

## Indigenous peoples' human rights, self-determination and local governance – Part 2

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### Abstract

*Part 1 of this article explored the relevance of the United Nations Declaration on the Rights of Indigenous Peoples to the Aboriginal and Torres Strait Islander peoples of Australia, particularly the key principles of self-determination and free, prior and informed consent; how the international human rights framework applies in Australia; and Australia's lack of compliance with it. Part One concluded by discussing the Uluru Statement from the Heart, presented to all the people of Australia in 2017, and how it marked a turning point in the struggle for recognition by Australia's Indigenous peoples.*

*Part 2 explores recent developments since the release of the Uluru Statement, especially at sub-national levels, in relation to treaty and truth-telling. It draws some comparisons with Canada and New Zealand, discusses the concept of coexistence, and presents a set of Foundational Principles for Parity and Coexistence between two culturally distinct systems of land ownership, use and tenure.*

### Introduction – coexistence and land

The Aboriginal and Torres Strait Islander peoples' grievances with the Australian nation have been summarised by Professor Mick Dodson, a Yawuru man from Broome in the Kimberley region of Western Australia and Australia's first Aboriginal and Torres Strait Islander Social Justice Commissioner, as follows:<sup>1</sup>

*No consent was given to the colonisers to occupy and settle this land. What the colonisers did was wrong in so many ways. And the nation-state continues to refuse to address these wrongs comprehensively within a human rights framework. ... We can fix your problem. Sit down and talk to us about it. Let's negotiate our way through this.*

The Aboriginal and Torres Strait Islander peoples of Australia have long accepted the need for coexistence between their system of land ownership, use and tenure and that devised by the British

<sup>1</sup> Professor Mick Dodson, Concluding Remarks at the National Centre for Indigenous Studies Research Retreat, 21 October 2016, Australian National University, Canberra. Notes of proceedings held on file by the author.

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Crown. Indeed, coexistence is now deeply embedded in Aboriginal peoples' perceptions of how those systems should interact with each other (Howitt 2006, p. 64; Brigg and Murphy 2011, p. 26). They seek coexistence on equal terms between the two systems of law and custom, not one always prevailing over the other.

*There are two laws. Our covenant and white man's covenant, and we want these two to be recognised... We are saying we do not want one on top and one underneath. We are saying that we want them to be equal* (David Mowaljarlai, Elder, Ngarinyin people, Western Australia, 1997).<sup>2</sup>

First Nations peoples are clearly not satisfied with the form of coexistence introduced by the High Court of Australia in *Wik Peoples v State of Queensland*.<sup>3</sup> It predicated recognition of native title on the basis of “*remnant possibilities*” (Walker 2015, p. 19) left *after* priority was given to the Crown's land tenures, merely because the two sets of rights and interests could not be exercised simultaneously (Strelein 2009, p. 35).

According to Howitt (2019, p. 7) “*coexistence is foundational in the ongoing challenge of recognising, respecting and accommodating human diversity*”. People and cultures all bring different sorts of claims, relationships and understandings to the same lands and spaces, and with each other, and all of these factors have implications for just, equitable and sustainable decision-making about ownership, occupation and use of land (Howitt and Lunkapis 2010, p. 109).

Application of this concept of coexistence demands that we confront the realities of our mutual responsibilities – those of colonial-settler societies and Indigenous societies – for land justice: “*responsibilities that arise from living together in shared spaces that demand an unsettling of deep colonial power relations*” (Porter and Barry 2016, p. 19). It also requires “*an acceptance of multiple and overlapping jurisdictions*” where our “*plural relations to and governance of place all have relevance and standing*” (Porter and Barry, pp. 5–6). Furthermore, coexistence is about a “*mediation on discomfort*” (Watson 2007, p. 30), in that it means “*acknowledging uncomfortable questions*” about how lawful Australia's sovereign status is and how Australia established its legal and land administration systems which Brennan J in *Mabo (No. 2)* held “*cannot be destroyed*” or the “*skeletal principles of which cannot be fractured*”.<sup>4</sup>

Establishing a mutually respectful coexistence with respect to property in land between First Nations peoples and the Crown involves challenging the power asymmetry between the parties, respecting the parity of two distinctly different approaches to land ownership and governance, and negotiating their interaction through agreements on matters of mutual concern (Wensing 2016, p. 51). It must include

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<sup>2</sup> Personal communication with the author. See also <http://kadomuir.wixsite.com/kadomuir>

<sup>3</sup> (1996) 187 Commonwealth Law Reports 1.

<sup>4</sup> (1992) 175 Commonwealth Law Reports 1, Brennan J, pp. 30, 43.

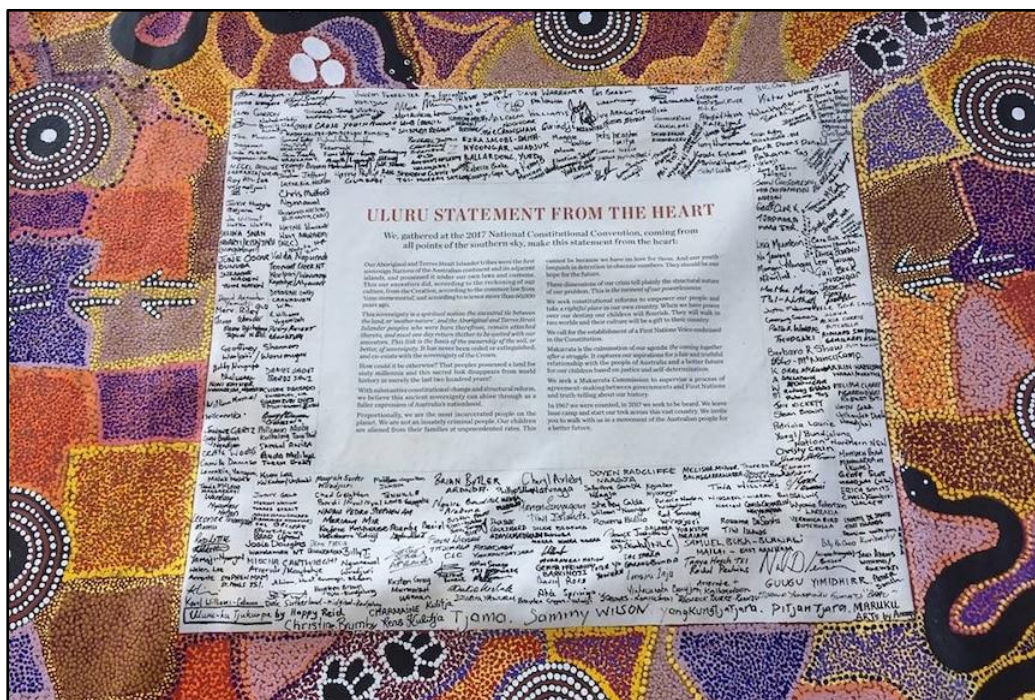
recognition of First Nations' pre-existing sovereignty, the integrity of their law and custom, and their right to self-determination and governance over their affairs, especially their ancestral lands and waters.

