



***University of New South Wales Law Research Series***

# **TREATY-MAKING IN THE AUSTRALIAN FEDERATION**

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(2019) 43(1) *Melbourne University Law Review*  
[2019] UNSWLRS 76

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## TREATY-MAKING IN THE AUSTRALIAN FEDERATION

HARRY HOBBS\* AND GEORGE WILLIAMS†

*For many generations, Aboriginal and Torres Strait Islander peoples have called for treaties to be negotiated with Australian governments. In the face of Commonwealth inaction, states and territories have commenced treaty processes with Indigenous communities whose traditional lands fall within their borders. This article examines how the United States and Canada have negotiated treaties with Indigenous peoples and details the ongoing Australian processes in order to determine the most appropriate means of entering into treaties in the Australian federation. It concludes that while the state and territory processes are positive and offer the potential to realise valuable outcomes, it is preferable for treaties to be conducted with both federal and subnational governments. This should be undertaken by a Makarrata Commission comprising representatives of Aboriginal and Torres Strait Islander communities and federal, state, and local governments.*

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Cite as:

Harry Hobbs and George Williams, ‘Treaty-Making in the Australian Federation’ (2019) 43(1) *Melbourne University Law Review* (advance)

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I INTRODUCTION

None of the land councils can tell me anything about treaty. What does the word treaty mean? Nothing. It means nothing to Yolngu people. The men offering us the word treaty, will it be nice or will it be no good? It has to be the federal government and not the Northern Territory government.<sup>1</sup>

... [W]e are not convinced that you can wait for a national process that has never ever delivered in relation to righting these wrongs ...<sup>2</sup>

These statements highlight a tension in the debate over treaty-making in Australia. In the first, Gumatj leader Galarrwuy Yunupingu gives voice to a widespread belief that treaties with Indigenous peoples are international agreements that must be negotiated with the Australian government.<sup>3</sup> In the second, Gavin Jennings, the Special Minister of the State of Victoria, speaks to a political reality: in the absence of action at the federal level, state and territory treaty processes are currently the only viable vehicle for treaty-making in Australia. In this article, we explore how this tension may be resolved with the aim of assessing whether state and territory treaty processes are legitimate, and discerning what is the best way to pursue treaties in the Australian federation.

Treaties and other legal agreements between Indigenous political communities and those who have colonised their lands have been, and continue to be, negotiated around the globe. In Part II we outline how a treaty is distinct from other legal arrangements.<sup>4</sup> We argue that a treaty is a special type of negotiated legal relationship that recognises an inherent right to sovereignty and

<sup>1</sup> Galarrwuy Yunupingu (Speech, Barunga Agreement Signing, 8 June 2018), cited in Chelsea Heaney, ‘NT Signs Historic Barunga Agreement to Begin Indigenous Treaty Talks’, *NT News* (online, 8 June 2018) <<https://perma.cc/2PC3-JDP7>>.

<sup>2</sup> Victoria, *Parliamentary Debates*, Legislative Council, 21 June 2018, 2893–4 (Gavin Jennings).

<sup>3</sup> See, eg, *ibid* 2870 (Luke O’Sullivan).

<sup>4</sup> See also Harry Hobbs and George Williams, ‘The Noongar Settlement: Australia’s First Treaty’ (2018) 40(1) *Sydney Law Review* 1.

acknowledges or establishes institutional arrangements to exercise some form of self-government.

In Part III, we explore treaty-making in its historic and contemporary forms in the United States and Canada. Although treaties have been negotiated across the world, these two states, as federations with entrenched constitutions and homes to hundreds of diverse Indigenous political communities, are valuable comparators to tease out lessons for the emerging processes in Australia. Our study reveals two distinct models of treaty-making in these federations. In the United States, despite the contemporary proliferation of subnational agreements struck between Native American tribes and state and local governments, the constitutional allocation of legislative and executive authority vests the federal government with sole responsibility for treaty-making. By contrast, while treaties were initially struck between the British Crown or national government and First Nations in Canada, today provincial governments in that country play a key role in the negotiation and settlement of modern treaties.

The shift towards subnational treaties in Canada and other forms of agreements in the United States has sparked contention.<sup>5</sup> For some Indigenous scholars and activists, negotiating with second and third order tiers of government challenges their distinctive status as sovereign nations.<sup>6</sup> Conversely, other Indigenous peoples view as desirable any agreement that responds to practical problems facing their community by strengthening and affirming their autonomy.<sup>7</sup> We do not take a position in this debate, but simply note that this is an important consideration for contemporary treaty-making in Australia. Our focus is instead on the legal and related questions that impact upon the making of treaties within the Australian federation.

In Part IV, we explore the emerging treaty processes in Australia, examining the steps undertaken in Victoria, the Northern Territory and Queensland, as well as the abandoned negotiations in South Australia and the single *South West Native Title Settlement* ('*Noongar Treaty*')<sup>8</sup> in Western Australia. While the formal processes in Victoria and the Northern Territory are in their initial stages, sufficient time has elapsed to commence a preliminary assessment. In

<sup>5</sup> See below nn 287–95 and accompanying text.

