

INDIGENOUS AUSTRALIAN CONSTITUTIONS

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I INTRODUCTION

The *Macquarie Dictionary* defines 'constitution' in several ways, including: 'the system of fundamental principles according to which a nation, state or body politic is governed: *the Australian constitution*'.¹

This definition raises the question of whether there are constitutions for Aboriginal and Torres Strait Islander peoples. It raises the further question of the relationship between any such Indigenous constitutions and Australian constitutions.

This article seeks to briefly explore these matters. It also considers issues surrounding possible constitutional recognition of a treaty between Indigenous and non-Indigenous Australians, and to examine international examples of similar instruments. It is argued that the lack of recognition of Indigenous Australians within the *Australian Constitution* ('Constitution') is a major flaw in the Australian polity.

II INTERNATIONAL STANDARDS

Notions of Indigenous political rights are not novel. The United States ('US') has long recognised the continuing sovereignty of Indian Nations, subject only to Congress. Such Nations operate, on their own lands, systems of tribal governments and tribal courts. Canada has recognised the 'inherent right of self-government' of First Nations, and has negotiated with particular Aboriginal peoples the forms that such self-government might take.² In both countries (as in New Zealand) there has been a history of treaty-making between the British and the Indigenous peoples.

The special place within states of the world's estimated 300 million Indigenous peoples has been recognised in a range of international instruments.

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1 *Macquarie Dictionary* (2nd revised edition, 1987) 399.

2 Garth Nettheim, "The Consent of the Natives": Mabo and Indigenous Political Rights' (1993) 15 *Sydney Law Review* 223; republished in LBC's *Essays on the Mabo Decision* (1993) 103.

Particularly significant on the question of political rights are the identical first articles of the *International Covenant on Civil and Political Rights* ('ICCPR')³ and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').⁴ Common art 1(1) states that '[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.

Indigenous peoples argue that, as peoples, they are entitled to determine their political status. Some states oppose the notion, fearing the possibility of secession. In 1982, the United Nations ('UN') Working Group on Indigenous Populations (note: not 'peoples') admitted representatives of Indigenous peoples to its deliberations, including, from 1985, deliberations over the *Draft Declaration on the Rights of Indigenous Peoples* (note: 'peoples').⁵ The Draft Declaration, as completed by the Working Group in 1993, replicates in art 3 the language of common art 1 of the ICCPR and the ICESCR as applicable to Indigenous peoples. The Draft Declaration is undergoing consideration by a Working Group of the Commission on Human Rights, the central human rights entity in the UN system.

The rights of Indigenous peoples have also received recognition under the general treaty regime and under other instruments that have specific application to Indigenous peoples.⁶

If a particular Indigenous people have, in fact, freely determined their political status, then their right of self-determination in this respect has been exercised. This can be said of Indigenous peoples whose forebears have signed treaties (leaving aside for the moment problems of implementation and interpretation of treaty commitments). In New Zealand, there is a single treaty, *The Treaty of Waitangi*, 1840.⁷ In North America, there have been many treaties over the centuries.⁸ For a world-wide perspective, one can refer to the UN *Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations*.⁹

In Canada, the process continues in respect of those regions that have not been covered by earlier treaties, particularly in the northern territories and in British Columbia. The primary concern of these modern treaties is to settle issues of land and resources. Since 1982, s 35 of the Canadian Constitution – *Constitution Act 1982* – has provided constitutional recognition to 'existing aboriginal and treaty rights' including post-1982 agreements. Canada has also recognised an

3 Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

4 Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

5 UN Doc E/CN.4/Sub.2/1994/2/Add.1 (1994).

6 Sarah Pritchard and Charlotte Heindow-Dolman, 'Indigenous Peoples and International Law: A Critical Overview' (1998) 3(4) *Australian Indigenous Law Reporter* 473; LBC, *Laws of Australia*, vol 1 (at 15 October 2001) 1 Aborigines and Torres Strait Islanders, '1.7 International Law'.

7 See IH Kawharu (ed), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (1989).

8 See David H Getches, Charles F Wilkinson and Robert A Williams Jr, *Cases and Materials on Federal Indian Law* (4th ed, 1998); Royal Commission on Aboriginal Peoples (Canada), *Report of the Royal Commission on Aboriginal Peoples* (1996).