And therein lies the need for a treaty or 'Makarrata', a Yolngu word from north-eastern Arnhem land in the Northern Territory of Australia, sometimes translated as "things are alright again after a conflict" or "coming together after a struggle" (Hiatt 1987, p. 140).<sup>5</sup>

### The Uluru Statement's 'Guiding Principles'

As outlined in Part 1 of this paper, the *Uluru Statement from the Heart* (Figure 1) emerged from a series of regional Dialogues which culminated in a National Constitutional Convention held at Uluru in central Australia on the land of the Anangu People in May 2017. The Dialogues and Convention were organised by a Referendum Council appointed by the then prime minister and leader of the opposition to lead a process of national consultations about constitutional recognition of Australian's First Nations Peoples (Referendum Council 2017a). Significantly, the *Uluru Statement* was deliberately issued to *all the people* of Australia rather than their political leaders because "the people of Australia... understand the current climate of policy inertia and it is they who ultimately can change the Constitution's text" (Davis 2017, p. 132).

Figure 1 *Uluru Statement from the Heart*, May 2017



Source: Referendum Council (2017b)

Reforms that had emerged with the highest level of support from the Dialogues were "the Voice to Parliament, Agreement-making through Treaty, and Truth-telling" (Referendum Council 2017a, p. 15).

<sup>5</sup> Hiatt argues that perhaps 'garma' may have been a better choice because it means 'getting together of minds in order to reach complete accord'.

However, the Australian (federal) government's negative response to the *Uluru Statement* (Turnbull et al. 2017) was “a stunning repudiation of the historic Indigenous agreement painstakingly reached at Uluru” (Lino 2018, p. 67). It was very clear that the conservative government would not go down the path of a national treaty or truth-telling. Also, while the government subsequently initiated a co-design process for a *legislated* Voice to Parliament and to improve local and regional decision-making (Wyatt, K. 2019), this does not satisfy the Referendum Council's (2017a) call for a *constitutionally enshrined* Voice that cannot be abolished by a future government. At the time of writing, the government was yet to indicate precisely how it intends to proceed.

In the course of conducting the Dialogues, the Referendum Council developed a set of Guiding Principles for assessing and deliberating on reform proposals. These were discussed and adopted by consensus at the Uluru Convention (Referendum Council, 2017a, p. 22) and are reproduced in Figure 2.

*Figure 2 Guiding Principles developed by the Referendum Council, 2017*

*The following guiding principles have been distilled from the Dialogues. These principles have historically underpinned declarations and calls for reform by First Nations. They are reflected, for example, in the Bark Petitions of 1963, the Barunga Statement of 1988, the Eva Valley Statement of 1993, the Kalkaringi Statement of 1998, the report on the Social Justice Package by ATSIC in 1995 and the Kirribilli Statement of 2015. They are supported by international standards pertaining to Indigenous peoples' rights and international human rights law.*

*The principles governing the assessment by the Convention of reform proposals were that an option should only proceed if it:*

- 1. Does not diminish Aboriginal sovereignty and Torres Strait Islander sovereignty.*
- 2. Involves substantive, structural reform.*
- 3. Advances self-determination and the standards established under the United Nations Declaration on the Rights of Indigenous Peoples.*
- 4. Recognises the status and rights of First Nations.*
- 5. Tells the truth of history.*
- 6. Does not foreclose on future advancement.*
- 7. Does not waste the opportunity of reform.*
- 8. Provides a mechanism for First Nations agreement-making.*
- 9. Has the support of First Nations.*
- 10. Does not interfere with positive legal arrangements.*

Source: Referendum Council (2017a, p. 22)

The first principle concerns Aboriginal and Torres Strait Islander sovereignty. Centring sovereignty in the *Uluru Statement* was deliberate, reflecting historic grievances with the Crown: “Aboriginal and

*Torres Strait Islander peoples were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our laws and customs*” (Referendum Council 2017b). To convey the meaning of sovereignty, the Statement invoked international law on decolonisation and self-determination.

*This sovereignty is a spiritual notion: the ancestral tie between the land, or ‘mother nature’, and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown* (Referendum Council 2017b).

The need for truth-telling emerged from the Dialogues because *“the true history of colonisation must be told: the genocides, the massacres, the wars and the ongoing injustices and discrimination”* (Referendum Council 2017a, p. 32). Principle 5 therefore reflects the importance of truth-telling to heal the relationship between First Nations and Australia as a whole, echoing the United Nations (UN) *Declaration on the Rights of Indigenous Peoples* (‘UNDRIP’, UN 2007); the resolution on the *Right to the Truth* adopted by the UN Human Rights Council (UN 2012); and the similar resolution passed by the UN General Assembly in 2013 (UN 2013).

Principle 8 is about agreement-making through treaty. The right to treaties, agreements and other constructive arrangements with nation states is enshrined in Article 37 of UNDRIP. Gover (2020 pp. 77–78) argues that Article 37 is a declaration that treaty guarantees are not to be diminished by other provisions in UNDRIP and therefore it *“appropriately exemplifies the kind of priority that historical collective Indigenous rights must have if they are to be adequately protected from the competing claims of third parties”*. Gover (2020) also asserts that Article 37 *“conveys the correct (in this author’s view) understanding of appropriately concluded treaties as quasi-contractual constitutional agreements that are not subject to general norms of distributive justice, individual rights and non-discrimination principles”*. Current treaty developments in Australia provide an excellent opportunity to include references to Article 37 in preambular paragraphs and also in any legislative and regulatory mechanisms implementing them.

The *Uluru Statement* represents a major turning point in Australia’s national conversation about First Nations’ rights precisely because it not only sets out Indigenous peoples’ outstanding grievances, but also invites the Australian people to engage with them through treaty and truth-telling. While the Australian government’s response has been at best disappointing, significant progress is being made in Australia’s states and territories.

## Treaty developments

Since the release of the *Uluru Statement*, five of Australia's eight sub-national jurisdictions have committed to treaty or treaties. In order of commencement, those are Victoria, the Northern Territory (NT), Queensland, the Australian Capital Territory (ACT) and Tasmania.<sup>6</sup> Also, in Western Australia a recent native title settlement has several hallmarks of a treaty. Some of these sub-national developments are arguably world-class.

### Victoria

The 'Aboriginal community'<sup>7</sup> of Victoria and the Victorian government have been working toward a treaty since February 2016 (Government of Victoria 2016). The government has acknowledged the need for a state-wide Aboriginal representative body with which it could negotiate and that the process of self-determination "*has to start with Aboriginal Victorians*" (Hutchins 2016). It has adopted the pathway shown in Figure 3.

The first step was to enact the *Advancing the Treaty Process with Aboriginal Victorians Act 2018*, the first attempt to legislate a treaty process with Aboriginal Australians. Notably, the preamble states that Aboriginal Victorians maintain their sovereignty was never ceded, that they have long called for treaty, that these calls have gone unanswered, and that the time has now come for Aboriginal Victorians and the State to talk treaty. The Act established a Treaty Advancement Commission charged with creating an Aboriginal representative body and developing a treaty negotiation framework. This led to the establishment of the First Peoples' Assembly of Victoria (FPAV) as the elected voice for Aboriginal people and communities in treaty discussions, and as the State's equal partner in the next phase of the pathway.