<sup>6</sup> See below nn 292, 312 and accompanying text.

<sup>7</sup> See generally Darryl Cronin, 'Indigenous Disadvantage, Indigenous Governance and the Notion of a Treaty in Australia: An Indigenous Perspective' in Aboriginal and Torres Strait Islander Commission and Australian Institute of Aboriginal and Torres Strait Islander Studies (eds), *Treaty: Let's Get It Right!* (Aboriginal Studies Press, 2003) 151.

<sup>8</sup> *South West Native Title Settlement*, signed 8 June 2015 (not yet entered into force).

June 2018, the Victorian Parliament enacted the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) ('Victorian Treaty Process Act'), which affirms the government's commitment to treaty consultations by requiring the State to recognise an Aboriginal representative body through which a treaty negotiation framework will be established.<sup>9</sup> That same month, the Northern Territory government and the four Aboriginal Land Councils entered into the *Barunga Agreement*, a memorandum of understanding committing the parties to consult with Aboriginal Territorians in order to discern their aspirations for a treaty.<sup>10</sup> Finally, while Queensland only committed to a conversation about treaty in July 2019, treaty has been part of the government's policy platform since 2016.<sup>11</sup>

Not every process is progressing smoothly. The same day that the *Barunga Agreement* was struck, a newly elected South Australian government formally stepped away from its predecessor's commitments to treaty-making.<sup>12</sup> Likewise, although Western Australia remains committed to the *Noongar Treaty* despite a change in government, several Noongar people prevented its implementation in February 2017.<sup>13</sup> Swift federal intervention followed to permit the settlement to proceed,<sup>14</sup> but further objections have meant the *Noongar Treaty* has still not entered into force. As these two examples highlight, treaty processes in Australia are vulnerable to political fluctuations — on both sides.

Our exploration of the treaty processes in Australia and internationally contributes to a clearer understanding of contemporary treaty-making. In this project we follow the path of Jill Gallagher, a Gunditjmara woman from western Victoria and the Victorian Treaty Advancement Commissioner. In articulating her role, Gallagher explains that she is interested in comparative examination, in order 'to see if we can learn something from them', to '[t]ake

<sup>9</sup> *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) s 9 ('Victorian Treaty Process Act').

<sup>10</sup> *Barunga Agreement*, The Aboriginal Land Councils–Northern Territory, signed 8 June 2018 (Memorandum of Understanding).

<sup>11</sup> Queensland Labor, 'Queensland State Policy Platform 2016' (State Conference of the Queensland Branch of the Australian Labor Party, 29–30 October 2016) 93 [8.190] ('Policy Platform 2016').

<sup>12</sup> Michael Owen, 'Aboriginal People Failed by "Expensive Gesture" Treaties', *The Australian* (online, 11 June 2018) <<https://perma.cc/Y9BY-YU2Q>>.

<sup>13</sup> *McGlade v Native Title Registrar* (2017) 251 FCR 172.

<sup>14</sup> *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth) sch 1 item 1, amending *Native Title Act 1993* (Cth) s 24CD(2)(a) ('Native Title Act').

some good bits, maybe not some of the bad bits'.<sup>15</sup> In Part V, we reflect on the lessons learned internationally and across Australia to consider how treaties with Aboriginal and Torres Strait Islander peoples should be pursued.

## II WHAT IS A TREATY?

There are many examples of contracts or agreements between Indigenous peoples and governments, both in Australia and around the world.<sup>16</sup> In Australia, for instance, there are agreements relating to land rights,<sup>17</sup> joint management of national parks,<sup>18</sup> and resource benefit-sharing agreements,<sup>19</sup> among many others. These agreements can secure important outcomes and may empower Aboriginal and Torres Strait Islander people to play a meaningful role in the development and implementation of solutions to problems faced by their communities. However, they are not treaties.

As we have established elsewhere, a treaty is a special kind of agreement that satisfies three conditions.<sup>20</sup> These conditions are drawn from contemporary international human rights instruments concerning Indigenous peoples and from modern comprehensive land settlements being negotiated in Canada. First, a treaty must recognise Indigenous peoples as a distinct polity based on their status as prior self-governing communities who owned and occupied the land now claimed by the state.<sup>21</sup> Acknowledgment of this status differentiates Indigenous peoples from other citizens of the state, distinguishes

<sup>15</sup> Jill Gallagher (Speech, University of Melbourne, 10 May 2018) <<https://victreatyadvancement.org.au/news/guest-lecture-university-melbourne>>.

<sup>16</sup> See generally Marcia Langton et al (eds), *Settling with Indigenous People: Modern Treaty and Agreement-Making* (Federation Press, 2006).

