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# Thoughts on the Treaty in Australia by Peter Andren

In 1996 I was elected as an independent MP to the rural federal electorate of Calare. The electorate has about 85,000 enrolled voters and stretches across the central western tablelands and slopes of NSW, stretching from Lithgow in the east, and including Bathurst and Orange, to Cowra in the west.

The electorate takes its name, Calare, from the Aboriginal name for the Lachlan River which runs through Cowra, and is a part of Wiradjuri country. It is therefore appropriate to start this article with an acknowledgment of the Wiradjuri nation and its people, the traditional owners of the electorate of Calare, and of Australia's other original nations and peoples.

Of course the sorry facts of our history show that the traditional owners of this land were never invited to participate in the formal organisation of relationships in Australia. A redressing of this shameful story is long overdue.

First, however, there are many issues and questions that come bundled with the idea of a treaty, which must be considered:

- How can a treaty provide an enforceable framework to settle relationships between Indigenous and non-Indigenous peoples and governments?
- Will a treaty provide a guarantee of rights, including economic and property rights and the right to self-determination for the Indigenous peoples of Australia?
- How may a treaty protect the culture and heritage of Aboriginal and Torres Strait Islander peoples?
- How can a treaty be relevant to everyday issues in Indigenous communities such as health and education, housing and unemployment (and the high rates of incarceration)?
- What form should a treaty take, recognising the diversity of culture, circumstance and need in Indigenous communities throughout Australia?

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 Indeed, with whom would a treaty or treaties be negotiated to ensure that all are represented equitably?

The idea of a treaty does not stand alone and apart from issues of inequity and social justice, or rights and self-determination. To my mind these issues are central to the aims of any treaty, whatever form it may take, and must be taken on board and addressed by governments and non-Indigenous people, under the *direction* and *guidance* of the Aboriginal and Torres Strait Islander peoples.

A treaty may well be different things to different peoples as is the case in Canada, but I believe it should grow from the peoples up - promoted, encouraged, assisted - but never dictated by government. What then is the recent history of Commonwealth responses to the idea of a treaty?

#### Makarrata

In the late '70s, early '80s, the Fraser Government changed the theme away from self-determination, and when it became clear that the spirit of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) was not going to be translated into nationwide legislation, the National Aboriginal Conference called on the Federal Government to negotiate a 'Treaty of commitment' with representatives of Aboriginal Australians.

The Conference began speaking of a 'Makarrata', a term taken from a northeastern Arnhem Land language, which means the end of a conflict and the resumption of normal relations between communities. This somehow strikes me as a better term than 'reconciliation' that suggests a coming together after a marriage separation. There has never been a marriage.

The Federal Government was prepared to discuss the concept of an agreement, but ruled out a treaty, saying that it suggested separate nations within Australia. There was also a worry that a treaty implied massive group compensation, which the government was not prepared to accept.

# Late 1980s and the concept of a 'compact'

In the late 1980s the prospect of a treaty, sometimes under the alternative name of 'compact', returned when Prime Minister Bob Hawke raised the possibility of a compact between the Aboriginal and non-Aboriginal peoples. The then Leader of the Opposition, John Howard, rejected the idea claiming 'there is no way the Australian people will ever accept that in some way we are two nations within one – nor should they'. This is ironic given the reality of many Aboriginal nations existing within Australia for millenniums.

However in 1988, at the Barunga Festival in the Northern Territory, Bob Hawke responded to the Barunga Statement presented to him by committing his government to concluding a compact by 1990, agreeing to 5 proposals including:

- That there shall be a treaty negotiated between the Aboriginal people and the Government on behalf of all the people of Australia; and
- That many Aboriginal people should decide what it is they want to see in that treaty.<sup>2</sup>

But in late 1988 and early 1989 discussions about how the compact consultations might be organised failed to get off the ground. Hawke revived the 'treaty' possibility in February 1990 during a visit to New Zealand for the 150th anniversary of the signing of the Treaty of Waitangi, pledging his

<sup>&</sup>lt;sup>1</sup> The Leader of the Opposition, John Howard, *News Release* (6 September 1987).

<sup>&</sup>lt;sup>2</sup> Sydney Morning Herald (Sydney), 13 June 1988.

government would accelerate its efforts to make a treaty with Australia's Aboriginal populations.

However, the Opposition argued that it was impossible for a nation to have a treaty with itself, and would 'create hostility within the Australian community... and not advance the material wellbeing of the Aboriginal people'.<sup>3</sup>

## Late 1980's 'document of reconciliation'

The political impasse of the late 1980s was broken with a compromise between Labor, who supported the idea of a treaty, and the Coalition who did not. This compromise was a ten year process of reconciliation, with the talk now not of a treaty but of a 'document of reconciliation', which would include among other things:

- The negotiation of new inter-governmental agreements regarding Indigenous peoples' issues;
- Statutory recognition of self-governing rights for Indigenous communities:
- The passage of amendments to Federal, State and Territory Acts
   Interpretation Acts to require courts to construe legislation consistent with Aboriginal and Torres Strait Islander customs and traditions wherever practicable;
- The introduction of statutory bills of rights which include specific recognition of Indigenous peoples' rights; and
- Statutory recognition of Aboriginal and Torres Strait Islander customary laws<sup>4</sup>.