The role of the FPAV is not to negotiate a treaty or treaties, but rather to work with the government to create a framework of rules and processes for reaching agreement. The Act requires the FPAV and the state government to establish four mechanisms to support treaty negotiations: a treaty authority; a treaty negotiation framework; a self-determination fund; and an ethics council (Victorian Parliamentary Library and Information Service 2018, p. 4). To reinforce its independence from the Victorian government, the FPAV is a company limited by guarantee. It has developed its own constitution (FPAV 2019) and a governance framework about decision-making and the respective roles of the members,

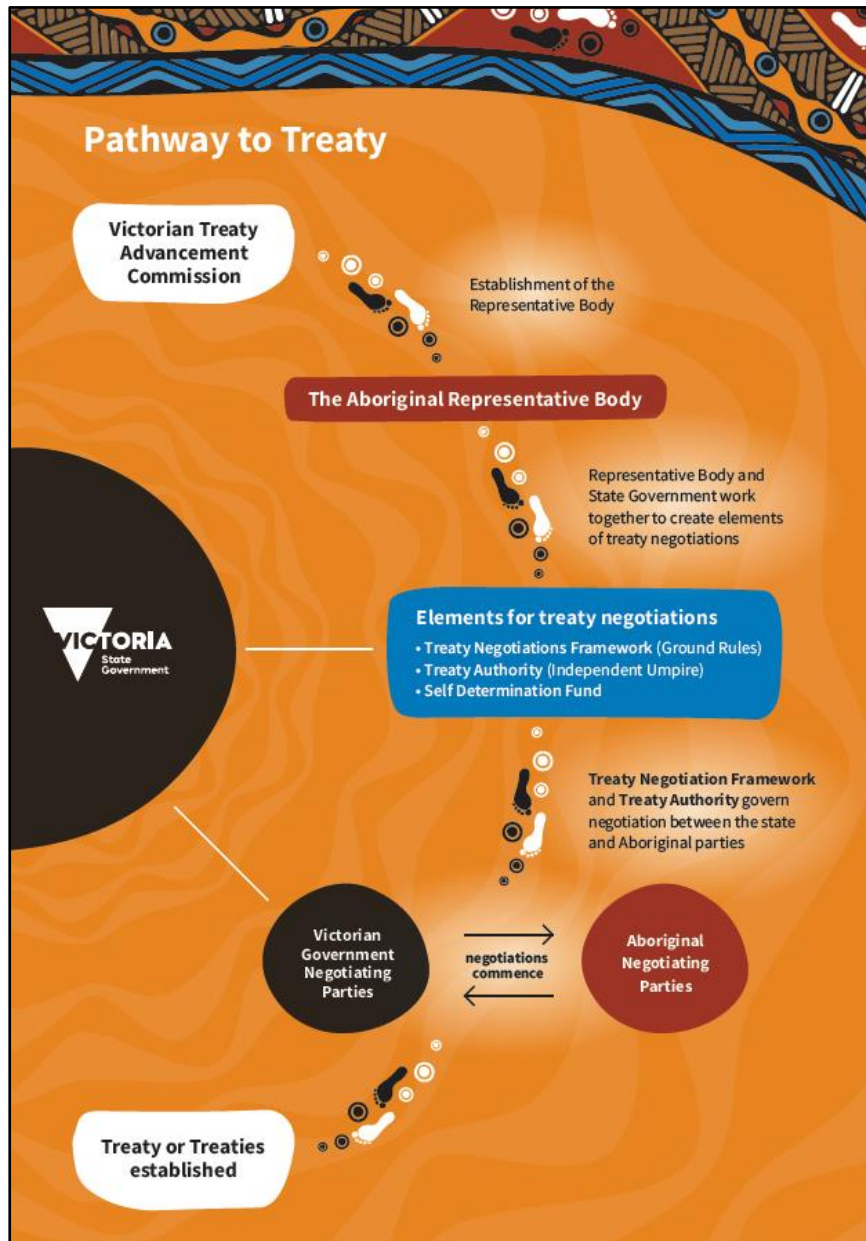
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<sup>6</sup> The South Australia government embarked on treaty negotiations in February 2017, before the release of the *Uluru Statement*, as part of its commitment to building a better and stronger relationship with Aboriginal people. However, a state election in March 2018 produced a change in government from Labor to Liberal, which then 'paused' the treaty negotiations in favour of 'other priorities' on Indigenous matters (Walquist 2018; Thomas 2017).

<sup>7</sup> While 'Aboriginal community' is often used to describe Aboriginal people, it is important to note that people who identify as Aboriginal Victorians cannot be seen as one entity who share a single 'community' (Graham and Petrie 2018, p. 10).

board, co-chairs and committee (FPAV undated). Importantly, all decisions on treaty-related matters are to be made by the Assembly members.

Figure 3 Pathway to Treaty in Victoria



Source: Victorian Treaty Advancement Commission (2018)

The FPAV was initially designed to comprise 33 seats: 21 determined through a popular voting process, and 12 reserved for formally recognised Traditional Owner groups. The Act allows the number to increase if more groups are established. Among the outstanding issues to be resolved is the imbalance between residents as distinct from Traditional Owners and the disparity about speaking on or for

someone else's Country. There are also concerns that the government compromised its message about Aboriginal-led processes by legislating the treaty pathway before the FPAV was established.<sup>8</sup>

There is much to be learned from the Victorian experience: specifically, the government's commitment to transparency and openness from the very outset; the annual public reporting requirements of the various institutions (see for example, Government of Victoria 2019); and the government's considerable efforts to engage with Traditional Owner voices across Victoria about their aspirations, challenges and relationships with government (Aboriginal Victoria 2019). This engagement took place within the broader social and political context of advancing Aboriginal self-determination. Most significant of all is the acceptance that the State and Aboriginal parties will have equal status in treaty negotiations. This is truly ground-breaking for an Australian jurisdiction and consistent with many of the Articles in UNDRIP.

Another notable feature is the role being played by the Federation of Victorian Traditional Owner Corporations (FVTOC), which has issued a series of papers exploring the foundations of and scope for a Victorian treaty.<sup>9</sup> These papers make a valuable contribution to the discussion about treaties not only in Victoria, but in other jurisdictions as well. Particularly pertinent is the paper on how the native title system has worked out in Victoria following the High Court of Australia's negative determination concerning the *Yorta Yorta*<sup>10</sup> claim in 2002, and the subsequent passing of the *Traditional Owner Settlement Act 2010* (Vic). It concludes that the Act "*has not delivered on much of its early promise*" (FVTOC 2021, p. 5), pointing to the need for land matters to be top of the agenda when treaty negotiations commence.

### **Northern Territory**

In 1988, at the annual Barunga Festival, Australian prime minister Hawke was presented with a statement calling for Indigenous rights to be recognised. This became known as the 'Barunga Statement' (AIATSIS 1988). Speaking at the Festival, the prime minister agreed to the statement's request for a treaty-making process, but this met with hostile opposition from conservative parties and was "*quietly shelved in 1991*" (Hobbs and Williams 2018, p. 24).

