively and systematically transfer power to Aboriginal communities in prioritising and delivering services, economic development, social wellbeing and cultural affirmation
- proactively build the Indigenous community sector by investing in community leadership, service delivery and advocacy
- realise the diversity of Aboriginal communities by avoiding 'one size fits all' impositions
- allow communities to determine their governance structures, their priorities, and what matters to each community/First Nation socially, economically, culturally, environmentally, and politically
- secure First Nations peoples a truly equal place at the tables of decision making
- are substantive by pursuing an affirmative action program to build or consolidate economic opportunities in areas such as innovation in the climate change age, arts and culture, tourism, services sector, community services, and human capital sectors
- engage in a substantial and substantive way in community engagement to build the case for change and define its footprint, inclusions and performance measures, and
- are spurred by leadership which is brave, visionary, transformative and underpinned by integrity, and truth – by having one eye to history and the other to the future.

The leadership roles that politicians, community leaders, the media, and the legal fraternity play in advancing transformational agreements with First Nations have been discussed throughout this paper. Of equal importance is the role of the public service when it comes to leadership. Whilst serving the government of the day is a long standing and entirely legitimate convention where it comes to role of the public service, civil servants will be critical into the future in transforming relationships with First Nations peoples by establishing evidence, building public confidence, educating the wider public, and facilitating social innovation that all contribute and lead to greater public good.

With particular regard to the matter of establishing and promoting policy evidence, the Harvard Study on North American Indian Economic Development alone highlights more than three decades of evidence on the effectiveness of local decision making and the practical application of tribal sovereignty (Cornell & Kalt, 2007).

In order for leadership to be transformational as opposed to simply transactional, then capacity building needs to occur on both sides – government and community. Elected officials, Ministers, public servants and departmental leaders will need to ensure that they have the skills, knowledge, and mindsets in negotiating in culturally-sensitive and culturally-responsive ways. While public sector agencies may have proven capacity in transactions (including contracts), they may not have, at this point in time, the prerequisite skills in negotiating transformational agreements in environments of historical, cultural and political sensitivity.

Without transformative action by politicians, community leaders, media, the legal sector, and the public service it is unlikely that we can respond in the affirmative to the overarching question of this paper – ‘are we mates yet?’

References

- Abbott, E., Allen, L., Biddle, N., & Crawford, H. 2015. *The Aboriginal population of NSW in 2015: Policy options and challenges*, for Aboriginal Affairs, NSW Department of Education, Sydney.
- Aboriginal Affairs New South Wales (AANSW) 2018. *Transforming the relationship between Aboriginal peoples and the NSW Government: Aboriginal Affairs NSW research agenda 2018-2023*. Sydney: Aboriginal Affairs New South Wales.
- Aboriginal and Torres Strait Islander Commission (ATSIC). 2003. *Treaty: Let's get it right!: A collection of essays from ATSIC's treaty think tank and authors commissioned by AIATSIS on treaty issues*. Canberra: Aboriginal Studies Press.
- Aboriginal and Torres Strait Islander Referendum Convention (ATSIRC), 2017. *Uluru Statement from the Heart*, Uluru: Aboriginal and Torres Strait Islander Referendum Convention, 26 May 2017, retrieved from https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF
- Austin-Broos, D. 2011. *A Different Inequality: The Politics of Debate about Remote Aboriginal Australia*. Sydney: Allen & Unwin.
- Cornell, S. & Kalt, J.P. 2007. 'Two approaches to the development of Native Nations: One works, the other doesn't.' In Jorgensen, M. (Ed.) *Rebuilding Native Nations: Strategies for Governance and Development*. Tucson: University of Arizona Press.
- Davis, M. 2018. 'Voice, Treaty, Truth' in *The Monthly*, July 2018. Melbourne: Black Inc.
- Davis, M. & Williams, G. 2015, *Everything you needed to know about the Referendum to Recognise Indigenous Australians*. Sydney: UNSW Press.
- Deane, W. 2001. *Peace and Justice: The Search for Aboriginal Reconciliation*, 2001 Sydney Peace Prize Lecture, The Honourable Sir William Deane AC KBE, CPACS Occasional Paper No. 01/2. Sydney: The Centre for Peace and Conflict Studies, University of Sydney.
- Department of the Chief Minister (DCM) 2018. *Factsheet; Treaty in the NT*, Darwin: Department of the Chief Minister, Northern Territory Government, retrieved from <https://dcm.nt.gov.au/supporting-government/office-of-aboriginal-affairs/treaty/treaty-in-the-nt>
- Department of Premier and Cabinet Victoria (DPCV) 2018. *Deadly Questions: Treaty in Victoria – a treaty between Aboriginal Victorians and the Victorian Government*, East Melbourne: Department of Premier and Cabinet Victoria, Victoria State Government, retrieved from: deadlyquestions.vic.gov.au/treaty
- Dow, C. & Gardiner-Garden. 1998. *Indigenous affairs in Australia, New Zealand, Canada, United States of America, Norway and Sweden*. Canberra: Department of the Parliamentary Library, retrieved from https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/Background_Papers/bp9798/98Bp15?print=1
- Fletcher, B.H. 1967. 'Arthur Phillip 1738-1814' in *Australian Dictionary of Biography*, Vol. 2. Melbourne: Melbourne University Press, retrieved
- Gammage, B. 2011. *The Biggest Estate on Earth: How Aborigines made Australia*. Sydney: Allen & Unwin.
- Goodall, H. 1996. *Invasion to Embassy: Land in Aboriginal Politics in New South Wales, 1770-1972*. Sydney: Allen & Unwin.
- Gussen, B.F. 2017. 'A Comparative Analysis of Constitutional Recognition of Aboriginal Peoples.' *Melbourne University Law Review*. Melbourne: University of Melbourne.
- Hobbs, H. & Williams, G. 2018. "The Noongar Settlement: Australia's First Treaty", *Sydney Law Review* 1; 40(1).
- Hunt, J. 2017. 'Self-determination' in *Transforming the relationship between Aboriginal peoples and the NSW Government: Aboriginal Affairs NSW Research Agenda 2018-2023*. Sydney: Aboriginal Affairs NSW, Department of Education.

