WHAT VALUE DOES A TREATY HAVE IN AUSTRALIA?

by Anna Harley

INTRODUCTION

In 2000, the Council for Aboriginal Reconciliation ('CAR') proposed that the Commonwealth Parliament enact legislation to 'put in place a process that will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation could be resolved'.[1] A proposed draft Reconciliation Bill was also provided within the final report which sought to propel the reconciliation process into a new era for modern Australia.[2]

The experience for Aboriginal and Torres Strait Islander Australians and the path towards reconciliation has been fraught with difficulty and political inaction. Constitutional recognition could take many forms if it were to be effected, a treaty being one of them. This article examines what the lived treaty experience looks like in Aotearoa New Zealand, and whether a post-colonial treaty could have any value in Australia today. New Zealand has been chosen as a direct comparison given the close geographical distance and common law similarities.

Growing up in New Zealand and immigrating to Australia has encouraged me to consider and question whether the benefits of a Treaty have any inherent or practical value in the recognition and empowerment of Indigenous Peoples in Australia. Further, the transferability of a Treaty model is a significant socio-political and legislative question currently being posed as Australia moves towards recognising Aboriginal and Torres Strait Islander peoples in the Constitution.

WHAT DOES THE WAITANGI EXPERIENCE LOOK LIKE?

Upon the colonisation of New Zealand, the Americas and the Pacific, the British Commonwealth signed and enacted treaties so as to determine laws and ownership over land and resources.[3] The treaties were initially to determine law and order by virtue of transferring British law. They ensured it was applicable to British settlers in the 'new land' and set up governance for that purpose.

The New Zealand perspective is relatively unique as colonisation occurred relatively late, with land and title claims under the Treaty of Waitangi still being determined today. This is in contrast with the 11 Post-Colonial Canadian treaties signed between 1871- 1921 under which claims continue to be addressed. The Treaty of Waitangi was signed on 6 February 1840 at Waitangi in the Bay of Islands.[4] The Treaty is an agreement, in Māori and English, which was made between the British Crown and about 540 Māori rangatira (chiefs).[5] The Treaty is a broad statement of principles on which the British and Māori made a political compact to found a nation state and build a government in New Zealand.[6] This forms part of New Zealand's unwritten constitution. The document itself contains three articles[7], however there are competing interpretations of the Treaty. In the English version, Māori cede the sovereignty of New Zealand to Britain; Māori give the Crown an exclusive right to buy lands they wish to sell, and, in return, are guaranteed full rights of ownership of their lands, forests, fisheries and other possessions; and Māori are given the rights and privileges of British subjects.[8]

The Treaty in Māori language was deemed to convey the meaning of the English version, but there are important differences. Most significantly, the word 'sovereignty' was translated as 'kawanatanga' (governance).[9] Some Māori believed they were giving up government over their lands but retaining the right to manage their own affairs.[10] The English version guaranteed 'undisturbed possession' of all their 'properties', but the Māori version guaranteed 'tino rangatiratanga' (full authority) over 'taonga' (treasures, which may be intangible and included scared or 'tapu' areas of land and coast).[11] Significantly, Māori understanding was at odds with the understanding of those negotiating the Treaty for the Crown, and as Māori society maintained oral traditions, explanations given at the time were probably as important as the wording of the document.[12] However, these oral records and their detail have been lost over time, undermining their value as evidence of what occurred.

The sole and exclusive right to determine the meaning of the Treaty rests with the Waitangi Tribunal, a commission of inquiry set up under the *Waitangi Tribunal Act 1975* to investigate alleged breaches of the Treaty by the Crown.[13] The role of the Tribunal is similar to that of the High Court of Australia in its interpretation

of the document, but restricted to Treaty claims. More than 2000 claims have been lodged with the Tribunal, and a number of major settlements have been reached.[14] Over many years this has included natural resources such as the Whakapapa and Turoa mountain ranges and the tourism operations provided there. The redistribution of colonised land has not only had vast effects on Māori reconciliation, but has and will continue to have huge economic impact on many rural communities who have 'ownership' over these resources.