Almost 30 years later, the Northern Territory government decided in early 2017 to establish an Aboriginal Affairs Sub-Committee of Cabinet as a voice for the Territory's Aboriginal people (NT Government 2019a). The sub-committee is chaired by the chief minister and has majority Aboriginal representation including the Minister for Aboriginal Affairs, three other Aboriginal members of the Legislative Assembly, and five advisers from regions across the Territory. Its role is to advise and

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<sup>8</sup> Maddison and Wandin (2019) and various free to air news reports.

<sup>9</sup> <https://www.fvtoc.com.au/treaty/discussion-papers-1?rq=Treaty%20Discussion%20paper%5C>

<sup>10</sup> *Members of the Yorta Aboriginal Community v Victoria* (2002) High Court of Australia 58, 214 Commonwealth Law Reports 422.



monitor a whole of government approach to the Aboriginal Affairs agenda, including progressing treaty discussions (NT Government 2019b).

In March 2018, the Territory's four Aboriginal Land Councils<sup>11</sup> wrote to the chief minister proposing a memorandum of understanding (MoU) to advance a treaty consultation process (NT Government et al. 2018, p. 5). At a meeting the following month, it was agreed to establish a Treaty Working Group to develop the MoU. Its purpose would be to capitalise on the 30<sup>th</sup> anniversary of the Barunga Statement by facilitating consultation with *all* Aboriginal people in the NT to agree a framework for treaty negotiations. The Land Councils were particularly concerned to reflect the wide range of Aboriginal interests in the Territory and also to involve the non-Aboriginal community and gain its commitment. The MoU, known as the 'Barunga Agreement' was signed later in 2018, paving the way for consultations to begin (NT Government et al. 2018).

The Agreement states that "*the key objective of any Treaty in the NT must be to achieve real change and substantive, long term, benefits for Aboriginal people' and that it 'needs to address structural barriers to [their] wellbeing'*" (NT Government et al. 2018, p. 9). There would be an independent Treaty Commission and the treaty process rests on the government's express acceptance of three foundational propositions:

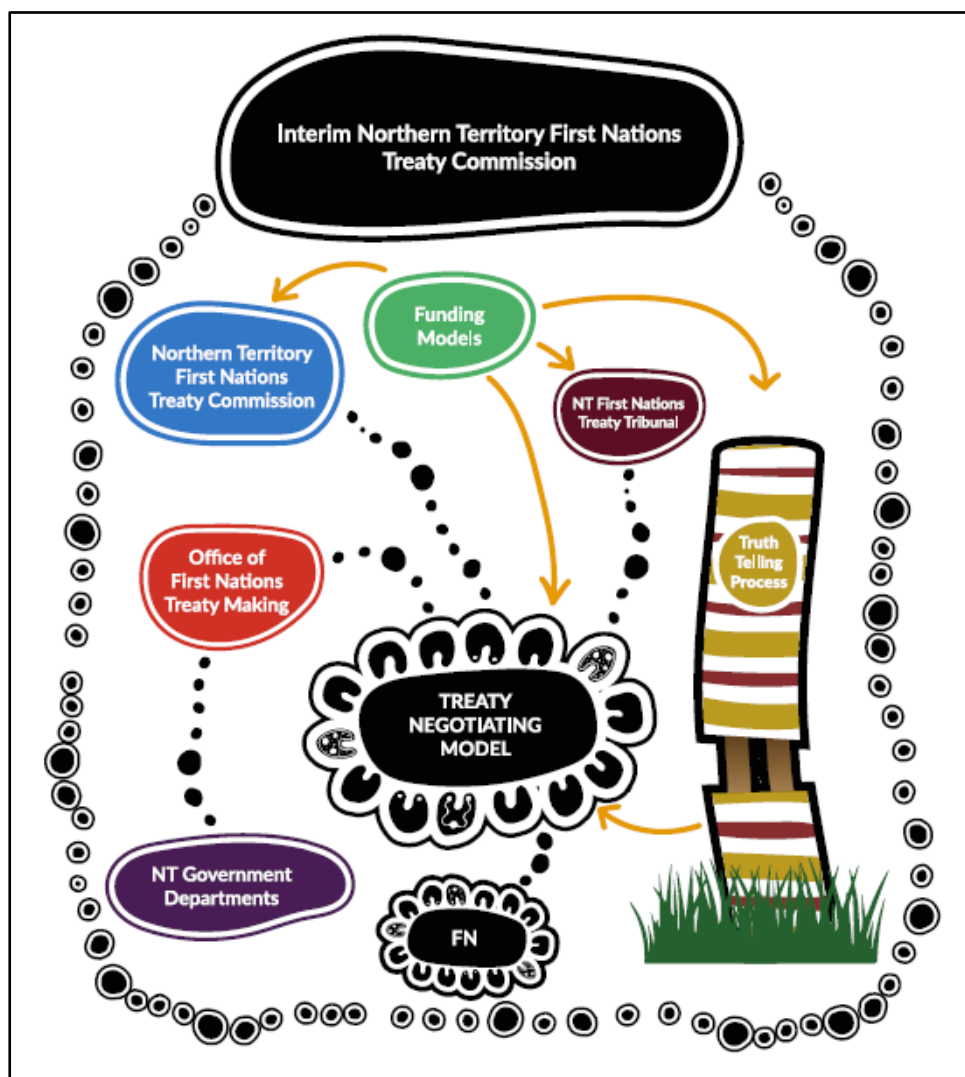
- Aboriginal people were the prior owners and occupiers of the land, seas and waters that are now called the Northern Territory of Australia;
- the First Nations of the Northern Territory were self-governing in accordance with their traditional laws and custom;
- First Nations peoples of the Northern Territory never ceded sovereignty of their land, seas and waters.

This provided "*a great starting point for treaty discussions'*" (NT Treaty Commission 2020b, p. 9) and is consistent with many of the Preamble paragraphs of UNDRIP. In March 2020, the Treaty Commission released an Interim Report on Stage One (NT Treaty Commission 2020a) and in July 2020, a Treaty Discussion Paper (NT Treaty Commission 2020b). The paper provides a wealth of information about treaties and treaty-making, including national and international best practice, a possible framework for treaty-making and a model process for treaty negotiations, applying learnings from British Columbia in Canada, Aotearoa/New Zealand and Victoria (Figure 4).

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<sup>11</sup> The Northern Land Council, the Central Land Council, the Anindilyakwa Land Council and the Tiwi Land Council are independent statutory bodies established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) to express the wishes and protect the interests of traditional owners throughout the NT.

Figure 4: Northern Territory Treaty Framework



Source: Northern Territory Treaty Commission (2020b, p. 66)

A potentially significant consideration for both the NT and the ACT (see below) is that under the Australian Constitution (Commonwealth of Australia 1901), the Australian Government can over-ride Territory laws on any subject. In a legal opinion to the NT Treaty Commission, Brett Walker SC (2020, p. 15) advised that “*the support or acquiescence of the Commonwealth Executive and the Parliament would be useful reassurance throughout and after the process of negotiating a treaty or treaties*”. The purpose would not be to involve the Commonwealth as a party, “*but rather to keep it appropriately informed of the negotiations between the Northern Territory and its First Nations*”.