- Jonas, B. 2002. *Talking Treaty*. <http://classic.austlii.edu.au/au/journals/IndigLawB/2002/48.html>
- Kastner, P. & Roy Trudel, E. 2016. 'Canada's progress shows indigenous reconciliation is a long-term process.' Melbourne: *The Conversation*, 16 May, 2016, retrieved from <https://theconversation.com/canadas-progress-shows-indigenous-reconciliation-is-a-long-term-process-49893>
- Katz, I., Bates, S., Idle, J., Jopson, W., & Barnes, M. 2018. *OCHRE Evaluation Synthesis Report Stage 1 Final Report Prepared for members of the NSW Coalition of Aboriginal Regional Alliances – NCARA June 2018*. Sydney: University of NSW.
- Langton, M. & Palmer, L. 2004. 'Treaties, Agreement Making and the Recognition of Indigenous Customary Polities' in Langton, M., Tehan, M., Palmer, L., & Shain, K. (Eds.) 2004. *Honour Among Nations: Treaties and Agreements with Indigenous People*. Carlton: Melbourne University Press.
- Limerick, M., Tomlinson K., Taufatofua, R., Barnes, R., & Brereton, D. 2012. *Agreement-making with Indigenous Groups: Oil and Gas Development in Australia*. Brisbane: CSRM. University of Queensland. ISBN number 978-0-9873402-0-7.
- Maddison, S. 17 May 2016. 'Indigenous reconciliation in the US shows how sovereignty and constitutional recognition work together.' Melbourne: *The Conversation*.
- Maynard, J. 2007. *Fight for Liberty and Freedom: The Origins of Australian Aboriginal Activism*. Canberra: Aboriginal Studies Press.
- McCausland, R. 2006. 'Agreement-making under the new arrangements in Indigenous Policy', 10 (3), *Australian Indigenous Law Review*.
- McKeon, N. 2016. 'Vincent Lingiari & Gough Whitlam: the story behind the image.' Retrieved on 15 July 2018 from <https://www.sbs.com.au/nitv/article/2016/03/02/vincent-lingiari-gough-whitlam-story-behind-image>
- McMullen, J. 2017. 'Influencing Public Discourse' in *Transforming the relationship between Aboriginal peoples and the NSW Government: Aboriginal Affairs NSW Research Agenda 2018-2023*. Sydney: Aboriginal Affairs NSW, Department of Education.
- Minister for Aboriginal Affairs Victoria (MAAV) 2018. *Historic treaty legislation passes in Victoria*, media release 21 June 2018 retrieved from <https://www.premier.vic.gov.au/historic-treaty-legislation-passes-in-victoria/>
- Morris, S. 2015. *The argument for a constitutional procedure for Parliament to consult with Indigenous peoples when making laws for Indigenous affairs*. Melbourne: Monash University.
- Mulholland, M. 2016. 'New Zealand's indigenous reconciliation efforts show having a treaty isn't enough.' Melbourne: *The Conversation*, May 12, 2016, retrieved from <https://theconversation.com/new-zealands-indigenous-reconciliation-efforts-show-having-a-treaty-isnt-enough-49890>
- Mundine, W. 2017. *In Black and White: Race, Politics and Changing Australia*. Sydney: Pantera Press.
- Norman, H. 2017. 'Return of Public Lands to Aboriginal Control/Ownership' in *Transforming the relationship between Aboriginal peoples and the NSW Government: Aboriginal Affairs NSW Research Agenda 2018-2023*. Sydney: Aboriginal Affairs NSW, Department of Education.
- NSW Coalition of Aboriginal Regional Alliances (NCARA). 2018. *A Step Closer: A Report with Recommendations from NCARA to the New South Wales Government following Stage One of the OCHRE Evaluation*. Sydney: Aboriginal Affairs NSW.
- O'Faircheallaigh, C., 2004, *Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples*. Canberra: AIATSIS.
- Palmer, Lisa. 2001. 'Agreements, Treaties and Negotiated Settlements Database.' *Indigenous Law Bulletin* 5(29).
- Pascoe, B. 2014. *Dark Emu: Aboriginal Australia and the Birth of Agriculture*. Broome, Western Australia: Magabala Books.