In March 2014 the New Zealand Government and iwi (tribes) were involved in a record settlement of land. The settlement itself involved NZ$32.5 million and the return of seven Crown land sites to the people of Rangitane o Wairarapa and Rangitane o Tamaki-Nui-o-Rua.[15] Upon signing the agreement Waitangi Negotiations Minister Christopher Finlayson noted that due to land confiscations and omissions by the Crown, the peoples of these tribes were virtually landless prior to the settlement.[16] He went on to say, 'As a result, since the nineteenth century, they have struggled to maintain their identity and connection with their land and cultural traditions. This agreement will help acknowledge the injustices of the past.'[17]

Even with a written document, such as a treaty, issues of interpretation of the text and implementation are an ongoing concern.

This article does not purport to speak on behalf of all Māori, however, historically Māori have felt that the Crown has not complied with the Treaty or kept the promises they made to Māori at Waitangi.[18] Many Māori generally feel that in order for reconciliation to occur, historical claims need to be settled in full. The meaning of a 'full' settlement for Māori differs depending on tribal geography and histories. In a general sense, a 'full' settlement includes political recognition and acknowledgement of the pervasive and damaging effects of colonisation, and a commitment to strive for more equal socioeconomic outcomes for Māori. Further, many iwi claim the reconstruction and restoration of the relationship been Māori and Pakeha is fundamental to a postcolonial national identity which recognises Aoteaora's unique biculturalism within a unitary constitutional structure.[19] In contrast, Rumbles suggests that settlement has the effect that the Treaty settlements are a mask that hide the neo-colonial tactic of denying recognition of tino rangatiratanga (indigenous sovereignty guaranteed in the Treaty), in order to protect the construction of unitary Crown sovereignty.[20]

THE NEIGHBOURHOOD EFFECT: HOW IS THE NEW ZEALAND EXPERIENCE RELEVANT TO AUSTRALIA?

As the New Zealand experience shows, even with a written document, such as a treaty, issues of interpretation of the text and implementation are an ongoing concern. In order to have any value in Australia a treaty would have to undertake a truly collaborative and consultative approach. In the past, the main criticism has been that not all Indigenous Australians could agree or sign, nor would it be possible to identify Indigenous Australians capable of representing the interests of all Indigenous peoples.[21] This is largely a consultative issue and reflects the need for any constitutional change or reform to be one which is driven by Indigenous people for Indigenous people. The underlying issue in the push for reconciliation and the possibility of a treaty is inevitably whether it would achieve any tangible outcomes for Indigenous people in Australia today.

Fundamentally a treaty would enable nationwide consultation on the obligations and responsibilities of both the Commonwealth and Indigenous peoples to each other and this nation. The dispossession of Indigenous peoples from their land has not only resulted in economic inequality, but also structural and social inequality.[22] The issue of sovereignty is one that would have to be addressed and require political leadership and support. A treaty ought not to be construed as a challenge to Commonwealth sovereignty, rather it should be considered as a fundamental building block in the future of Australia. Moreover, it should be considered a way to address pervasive and crippling inequality amongst the Indigenous population as a result of colonisation, and of building a united nation for the future.

Any such move to draft and enact a treaty would require a referendum. We know from past experience that this is difficult, as any change to the Constitution requires bipartisan support.[23] In order to operate on equal footing and not be defeated by an Act of Parliament, a treaty would need to be inserted into the current Constitution. In their consideration of the 1983 Standing Committee on Constitutional and Legal Affairs' recommendation of amending s 105A of the Constitution, the 1988 Constitutional Commission confirmed that:

> [t]here is no doubt that the Commonwealth has sufficient constitutional powers to take appropriate action to assist in the promotion of reconciliation with Aboriginal and Torres Strait Islander citizens and to recognise their special place in the Commonwealth of Australia.[24] However, the Commission was not convinced that the amendment ought to be made until an agreement had been negotiated and constitutional amendment was deemed necessary.[25]

However, as the experience in New Zealand shows, treaties have far-reaching and long-lasting effects. It took the New Zealand Government over 100 years to begin addressing land claims and to institute the Waitangi Tribunal.[26] Many of the solutions or settlements have resulted in Crown or public land being returned to local iwi (tribes), or payments for the loss of that land or resource in the instance that it is under third party ownership.[27] A treaty is not a short-term solution. If anything, the benefits may not be felt for a generation. This makes it both politically unpopular to sell and very expensive in the short-term for little perceived benefit.