## Other jurisdictions

### Queensland

In July 2019 the Queensland government committed to the *Tracks to Treaty – Reframing the relationship with Aboriginal and Torres Strait Islander Queenslanders* initiative (Palaszczyk 2019). It established an Eminent Panel of Indigenous and non-Indigenous Queenslanders to engage with key

parliamentary, government and non-government stakeholders; and a Treaty Working Group to lead the conversation with First Nations Queenslanders.

Reporting to the government in February 2020, the Working Group concluded there is broad support within the Queensland community for a treaty process, asserting that the *Human Rights Act 2019* (Qld), a 2016 report *Reconciling Past Injustice*, and emerging conversations around treaty and truth-telling, all provided fertile ground to progress this issue (State of Queensland 2020a, p. 6). The Eminent Panel also presented its Advice and Recommendations in February 2020, confirming that the government should proceed on a Path to Treaty. This could:

- deal with the ‘unfinished business’ of the colonisation of Queensland and its devastating ongoing impact on First Nations;
- empower First Nations Peoples to deal with social and economic disadvantage that top-down government programmes have not, and never will be able to, address;
- advance reconciliation and justice between First Nations and all other Queenslanders;
- mark the maturity of Queensland to deal honestly with its history and provide the foundation for a path forward (State of Queensland 2020b).

In August 2020, the Queensland Government accepted, fully or in principle, the Eminent Panel’s recommendations and committed to a truth-telling and healing process, to supporting First Nations peoples to engage in treaty-making, and to raise awareness about Queensland’s shared history and the diversity of perspectives (Queensland Government 2020). In February 2021 a Treaty Advancement Committee was established to develop options and provide independent advice on how to progress treaty-making. It is expected to report by the end of 2021.

### ***Australian Capital Territory***

In October 2020 the ACT’s Labor and Greens government committed to “*treaty discussions with traditional owners, informed by processes underway around the nation; supporting First Nations families with connections to country in the ACT to submit native title claims; and repealing and replacing the Namadgi National Park Agreement*” (Barr and Rattenbury 2020, pp.18 and 24). The Namadgi Agreement, signed under a conservative government in 2001, had required the Aboriginal parties to withdraw all native title claims over *any* land in the ACT, and ruled out any new claims (ACT Government 2001). Its validity is doubtful (Wensing 2021a, pp. 29–30) and Aboriginal land rights and native title matters in the ACT remain unfinished business (Wensing 2021a, p. 58).

The ACT budget for 2021–22 provides \$20m over ten years for a Healing and Reconciliation Fund, including funds to support a treaty process (ACT Government 2021a, p. 2). However, no further information is publicly available as to how this will proceed.

### **Tasmania**

In June 2021 the Tasmanian Premier announced the appointment of a former state governor, Professor Kate Warner AC, “to facilitate a process to understand directly from Tasmanian Aboriginal people themselves how best to take our next steps towards reconciliation” (Gutwein 2021). Professor Warner was to report by October 2021 and make “recommendations outlining a proposed way forward towards reconciliation, as well as the views of Tasmanian Aboriginal people on a Truth Telling process and what a pathway to Treaty would consist of” (Government of Tasmania 2021, p. 7). The Tasmanian Government’s initiative is commendable, but the apparent haste in producing this first report is concerning, as other states and territories have taken much longer to develop their processes.

### **Western Australia**

Following lengthy proceedings in both the Federal and High Courts and protracted negotiations over 18 years, the WA government and the Noongar people of the state’s south-west recently registered six Indigenous land use agreements under the *Native Title Act 1993* (Cth) as “full and final resolution of all native title claims ... in exchange for a comprehensive settlement package” (Barnett 2015).<sup>12</sup>

The Noongar Settlement is by far the largest and most comprehensive reached to date in Australia and a “landmark and unprecedented outcome” (Jackson McDonald Lawyers 2016, p. 14). It involves some 30,000 Noongar people, covers approximately 200,000 square kilometres of land and waters, and includes agreements on rights, obligations and opportunities relating to land, resources, governance, finance, and cultural heritage (Hobbs and Williams, 2018, p. 31). The total value of the package is \$1.3 billion. The Settlement requires recognition through an act of parliament, the establishment of a perpetual trust and six regional corporations, land transfers, joint management arrangements for the South West Conservation Estate, land and water access for customary purposes, heritage agreements, an economic participation framework, a housing programme, a community development programme, a capital works programme and a land fund.

The Settlement is intended to compensate the Noongar people “for the loss, surrender, diminution, impairment and other effects” levied on their native title rights and interests.<sup>13</sup> In the words of the WA Minister for Aboriginal Affairs: “it’s as close as we’ve come in Australia to a treaty between a group of traditional owners and a government” (Wyatt, B 2018). However, it does not recognise self-government rights to the same extent as the modern treaties in Canada (Hobbs and Williams 2019, p. 204).

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<sup>12</sup> See also the Preamble to the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA).

<sup>13</sup> Preamble to the *Land Administration (South West Native Title Settlement) Act 2016* (WA).

## Truth-telling developments

There is now widespread understanding in Australia that genuine reconciliation cannot be achieved without confronting and acknowledging the legacy of the past through some form of truth-telling (Referendum Council 2017a; Coalition of Peaks 2020). Notably, the *Uluru Statement* called for a Makarrata Commission to “supervise a process of ... truth-telling about our history” (Referendum Council 2017b). Once again, sub-national governments have responded positively, and the actions of two jurisdictions – the Northern Territory and Victoria – are consistent with the resolution on the *Right to the Truth* adopted by the UN Human Rights Council and later the General Assembly (UN 2013).

### **Northern Territory**

In February 2021, the NT Treaty Commission (2021) released a paper discussing the role of truth-telling and truth-telling commissions, an overview of experiences in Australia and around the world, and truth-telling models that could work in the Territory. Truth-telling processes in other countries have played an important role in reconciliation by uncovering and acknowledging past human rights violations and ongoing injustices towards First Peoples. While there are diverse opinions about their successes or failures, Australia can learn from those experiences. Other countries examined by the NT Commission include Canada, South Africa, Guatemala, Mauritius, Peru and Timor-Leste. The Commission concludes that while “each place and its history is unique”, there are many common themes, “such as the impacts of colonisation, the forcible removal of children and intergenerational trauma” (NT Treaty Commission 2021, pp. 18–25).

The Commission also notes that while there has not been any official government-led truth-telling processes in Australia, truth-telling has occurred through land rights claims in the NT,<sup>14</sup> Royal Commissions<sup>15</sup> and one national inquiry<sup>16</sup> (NT Treaty Commission 2021, p. 26). In the NT, the 2018 Barunga Agreement acknowledged the need for truth-telling and healing (NT Government et al. 2018). The Commission finds that “culturally appropriate structures and ownership of the truth telling process are integral to success” (NT Treaty Commission 2021, p. 33), and that while there is a need for swift action, there is an even greater need to get the process right: “...by tracing the journey back through these truths, we can start to weave a new story, what the *Uluru Statement from the Heart* terms a ‘fuller expression of Australia’s nationhood’” (p. 43). It thus recommended that a Truth Commission be established as soon as possible, and that consultation with Aboriginal people will be necessary to decide the specifics (NT Treaty Commission 2021, p. 5)

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<sup>14</sup> Under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) because claimants were required to demonstrate their traditional connection to the land in order to justify their claim.