9 Miguel Alfonso Martinez, *Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations*, Final Report, UN Doc E/CN.4/Sub.2/1999/20 (1999).

inherent right of self-government as belonging to Aboriginal peoples (Indians, Inuit and Metis). A recently concluded treaty with the Nisga'a Nation in British Columbia specifically recognised certain limited rights of self-government.¹⁰ The treaty was challenged on the ground that it created a third order of government, whereas Canada's Constitution contemplated only two such orders – National government, and Provincial or Territory governments. The challenge was rejected by Williamson J in the Supreme Court of British Columbia.¹¹

Canada, then, provides an example of a state that currently negotiates treaties with Indigenous peoples, is prepared to include provisions for self-government, and provides constitutional status for such agreements. While aspects of these contemporary Canadian developments have been subject to criticism by Indigenous and non-Indigenous Canadians alike, there are elements that may be instructive to Australians in attempting to move on towards reconciliation.

On 8 September 2001, the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa, adopted a Declaration and Programme of Action that contained the following provisions relating particularly to Indigenous peoples.¹²

The Declaration includes the following:

23. Fully recognize the rights of indigenous peoples consistent with the principles of sovereignty and territorial integrity of States, and therefore stress the need to adopt the appropriate constitutional, administrative, legislative and judicial measures, including those derived from applicable international instruments; ...

41. We emphasize that, in order for indigenous peoples freely to express their own identity and exercise their rights, they should be free from all forms of discrimination, which necessarily entails respect for their human rights and fundamental freedoms. Efforts are now being made to secure universal recognition for those rights in the negotiations on the draft declaration on the rights of indigenous peoples, including the following: to call themselves by their own names; to participate freely and on an equal footing in a country's political, economic, social and cultural development; to maintain their own forms of organization, lifestyles, cultures and traditions; to maintain and use their languages; to maintain their own economic structures in the areas where they live; to take part in the development of their educational systems and programmes; to manage their lands and natural resources, including hunting and fishing rights; and to have access to justice on a basis of equality; ...

The Programme of Action includes the following:

Indigenous peoples

19. Urges States:

10 'Canada – The Nisga'a Final Agreement in Brief' (1998) 3(4) *Australian Indigenous Law Reporter* 562.
 11 *Campbell et al v Attorney-General (BC), Attorney-General (Canada) and the Nisga'a Nation* [2000] BCSC 1123 (Supreme Court of British Columbia, Williamson J, 24 July 2000).
 12 'Declaration' and 'Programme of Action' (Adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 August - 7 September 2001) A/CONF.189/5 (unedited version direct from the Conference). For a record of a Regional Meeting of Indigenous Peoples and Racism: Conference of Indigenous Peoples of Australia, New Zealand, Canada and the United States (Sydney, 20-22 February 2001), see Martin Nakata (ed), *Indigenous Peoples, Racism and the United Nations* (2001).

(a) To adopt or continue to apply, in concert with them, constitutional, administrative, legislative, judicial and all necessary measures to promote, protect and ensure the enjoyment by indigenous peoples of their rights, as well as to guarantee them the exercise of their human rights and fundamental freedoms on the basis of equality, non-discrimination and full and free participation in all areas of society, in particular in matters affecting or concerning their interests;

(b) To promote better knowledge of and respect for indigenous cultures and heritage; and welcomes measures already taken by States in these respects; ...

24. Calls upon concerned States to honour and respect their treaties and agreements with indigenous peoples and to accord them due recognition and observance; ...

III THE AUSTRALIAN CONSTITUTION

One would expect such a foundational matter as the place of Indigenous peoples in the national polity to be addressed in the national constitution. In Australia's case, this has not been done. The Constitution as originally drafted contained only exclusionary references to Aborigines. These were removed as a result of the 1967 referendum. As a consequence of this referendum, the Commonwealth Parliament's power under s 51(xxvi) to make laws for 'the people of any race for whom it is deemed necessary to make special laws' (the 'races power') no longer excluded 'people of the aboriginal race in any state'. (However, the High Court of Australia has not accepted an argument that the exercise of this power is confined to the enactment of laws that are beneficial to Indigenous Australians.¹³)

In 1998, a further referendum was held. The major proposal put to the voters was to move to a republic, but an additional proposal was to add a preamble to the Constitution that would, among other things, acknowledge Aborigines and Torres Strait Islanders. Both proposals were unsuccessful.

Other constitutional provisions have been proposed by Indigenous Australians, including:

- the repeal of s 25, which contemplates that a State may exclude people of any race from voting for the State Lower House, albeit penalising such a State by reducing its representation in the national House of Representatives;
- revision of the 'races power' to confine it to a power to pass laws with respect to (or for the benefit of) Aborigines and Torres Strait Islanders; and
- a prohibition on racial discrimination.¹⁴

13 *Kartinyeri v Commonwealth* (1998) 195 CLR 337 ('Hindmarsh Island Bridge Case').