# Also included would be constitutional change with:

- The insertion of a preamble into Federal, State and Territory
  constitutions acknowledging prior Aboriginal and Torres Strait Islander
  ownership of the continent and its islands, and its subsequent,
  substantial extinguishment; and
- The creation of reserved seats in Federal, State and Territory parliaments (lower or upper houses, or both) for Indigenous peoples, to follow models such as India and New Zealand.<sup>5</sup>

But the closer the 2001 deadline for finalising a document of reconciliation approached, the more it became clear that the new Coalition Howard Government was not fully committed to the finalisation of such a document, and calls for a treaty started to be heard once again.

### 1998 election and a new commitment

On the night of his re-election in October 1998, Prime Minister John Howard declared reconciliation a priority for his Government's second term. He also gave his backing to the drawing up of a historic document by May 2000, 'that

<sup>&</sup>lt;sup>3</sup> The Opposition Spokesperson on Aboriginal Affairs, Warrick Smith, *Australian Associated Press* (4 February 1990).

<sup>&</sup>lt;sup>4</sup> Council for Aboriginal Reconciliation, Addressing the key issues for reconciliation (1993) 51-52.

<sup>&</sup>lt;sup>5</sup> Ibid.

acknowledges the historical truths of this country, the prior occupation of it by the indigenous people and acknowledging injustices<sup>6</sup>.

But this was qualified by his rejection of what he termed a 'black armband view of history'. Nor did he favour including in such a document an apology for past wrongs, nor adding a preamble to the constitution acknowledging Indigenous rights.

By late December Howard was qualifying his commitment to 'try to reach an understanding with Aborigines' by the suggestion that there were some people in the Indigenous community 'who were never going to be satisfied, no matter what is acknowledged and what is agreed'.<sup>8</sup>

At that time, Gustav Nossal, Deputy Chair of the Council for Aboriginal Reconciliation suggested that 'Reconciliation has two faces: a symbolic and an action-oriented one'9, and Mick Dodson described an apology to the stolen generation as central to reconciliation.<sup>10</sup>

Part of the Government's commitment to reconciliation in 1998 was their support of a referendum question, which would have cleared the way for acknowledging in a preamble to the constitution that 'since time immemorial our land has been inhabited by Aborigines and Torres Strait Islanders'.

Legal alarm bells drowned out any recognition or understanding of Indigenous custodianship of the land, and there was no apology for the injustices suffered by Aboriginal people.

The suggested preamble as a whole attracted a lot of criticism and was voted down at the referendum. Indeed, I was the MP who wrote the no case for the preamble. Committed as I am to justice and a lasting Makarrata, I believe the preamble put to the people at the referendum was no way to achieve it.

#### Declarations of reconciliation

In the Council for Aboriginal Reconciliation's final report presented to Parliament in December 2000 a recommendation was made that a treaty, 'a national framework', was a way forward.

In Question time December 2000, the PM answering a question on the Government's response to the final report, said 'It contains a number of recommendations. We will consider all of those recommendations' but 'the government has certain reservations about the concept of a treaty'. 11

<sup>9</sup> Gustav Nossal, 'Let's call it for Australia', *The Age* (Melbourne), 29 October 1998.

<sup>&</sup>lt;sup>6</sup> Canberra Times (Canberra), 30 November 1998.

<sup>&</sup>lt;sup>7</sup> The Koori Mail (New South Wales), 21 October 1998.

<sup>&</sup>lt;sup>8</sup> Canberra Times (Canberra), 22 December 1998.

<sup>&</sup>lt;sup>10</sup> Michelle Grattan, 'Reconciled to change', *The Australian Financial Review* (Sydney), 10 November 1998.

<sup>&</sup>lt;sup>11</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2000, 23651 (John Howard, Prime Minister).

This is where we stand today - with the Government's focus on 'practical reconciliation' measures. But as Gustav Nossil would no doubt say, there is none of the symbolic in this approach. Just as native title was viewed by the ignorant as akin to a Torrens title land grab, so too does an apology and reconciliation process become confused with material outcomes, and a treaty is viewed as a precursor to a writ for damages.

Just as our nation celebrates multi-culturalism, our first responsibility is to recognise and celebrate the first occupants of this land and their unique role in the evolution of modern Australia. If we are to celebrate strength in diversity, then we must all realise that diversity began not with the first fleet, later complemented by the immigration flows of the nineteenth and twentieth centuries, but with the original peoples of the continent.

Understanding and recognising this, and sealing it with a formal treaty or series of treaties, would see our maturing as a nation worthy of the fair go reputation we so unjustifiably assume.