<sup>15</sup> The Royal Commission into Aboriginal Deaths in Custody (1987–1991) (RCADC 1991); Royal Commission into Institutional Responses to Child Sex Abuse (2013–2017) (RCIRCSA 2017).

<sup>16</sup> *Bringing Them Home: The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1995–1997) (HREOC 1997).

### **Victoria**

One of the first resolutions of the FPAV in June 2020 was for the state government to establish a truth and justice process. The government responded positively, and in March 2021 the FPAV and the government announced the establishment of the Yoo-rook Justice Commission (named for the Wemba/Wemba/Wamba Wamba word for truth). It has been established under the *Inquiries Act 2014* (Vic) with the powers of a Royal Commission to call evidence and to hold public hearings. This is the first formal truth-telling process about historical and ongoing injustices experienced by First Peoples in Victoria since colonisation (Williams 2020; Government of Victoria and Co-Chairs of the FPAV, 2021).

The Commission has been invested with the powers of a royal commission (Hobbs 2021). It will:

- Establish an official record and develop a shared understanding among all Victorians of the impact of colonisation, as well as the diversity, strength and resilience of First Peoples' cultures.
- Make recommendations for healing, system reform and practical changes to laws, policy and education, as well as to matters to be included in future treaties (Yoo-rook Commission 2021a, 2021b).

By establishing the Yoo-rook Commission, Victoria is now the first and only jurisdiction in Australia to have begun implementing all three key elements of the *Uluru Statement: Voice, Treaty and Truth*.

### **Other jurisdictions**

Commitments to truth-telling by other jurisdictions can be found in the Implementation Plans for the new *National Agreement on Closing the Gap* (NIAA 2020), the primary objective of which is to overcome the entrenched disadvantage still faced by too many Aboriginal and Torres Strait Islander people. Those plans were released in September 2021.

The only commitment by the Commonwealth is in relation to its Stolen Generations Reparations Scheme in the NT and the ACT, where it retains jurisdictional responsibility for past wrongs. The Commonwealth's Implementation Plan states that the truth-telling component of the Reparations Scheme sits "*alongside the additional measures the Commonwealth is taking to progress truth-telling as part of the nation's journey to reconciliation*" (Commonwealth of Australia 2021, p. 18). However, no 'additional measures' about truth-telling can be found in the Plan, nor on any Australian government website about its policies and programmes relating to Aboriginal and Torres Strait Islander peoples.

The ACT's Implementation Plan states that truth-telling exposes the past, enables a better understanding of history and paves the way towards "*authentic reconciliation*" (ACT Government 2021b, p. 3). The Plan refers to the Healing and Reconciliation Fund mentioned earlier, but nothing further has been published about whether and how truth-telling will play a role.

Queensland's Plan notes that the consultations for the Path to Treaty in Queensland identified truth-telling and healing as a crucial foundation, and that it has established a Treaty Advancement Committee to provide independent advice to the government on options to implement the recommendations of the Eminent Panel (Queensland Government 2021, p. 4).

South Australia's Plan simply states that it supports truth-telling "*to enable reconciliation and active, ongoing healing*" in the context of government organisations identifying their history with Aboriginal peoples (Government of South Australia 2021, p. 27).

Western Australia's Plan states that the government is developing a Strategy for Aboriginal Affairs which reflects the priorities expressed by Aboriginal peoples and requires each government agency "*to contribute to truth-telling and incorporate it into their business*" (Government of Western Australia 2021, p. 40).

While the NSW government has developed a comprehensive OCHRE programme (Opportunity, Choice, Healing, Responsibility, Empowerment) to support Aboriginal self-determination and priorities by progressively transferring control of programme design and delivery to Aboriginal communities, its Plan remains conspicuously silent on treaty and truth-telling (NSW Government 2021).

### **Comparisons with Canada and New Zealand**

Part 1 of this paper noted that the four common-law CANZUS countries (Canada, Australia, New Zealand and the USA) originally voted against the UN *Declaration on the Rights of Indigenous Peoples* (UNDRIP), but to varying degrees have subsequently reversed that position (Wensing 2021b, p. 102). However, notably at the national level, Australia's level of compliance with UNDRIP's principles and standards remains poor (Wensing 2021b, pp. 109–112), especially compared with Canada and New Zealand.

#### **Canada**

Canada has a long history of treaty-making. There are 70 historic treaties forming the basis of the relationship between the Crown and 364 First Nations, representing over 60,000 Indigenous people (Government of Canada undated). The modern treaty era began following the Supreme Court of Canada's 1973 decision in *Calder et al. v. Attorney-General of British Columbia*, in which the Court recognised Aboriginal rights for the first time. Since then, 25 more treaties have been signed and treaty-making continues to this day (Government of Canada, undated). However, treaties in Canada have not been without their difficulties with respect to reconciling sovereignties (Hoehn 2012, pp. 2, 35).

The Canadian government announced its support in principle for UNDRIP in 2010, and in 2016 re-endorsed the Declaration without qualification and committed to its full and effective implementation (Government of Canada 2016). Recognising that implementation requires transformative change, in

2018 it adopted a set of Principles respecting the government's relationship with Indigenous peoples (Figure 5). The principles "*reflect a commitment to good faith, the rule of law, democracy, equality, non-discrimination, and respect for human rights*" and will guide the work required to fulfil the government's commitment to renewed nation-to-nation, government-to-government, and Inuit-Crown relationships (Government of Canada 2018).

Figure 5: Principles for the Canadian government's relationship with Indigenous peoples

<b>01</b>	All relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.	<b>06</b>	Meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources.
<b>02</b>	Reconciliation is a fundamental purpose of section 35 of the <i>Constitution Act, 1982</i> .	<b>07</b>	Respecting and implementing rights is essential and that any infringement of section 35 rights must by law meet a high threshold of justification which includes Indigenous perspectives and satisfies the Crown's fiduciary obligations.
<b>03</b>	The honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples.	<b>08</b>	Reconciliation and self-government require renewed fiscal relationship, developed in collaboration with Indigenous nations, that promotes a mutually supportive climate for economic partnership and resource development.
<b>04</b>	Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government.	<b>09</b>	Reconciliation is an ongoing process that occurs in the context of evolving Indigenous-Crown relationships.
<b>05</b>	Treaties, agreements, and other constructive arrangements between Indigenous peoples and the Crown have been and are intended to be acts of reconciliation based on mutual recognition and respect.	<b>10</b>	Distinctions-based approach is needed to ensure that the unique rights, interests and circumstances of the First Nations, the Métis Nation and Inuit are acknowledged, affirmed, and implemented.

Source: Government of Canada (2018)

In June 2021, the Canadian Parliament passed '*An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples*'. The purposes of the Act are to:

- (a) affirm the Declaration as a universal international human rights instrument with application in Canadian law; and
- (b) provide a framework for the Government of Canada's implementation of the Declaration.