14 See Garth Nettheim, 'Indigenous Australians and the Constitution' (1999) 74 *Reform* 29; Garth Nettheim, 'Reconciliation and the Constitution' (1999) 22 *University of New South Wales Law Journal* 625.

IV TREATY NOW?

In Australia, there has been a long history of proposals to establish a consensual basis with the Indigenous peoples for non-Indigenous settlement. These date back to the Admiralty's 1768 instructions to Lieutenant James Cook that he should seek 'the consent of the natives'.

In more recent times, these moves have taken the form of proposals for a treaty or treaties. Such a proposal was advanced between 1979 and 1983 by the National Aboriginal Conference with the support of the Aboriginal Treaty Committee.¹⁵ Between 1987 and 1988, the idea resurfaced in the Barunga Statement of Northern Territory Aboriginal peoples.¹⁶ In 1995, as reported by the Aboriginal and Torres Strait Islander Commission ('ATSIC') and the Council for Aboriginal Reconciliation ('Reconciliation Council'), Indigenous Australians advocated that a treaty or treaties be a part of the then Prime Minister Paul Keating's proposal for a 'social justice package'.¹⁷

One of the functions of the Reconciliation Council under the *Council for Aboriginal Reconciliation Act 1991* (Cth) ('*Aboriginal Reconciliation Act*') was to consult with Aborigines and Torres Strait Islanders and the wider Australian community, and to advise the Federal Government as to whether reconciliation would be advanced by a 'document or documents of reconciliation'. At Corroboree 2000 (noted largely for the 'Bridgewalk' in Sydney and other centres), the idea of a treaty resurfaced. The Reconciliation Council presented to leaders of Australian governments its document, *Towards Reconciliation*.¹⁸ This is mainly an aspirational document, but it is supported by four 'National Strategies', gathered in a document entitled *Roadmap for Reconciliation*.¹⁹

The Reconciliation Council formally endorsed the notion of a treaty in the last two recommendations in its final report, presented to the Prime Minister, John Howard, and the Commonwealth Parliament on 7 December 2000. The Reconciliation Council's recommendations on the treaty issue were that:

5. Each government and parliament:

- recognise that this land and its waters were settled as colonies without treaty or consent and that to advance reconciliation it would be most desirable if there were agreements or treaties; and
- negotiate a process through which this might be achieved that protects the political, legal, cultural and economic position of Aboriginal and Torres Strait Islander peoples.

15 Stewart Harris, *'It's Coming Yet...': An Aboriginal Treaty Within Australia Between Australians* (1979); Judith Wright, *We Call For A Treaty* (1985).

16 Heather McRae, Garth Nettheim and Laura Beacroft, *Indigenous Legal Issues: Commentary and Materials* (2nd ed, 1997) 469.

17 See *ibid* chh 3 and 10.

18 Council for Aboriginal Reconciliation, *Corroboree 2000: Towards Reconciliation* (2000).

19 Council for Aboriginal Reconciliation, *Roadmap for Reconciliation* (2000).

6. That the Commonwealth Parliament enact legislation (for which the Council has provided a draft in this report) to put in place a process which will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation can be resolved.²⁰

The Council was disbanded on 31 December 2000 under the 'sunset clause' contained in the *Aboriginal Reconciliation Act*. However, ATSIC has established a National Treaty Secretariat in its National Policy Office. It has published an Issues Paper entitled *Treaty: Let's Get it Right!* to raise awareness and promote understanding of the treaty concept.²¹

The ATSIC Board has endorsed an initial strategy which will culminate in a plebiscite of Aboriginal and Torres Strait islander peoples on the treaty concept in the first half of the year 2002. The initial strategy consists of three major sub-strategies, namely:

1. An Information and Awareness Strategy;
2. A Political Strategy; and
3. Treaty Framework Development.

ATSIC has consistently said it is not proposing to negotiate a treaty with the Commonwealth Government on behalf of Aboriginal and Torres Strait Islander peoples. What they do say is that they are seeking to promote and encourage discussion and debate within the Indigenous and broader Australian community on the concept of a treaty (or treaties) between the Commonwealth and Aborigines and Torres Strait Islanders.²²

A treaty may take many possible forms and address a wide range of possible issues. A meeting of Indigenous leaders, convened by ATSIC in September 1999, identified some 17 headings of 'unfinished business' that await resolution:²³

- Equality
- Distinct Characteristics and Identities
- Self-Determination
- Law
- Culture
- Spiritual and Religious Traditions
- Language
- Participation and Partnerships
- Economic and Social Development
- Special Measures

20 Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge* (2000) 106. In April 2001, Senator Aden Ridgeway introduced the Reconciliation Bill 2001 (Cth) based on the Council's draft.