- Pemberton, G. 2017. 'Why New Zealand's Maori got a treaty, and Australia's Indigenous peoples didn't'. *Sydney Morning Herald*, 2 June 2017.
- Petrie, A. & Graham, M. 2018. *Treaty discussions in Australia: an overview*. Melbourne: Victorian Parliamentary Library & Information Service.
- Reynolds, H. 2018. *This Whispering in Our Hearts: Revisited*. Sydney: NewSouth Publishing.
- Reynolds, H. 1981. *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia*. Sydney: UNSW Press.
- Stanner, W.E.H. 1969. The Boyer Lectures 1968 – After the Dreaming. Sydney, NSW: Australian Broadcasting Commission.
- Strelein, L. in Williams, G. 2001. 'Bill of Rights, The Republic and a Treaty: Strategies and Lessons for Reform', paper presented at the AIATSIS Seminar Series, Limits and Possibilities of a Treaty Process in Australia, 3 September 2001.
- Thomas, R. 2017. *Talking treaty: Message from the Commissioner*, Adelaide: Government of South Australia, retrieved from https://web.archive.org/web/20190301151209/https://www.dpc.sa.gov.au/_data/assets/pdf_file/0016/34432/Treaty-Consultation-Paper-Update.pdf, originally published May 2017, archived 1 March 2019
- Trigger, D., Keenan, J., De Rijke, K., Rifking, W. 2014. 'Aboriginal engagement and agreement-making with a rapidly developing resource industry: Coal seam gas development in Australia', *The Extractive Industries and Society*, Vol. 1, Issue 2, November 2014, pp. 176-188.
- Trudel, E.R, Heinämäki, L., and Kastner, P. 2016. 'Despite gains, Europe's indigenous people still struggle for recognition' Melbourne: *The Conversation*, retrieved from <https://theconversation.com/despite-gains-europes-indigenous-people-still-struggle-for-recognition-54330>
- United Nations 2007. United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP Publication No.07-58681, adopted by the United Nations General Assembly, 2 October 2007, A/RES/61/295). Retrieved from https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf
- Williams, G. 2001. 'Bill of Rights, The Republic and a Treaty: Strategies and Lessons for Reform', paper presented at the AIATSIS Seminar Series, Limits and Possibilities of a Treaty Process in Australia, 3 September.