The Act outlines measures to ensure that Canadian laws are consistent with UNDRIP. This specifically includes working with First Nations to set priorities and to identify laws that need to be changed. The Act states that the federal government "*must... prepare and implement an action plan to achieve the purposes of the Declaration*". It also provides that the action plan must be created in 'consultation and cooperation' with Indigenous peoples, and requires regular reporting on the progress being made, including published reports to parliament (Assembly of First Nations, undated).



In 2019, the province of British Columbia passed its own statute to implement UNDRIP, the first sub-national jurisdiction in Canada to do so. The Act's objectives are to affirm the application of Declaration to the laws of British Columbia, to contribute to the implementation of the Declaration, and to support the affirmation of, and develop relationships with, Indigenous governing bodies (British Columbia 2019). Unlike the Canadian statute, the British Columbia Act also includes provisions authorising the provincial government to enter into agreements with Indigenous governing bodies for joint decision-making or consent with respect to the use of statutory powers (Library of the Parliament of Canada 2021, p. 5).

Under the Act, the provincial government must develop an action plan in consultation and cooperation with Indigenous peoples. A draft has been prepared for consultation, outlining proposed actions to be taken in cooperation with Indigenous peoples between 2021 and 2026, with progress to be reviewed and publicly reported annually. Actions are grouped under the four themes of self-determination and inherent right of self-government; title and rights of Indigenous peoples; ending Indigenous-specific racism and discrimination; and social, cultural and economic well-being (British Columbia 2021).

*Figure 6: Draft Principles for British Columbia's relationship with Indigenous peoples*

- The Province of British Columbia recognises that:**
1. All relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.
  2. Reconciliation is a fundamental purpose of section 35 of the *Constitution Act*, 1982.
  3. The honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples.
  4. Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government.
  5. Treaties, agreements, and other constructive arrangements between Indigenous peoples and the Crown have been and are intended to be acts of reconciliation based on mutual recognition and respect.
  6. Meaningful engagement with Indigenous peoples aims to secure their free, prior and informed consent when B.C. proposes to take actions which impact them and their rights, including their lands, territories and resources.
  7. Respecting and implementing rights is essential and that any infringement of section 35 rights must by law meet a high threshold of justification which includes Indigenous perspectives and satisfies the Crown's fiduciary obligations.
  8. Reconciliation and self-government require a renewed fiscal relationship, developed in collaboration with the federal government and Indigenous nations that promotes a mutually supportive climate for economic partnership and resource development.
  9. Reconciliation is an ongoing process that occurs in the context of evolving Crown-Indigenous relationships.
  10. A distinctions-based approach is needed to ensure that the unique rights, interests and circumstances of Indigenous peoples in B.C. are acknowledged, affirmed, and implemented.

Source: British Columbia (2018)

British Columbia has also developed ten draft principles, modelled on those introduced by the federal government in 2017, which provide high-level guidance on how provincial representatives engage with Indigenous peoples (Figure 6). As in Australia, it is notable that a sub-national government is playing a leadership role, albeit within a much more supportive national framework.

### ***New Zealand***

The Treaty of Waitangi, signed in 1840 by Māori Chiefs and representatives of the British Crown, continues to provide a framework for the relationship between Māori and the New Zealand government (Jones 2016, pp.7, 42). While there is some contention about differences between the Māori and English versions of the Treaty, the essential element is that “*the Crown has the authority to establish some form of government in New Zealand and that the Māori property and other rights and the authority of the chiefs is protected*” (Jones 2016, p. 7). Palmer (2008) maintains that the Treaty did not transfer sovereignty from the Māori to the British Crown.

The Treaty is not enforceable by the courts in New Zealand (Office of Treaty Settlements 2018, p. 6), but its principles have been given some legal effect by reference in specific legislation, such as s.8 of the *Resource Management Act 1991* (New Zealand Government 1991). Professor Hirini Matunga from Lincoln University<sup>17</sup> asserts that while these provisions have been laudable, they fail the Treaty responsiveness test because Māori planning, management and decision-making were not included in the Act in the first place.

When New Zealand endorsed UNDRIP in 2010, it did so “*without a substantive commitment to the core rights it affirms in that process*” (Te Aho 2020, p. 39). It was not until March 2019 that the New Zealand Attorney-General and Te Minita Whanaketanga Māori directed the Crown Law Office and Te Puni Kōkiri to start work on a Declaration Plan. A stocktake on the government’s response to the Declaration until that point identified low public sector understanding of the Declaration and of its connection with the Treaty of Waitangi.

In August 2019, the Declaration Working Group was established to provide advice on the form and content of a Declaration Plan and engagement process. It reported to government in November 2019, outlining a vision for realising the Declaration by 2040 – in particular advancing Māori self-determination/*rangatiratanga*, and ideas for constitutional transformation (New Zealand Government 2019). The government subsequently agreed to a two-step process including targeted engagement with key iwi and significant Māori organisations, as well as wider public consultations, with the intention of approving a Declaration Plan by the end of 2022 (New Zealand Government 2021). However, Te Aho (2020, p. 35) has expressed concerns that New Zealand’s actions can be characterised as “*rights ritualism*”. This was because when the government endorsed UNDRIP in 2010, it “*made it clear that*

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<sup>17</sup> Personal communications, 26 October 2021.

*implementation of the declaration would occur within existing constitutional and legal parameters*" (Te Aho 2020, p. 35).

### **Foundational principles for parity and coexistence**

Calls for a treaty in Australia are not new. Issues of prior ownership, continued occupation and sovereignty, and affirming their human rights and freedoms, including land rights, have been raised repeatedly since the 1930s in declarations by First Nations peoples (Table 1). And over the last 12 years, various key organisations in Australia have made clear statements of expectations or principles about Indigenous land reforms, each developed either directly by Aboriginal and Torres Strait Islander peoples themselves or in close consultation with them (Wensing 2016, pp. 3–9).

*Table 1: Declarations by Aboriginal and Torres Strait Islander Peoples 1937 to 2018*

<b>Year</b>	<b>Event</b>
1937	Petition to King George VI
1963	Bark Petitions
1972	Larrakia Petition to Queen Elizabeth II
1979	National Aboriginal Conference
1988	Barunga Statement
1993	Eva Valley Statement
1995	Social Justice Package
1998	Kalkaringi Statement
2015	Kirribilli Statement
2017	Uluru Statement from the Heart
2018	Yolngu Leaders Declaration of Sovereignty

Source: Wensing (2019, pp. 104–106)

Several key messages can be drawn from these statements:

- Land is central to First Nations peoples' culture and way of life and these are inseparable;
- First Nations peoples' right to pursue, reject or negotiate development on their lands should be respected, especially with respect to local decision-making;
- First Nations peoples want to be able to use their land as collateral for long-term social, economic and cultural development;
- There should be no extinguishment of their rights and interests or any diminution of the Indigenous estate; and
- International human rights standards are applicable, in particular the rights to self-determination and to free, prior and informed consent on matters affecting their interests, including their ancestral lands and waters (Wensing 2016, p. 6; 2019, p. 271).