21 Aboriginal and Torres Strait Islander Commission, *Treaty: Let's Get it Right!* (2001). See also <<http://www.treatynow.org>> at 19 September 2001.

22 Michael Dodson, 'A National Treaty' (Paper presented at 'The Past and Future of Land Rights and Native Title', Native Title Representative Bodies Legal Conference, Townsville, 28 August 2001).

23 The statement is set out in Patrick Dodson, 4th Vincent Lingiari Memorial Lecture – *Until the Chains are Broken* (1999) <<http://austlii.edu.au/au/other/IndigLRes/car/1999/2708.html>> at 19 September 2001. It is also reproduced in Michelle Grattan (ed), *Reconciliation: Essays on Australian Reconciliation* (2000) 264.

- Education and Training
- Land and Resources
- Resource Development
- Self-Government
- Constitutional Recognition
- Treaties and Agreements
- Legislation

Particular issues may be dealt with via legislation, or changes in administrative policy, or by other means.

But a treaty – or a series of treaties – is particularly apt to address the fundamental issue of Indigenous consent to non-Indigenous settlement in their territories. Of course, such an agreement does not need to be called a ‘treaty’ – between 1979 and 1983, the term adopted was a Yolgnu term from Arnhem Land, ‘*Makarrata*’. A treaty, by whatever name, may not even be necessary to constitute entry by Indigenous Australians into the Australian polity, but it would seem to be appropriate for the purpose.²⁴

Would such a treaty have constitutional status? That is a matter of choice, as the ATSIIC Issues Paper points out.²⁵ In 1983, the Senate Standing Committee on Constitutional and Legal Affairs published its report on the constitutional and legal feasibility of a treaty, *Makarrata* or compact. The Committee accepted the possibility of a constitutional amendment to provide constitutional backing for such a treaty, modeled on the existing s 105A.²⁶ On a matter so fundamental to the ‘constituting’ of Australia, and to the juridical basis of the nation, constitutional status (in one form or another) seems highly appropriate.

V KALKARINGI AND BATCHELOR

In addition to calls for a treaty, Indigenous Australians have sought to define for themselves their own concept of ‘constitution’. The *Indigenous Constitutional Strategy: Northern Territory* – a document compiled from resolutions adopted by Aboriginal people across the Northern Territory during 1998 – defines the term ‘constitution’ as ‘our systems of Aboriginal law and Aboriginal structures of law and governance, which have been in place since time immemorial’. The people there have sought to negotiate with the government of the Territory about a ‘framework agreement, setting out processes for the mutual recognition of our respective governance structures’.²⁷ (At the

24 M J Detmold, *The Australian Commonwealth: A Fundamental Analysis of its Constitution* (1985) 62-6; M J Detmold, ‘Law and Difference: Reflections on Mabo’s Case’ (1993) 15 *Sydney Law Review* 159, 165, also published in LBC’s *Essays on the Mabo Decision* (1993) 39, 45.

25 Aboriginal and Torres Strait Islander Commission, above n 21.

26 Senate Standing Committee on Constitutional and Legal Affairs, *Two Hundred Years Later – A Report on the Feasibility of a Compact or ‘Makarrata’ between the Commonwealth and Aboriginal People* (1983) 69-76.

27 Aboriginal and Torres Strait Islander Commission, Central Land Council and Northern Land Council, *Indigenous Constitutional Strategy: Northern Territory* (undated).

national level, the Reconciliation Council also proposed a process to settle unresolved issues by way of an agreement or treaty.)

Aboriginal people have got our own constitution to run our own way, not whitefella way.

We were self government right from the start and we ran it pretty good. And now we're still going to run it ...²⁸

Yolgnu law has been benefiting Aboriginal society for thousands of years. ...

White mans' system may be different, but if we are going to live here the two laws need to come and meet in between. I'm talking about negotiating and having rights in law to negotiate. We need to put our law in the system of Australian law so that the two law systems balance and are dealt with equally.

Maybe your law can sit down and look after our law, or our law can sit down and look after your law. And maybe all of us can be responsible to each others' law.²⁹

The above quotations from the Chairs of the Central and Northern Land Councils introduce the *Indigenous Constitutional Strategy: Northern Territory*. These resolutions were adopted in the context of debate on a draft constitution proposed by the then Country Liberal Party Government as a basis on which it would seek Statehood under the Constitution.