Ultimately a treaty would have symbolic benefits that would have practical overflow. For a start, it would recognise the wrongs of the past and go some way to reconciling and remedying them. It would give Indigenous Australians the opportunity for self-determination for their communities and their culture in the future of Australia. If the process was truly consultative it would enable greater social cohesion and true 'popular sovereignty' in respect of sections 7 and 24 of the Constitution. The inherent value, therefore, is the opportunity for recognition both within the nation and internationally, and for Indigenous people to receive equal recognition in this country's founding document.[28]

CONCLUSION

On the path to reconciliation, Australia's history of dispossession and marginalisation needs to be publically and politically ventilated. In order to achieve true equality and to begin to reverse the pervasive systematic effects of colonisation, all Australian citizens need to be treated equally.

The value of a treaty in Australia may be criticised as being merely symbolic. However, such a symbol of societal recognition and acknowledgment has the potential to have far-reaching practical effects, and at the very least it would be a symbol of equality.[29] It is widely noted that Aboriginal and Torres Strait Islander peoples are over-represented in a number of socio-economic indicators at the lower end of the scale.[30] It would appear that Indigenous people and supporters of a treaty in Australia are waiting for their 'constitutional moment' when the very foundation of the law in Australia is recalibrated with an eye to the future. If Australia as a nation seeks to close the gap, further equality, and address some of the socioeconomic and political issues that face Indigenous peoples in the 21st century, then it is fundamental that the rights of all Australians are encompassed in a legally-effective document.

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1 Council for Aboriginal Reconciliation, 'Reconciliation: Australia's Challenge, Final report of the Council for Aboriginal Reconciliation', ('Final Report CAR') Chapter 10.

2 Final Report CAR, Appendix 3 includes the draft Reconciliation Bill 2001 and Explanatory Notes, as discussed in Chapter 7.

3 George Williams, 'Does True Reconciliation Require a Treaty?' (2013) 8(10) *Indigenous Law Bulletin* 3-5.

4 Alan Ward, *An unsettled history: Treaty claims in New Zealand today* (Bridget Williams Books, 1999), 3.

5 Ibid.

6 Ibid.

7 Ibid.

8 Ibid 14.

9 Ibid.

10 Ibid 15.

11 Ibid.

12 Ibid.

13 Waitangi Tribunal, *The Meaning of the Treaty* <http://www.justice.govt.nz/tribunals/waitangi-tribunal/treaty-of-waitangi/the-meaning-of-the-treaty>.

14 Waitangi Tribunal, *Home*< http://www.justice.govt.nz/tribunals/waitangi-tribunal>.

15 Nathan Crombie, '$32.5m Wairarapa land deal struck', *New Zealand Herald* (online), 31 March 2014 <http://www.nzherald.co.nz/wairarapa-times-age/news/article.cfm?c_id=1503414&objectid=11229380>.

16 Ibid.

17 Ibid.

18 Jane Kelsey, *A question of honour?: Labour and the treaty 1984-1989* (Allen & Unwin, 1999).

19 Wayne Rumbles, Treaty of Waitangi Settlement Process: New Relationship Or New Mask? Paper Presented at the Compr(om)ising Post/Colonialism Conference Wollongong 10-13 February 1999, 10.

20 Ibid, 2.

21 Final Report CAR, above n 1.

22 Steering Committee for the Review of Government Service Provision, 'Overcoming Indigenous Disadvantage Key Indicators 2011' (Report, 2011).

23 Above n 3.

24 Australia Constitutional Commission, *Final report of the Constitutional Commission* (Australian Government Publishing, 1988) < http://www.recognise.org.au/wp-content/uploads/shared/uploads/assets/html-report/1.html>.

25 Ibid.

26 Above n 4.

27 Ibid 14.

28 Sean Brennan, 'Why 'Treaty' and Why This Project?' (Discussion Paper No. 1, The Treaty Project, Gilbert + Tobin Centre of Public Law, 2003).

29 Above n 3.

30 Ibid.