The statements appear to reflect growing concerns by First Nations peoples that schemes of statutory land rights and the native title system are neither recognising their sovereignty nor providing appropriate

self-determination over their land rights and interests. The current arrangements mostly fail to deliver tangible outcomes in terms of restoring, protecting and exercising Indigenous peoples' unique knowledge, culture and world values, and to improve well-being on their terms (Wensing 2019, p. 273).

Drawing on UNDRIP, the declarations in Table 1 and the points listed above, Figure 7 proposes ten 'Foundational Principles' as the basis for parity and coexistence between Indigenous and Western forms of land ownership, use and tenure in Australia (Wensing 2019, pp. 274–287). The principles express important values that indicate how Indigenous forms can be regarded as being at least equal to their Western counterparts, if not superior (Wensing and Small 2012). All ten are inter-related and must be applied equally applied for the two systems to operate effectively side by side.

*Figure 7: Foundational Principles for Parity and Coexistence*

<b>Foundational Principles for Parity and Coexistence</b>
1. Land is integral to Aboriginal peoples' culture and ways of life and these are inseparable. Land is also inalienable from Aboriginal knowledge, culture and tradition.
2. Self-determination in relation to land ownership, use and tenure is fundamental to Aboriginal peoples' economic, social and cultural development and wellbeing. This includes Traditional Owners undertaking land use and occupancy planning in accordance with their law and custom.
3. The free, prior and informed consent of Aboriginal people (Traditional Owners) must be obtained and respected, and Aboriginal people must be able to use their own legal traditions to structure their decision-making and to define the meaning of consent.
4. No (further) extinguishment of native title rights and interests and no diminution of the (existing) Indigenous estate.
5. Aboriginal land is no lesser a form of land ownership than any other form of land ownership.
6. Communal forms of land ownership should be recognised, respected and preserved.
7. Aboriginal peoples' have the right to pursue, reject or negotiate development on their lands, which must be respected at all times.
8. Land used by Traditional Owners (or other Aboriginal people with the Traditional Owners' free, prior and informed consent) as collateral for long-term social, economic and cultural development must not depend on extinguishment of native title rights and interests or alienation of any other Aboriginal land rights and interests.
9. The acquisition of Aboriginal land rights and interests should never be exerted by the Crown or any third party. Acquisition can only proceed on the basis of terms negotiated and agreed with the Traditional Owners.
10. Compensation for any extinguishment, loss, diminution, impairment or damage of/to Aboriginal land rights and interests must be on just terms having regard to all of the above principles.

Source: Wensing (2019, p. 274)

## Conclusion

The *Uluru Statement* will live on because it not only sets out the grievances of First Nations peoples that require Australia's attention, but also includes three key mechanisms for addressing those grievances: Voice, Treaty, Truth.

Commitment to real constitutional reform in Australia continues to wax and wane. As Lino (2018, p. 68) observes, minimalist proposals for recognition of Aboriginal and Torres Strait Islander peoples in Australia's Constitution have been about "*including a symbolic, unenforceable reference*", this being "*the model promoted by the Howard Government<sup>18</sup> and now enshrined within all six State Constitutions*". On the other hand, Aboriginal and Torres Strait Islander peoples have become far more assertive in their bid for substantive recognition, seeking removal of remnants of racism from the Constitution together with amendments that safeguard Indigenous rights and go beyond mere symbolic gestures to "*more expansive projects of reconciliation, rights, sovereignty, treaty and postcolonial reckoning*" (Lino 2018, p. 68).

There are many different ways of addressing the longstanding lack of recognition of First Peoples' prior ownership and occupation of the lands that comprise Australia, but history shows that such measures cannot be imposed, they must be negotiated (Hoehn 2016, p. 125). The challenge is for any negotiations over land rights to be based on parity between the parties, mutual respect and justice, rather than exploitation and domination by one or other party.

Four (possibly five) states and territories have now formally commenced efforts to negotiate treaties. Three have indicated they are willing to consider treaties at the Aboriginal language group or regional level, based on affiliations between clans or native title determinations that have established connections to Country. This is the path that South Australia was pursuing before the change in government from Labor to Liberal in 2018 when the process was 'paused' (Government of South Australia 2013).

What stands out here is that Australia's sub-national jurisdictions have taken on treaty developments without the involvement of the Commonwealth. The COVID-19 crisis and the need to address climate change have revealed the potential for states and territories once again to play a more assertive role in the federation, and to work together without a Commonwealth presence. This may well continue and expand into other policy areas.

The sub-national approaches to treaty and truth telling are bold attempts to respond to calls by Aboriginal and Torres Strait Islander peoples for voice, treaty, and truth, and are consistent with the principles embedded in UNDRIP. At this point, it is still too early to determine whether the states and territories can accomplish what really needs to be achieved: a resolution of past wrongs, and a path to

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<sup>18</sup> The conservative government in office from 1996 to 2007.

a better future for Indigenous peoples that respects their rights and interests and their law and culture as Australia's First Nations. The crucial test each jurisdiction will have to pass is whether they successfully adopt and apply the three critical ingredients of voice, treaty and truth-telling as the foundation for their negotiations.

In addition, negotiations between sub-national governments and First Nations peoples need to reflect and embrace the interests and potential contributions of the more than 500 local governments established and supervised under state and Northern Territory laws. Across the Northern Territory, northern Queensland and the Torres Strait a substantial number of those local governments are primarily Indigenous. Detailed discussion of local government issues is beyond the scope of this paper, but it is clear that the sector will need to play – and is already playing – an expanded role in advancing social justice for Indigenous Australians (Wensing 2021a).

Because of their place-based responsibilities, local governments are often seen as being 'closest to the people': they are therefore in a unique position to implement some structural and systemic reforms that central government cannot, and to reconfigure relationships at a local and regional scale. This can include meaningful consultations on matters that affect Aboriginal and Torres Strait Islander peoples, ensuring their representation in all relevant forums and governance bodies, and entering into place-based protocols and agreements on matters of mutual concern. Such initiatives can be particularly valuable in metropolitan areas and regional cities where most of Australia's Indigenous peoples live.

There is also scope for a 'leadership from below' or 'building block' role for local and regional action led by local government. Many municipalities have a solid track record of reaching agreements under the reconciliation agenda and native title legislation. With respect to truth-telling, local governments are often rich repositories of histories which can be re-told in partnership with Aboriginal and Torres Strait Islander communities, especially with native title holder groups where they have been determined or have active claims in train, thus rebuilding relationships. This could be a really important starting point for regional treaties. The most significant challenge for local governments is understanding the opportunities and becoming involved from the outset and for the long term (Wensing 2021c, p. 24).

There is much at stake in all these sub-national and local and regional processes, especially given continuing inaction, or a lack of real commitment and effort, by the Australian government. If any of the initiatives discussed in this paper fail, it may well be some decades before they can be revisited. Ultimately, Australia must come to terms with how European settlement failed to seek the consent of the First Nations peoples who have lived here for so many thousands of years. Unequivocal respect for their human rights, including land rights, is long overdue.

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