Aboriginal people in central Australia convened in August 1998 as the Constitutional Convention of the Combined Aboriginal Nations of Central Australia and produced the *Kalkaringi Statement*.³⁰ That statement was endorsed and supplemented in November-December 1998 in a set of resolutions, adopted at the Northern Territory Aboriginal Nations meeting at Batchelor College as the Northern Territory Indigenous Constitutional Convention.³¹ In the meantime, the referendum of Territorians on the proposed constitution failed to achieve majority support.³²

It is perhaps not surprising that these statements emerged in the Northern Territory. It remains a Territory rather than a State within the Commonwealth, and successive governments have long looked forward to achieving Statehood. In addition, it is the jurisdiction with the largest proportion of Indigenous inhabitants – 28.5 per cent. Their assertions of their interests in land and law since the 1960s have been highly influential in the recognition of pre-existing rights, at least in terms of legislated land rights and common law native title.

28 Max Stuart, Co-Chair, Northern Territory Indigenous Constitutional Convention, quoted in *ibid*.

29 Galarrwuy Yunupingu, AM, Co-Chair, Northern Territory Indigenous Constitutional Convention, quoted in Aboriginal and Torres Strait Islander Commission, above n 27.

30 Sarah Pritchard, 'Constitutional Developments in the Northern Territory' (1998) 4(15) *Indigenous Law Bulletin* 12, 12, 14-15.

31 Northern Territory Indigenous Constitutional Convention, *Standards for Constitutional Development* (1998).

32 See Alistair Heatley and Peter McNab, 'The Northern Territory Statehood Referendum 1998' (1999) 10 *Public Law Review* 3; Garth Nettheim, 'Aboriginal Constitutional Conventions in the Northern Territory' (1999) 10 *Public Law Review* 8.

It is worth quoting several excerpts from the document *Indigenous Constitutional Strategy: Northern Territory*:³³

Introduction and General Principles

The Aboriginal Nations of the Northern Territory are governed by our own constitutions (being our systems of Aboriginal law and Aboriginal structures of law and governance, which have been in place since time immemorial). Our constitutions must be recognised on a basis of equality, co-existence and mutual respect with any constitution of the Northern Territory.

1. That we will withhold our consent to the establishment of a new State until there are good faith negotiations between the Northern Territory Government and the freely chosen representatives of the Aboriginal peoples of the Northern Territory leading to a Constitution based upon equality, co-existence and mutual respect. ...

Aboriginal Law

1. That a Northern Territory Constitution must recognise Aboriginal law through Aboriginal traditional law holders, and Aboriginal structures of law and governance. ...

Aboriginal Self-Determination and Self-Government

1. That Aboriginal peoples, being the first peoples to own and govern this land, have the right to self-determination and that our inherent right of self-government must be recognised and protected in any Constitution of the Northern Territory.

2. That Aboriginal self-government shall be recognised as a fundamental right and a solution to the present disempowerment of the people of the Aboriginal nations of the NT.

3. That a Northern Territory Constitution must contain a commitment to negotiate with Aboriginal peoples a framework agreement, setting out processes for the mutual recognition of our respective governance structures, the sharing of power and the development of fiscal autonomies.

These statements from Indigenous Territorians were, effectively, ignored by the long-standing Country Liberal Party Government. But, in 2001, an Australian Labor Party Government won office for the first time in the Northern Territory's history of self-government, and it may prove to be more receptive to Aboriginal aspirations.

VI CONCLUSION: RECOGNITION AND RECONCILIATION

The term 'constitution' is a broad one. It has a highly specific meaning in respect of national constitutions, such as that of Australia, though national constitutions vary considerably. It has a looser meaning for the less compartmentalised ways of thinking that characterise many Indigenous peoples.

One of the basic unresolved issues is, in Michael Detmold's terms, to belatedly establish the basis for entry by Aboriginal peoples and Torres Strait

33 This document consolidates the *Kalkaringi Statement* and the *Standards for Constitutional Development* adopted at Batchelor College.

Islanders into the Australian polity.³⁴ If this is to be done, it would need to be done through a negotiated agreement (or agreements). This foundational issue – that of constituting the nation with the ‘consent’ of the Indigenous peoples – deserves a place in the Constitution.

34 See generally Detmold, *The Australian Commonwealth* and ‘Law and Difference’, above n 24.