<sup>17</sup> *Starkey v South Australia* (2014) 319 ALR 231 (Federal Court); 'Dja Dja Wurrung Settlement Commences', *Victoria State Government: Justice and Community Safety* (Web Page, 15 January 2019) <<https://www.justice.vic.gov.au/your-rights/native-title/dja-dja-wurrung-settlement-commences>>.

<sup>18</sup> See, eg, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 374–83; 'Park Management', *Australian Government: Department of the Environment and Energy* (Web Page) <<https://www.environment.gov.au/topics/national-parks/kakadu-national-park/management-and-conservation/park-management>>.

<sup>19</sup> See, eg, *Western Cape Communities Co-Existence Agreement* (Indigenous Land Use Agreement, 24 August 2001). For a statutory right in the Northern Territory, see *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 48D. See generally Jon Altman, 'Benefit Sharing Is No Solution to Development: Experiences from Mining on Aboriginal Land in Australia' in Rachel Wynberg, Doris Schroeder and Roger Chennells (eds), *Indigenous Peoples, Consent and Benefit Sharing: Lessons from the San-Hoodia Case* (Springer, 2009) 285.

<sup>20</sup> Hobbs and Williams (n 4) 7–14.

<sup>21</sup> *Ibid* 7.

the agreement from other legal forms, and reflects international law as affirmed in the *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*').<sup>22</sup>

Second, a treaty is a political agreement that must be reached by way of a fair process of negotiation between equals.<sup>23</sup> Negotiation is the appropriate process for resolving differences between Indigenous peoples and the state as it reduces the risk that important rights and interests will be ignored, brings all relevant information and perspectives to the decision-making process, and 'recognises that winner-takes-all processes are unlikely to endure or produce good policy'.<sup>24</sup> While securing a fair negotiation process can be challenging, the *UNDRIP* articulates a standard predicated on respecting the status of Indigenous peoples as a polity.<sup>25</sup>

Third, a treaty requires both sides to accept a series of responsibilities so that the agreement can bind the parties in a relationship of mutual obligation.<sup>26</sup> As part of this, Indigenous peoples are expected to withdraw all current and future claims relating to historical and contemporary dispossession.<sup>27</sup> But the state must also agree to certain conditions, for a treaty must contain more than symbolic recognition. While the content of any negotiated settlement will differ in accordance with the aspirations of each Indigenous political community, a treaty must recognise that Indigenous nations retain an inherent right to sovereignty.<sup>28</sup> Consequently, as an exercise of that right, a treaty must empower Indigenous peoples with some form of decision-making and control that amounts to a form of self-government.<sup>29</sup> This is both a concomitant of the recognition of an Indigenous people as a distinct political community, as required under the first condition, and a recognition that a treaty is designed to improve the lives of Indigenous communities and secure the foundations for a just relationship. As has been noted, a treaty is a

<sup>22</sup> GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) arts 6, 9, 33 ('*UNDRIP*').

<sup>23</sup> Hobbs and Williams (n 4) 8–10.

<sup>24</sup> Sean Brennan et al, *Treaty* (Federation Press, 2005) 8.

<sup>25</sup> See, eg, *UNDRIP* (n 22) arts 9, 33.

<sup>26</sup> Hobbs and Williams (n 4) 10.

<sup>27</sup> *Ibid* 13

<sup>28</sup> *Ibid* 10.

<sup>29</sup> For discussion on institutions of self-rule for Indigenous communities, see Harry Hobbs, 'Aboriginal and Torres Strait Islander Peoples and Multinational Federalism in Australia' (2018) 27(3) *Griffith Law Review* 307; Alison Vivian et al, 'Indigenous Self-Government in the Australian Federation' (2017) 20(1) *Australian Indigenous Law Review* 215.

marriage, not a divorce.<sup>30</sup> The effect of this third condition is to exclude from the definition of treaty any agreement struck between Indigenous peoples and governments that acknowledges their distinct status but fails to recognise a domain of autonomy.

### III TREATY-MAKING INTERNATIONALLY

#### A *The United States*

In the early years of the American republic, questions arose over the management of Native American affairs. A key issue was whether treaty-making with Native Americans was the exclusive responsibility of the federal government, or whether it should also be the responsibility of the states 'who inherited the sovereignty of the British Crown and who were intimately concerned with the Indians on their borders'.<sup>31</sup> The 1777 *Articles of Confederation* were ambiguous on this point,<sup>32</sup> and several states protested against centralised administration. New York, for example, sought to 'counteract and frustrate' federal treaty commissioners seeking to negotiate with the Iroquois at Fort Stanwix in 1784,<sup>33</sup> while Georgia, acting on its own, secured large land cession treaties with unauthorised Creek representatives,<sup>34</sup> sparking hostilities between Creek bands and settlers.<sup>35</sup> Recognising that land acquisition was a 'principal source' of contention with Native Americans and that peaceful

<sup>30</sup> Carole Blackburn, 'Producing Legitimacy: Reconciliation and the Negotiation of Aboriginal Rights in Canada' (2007) 13(3) *Journal of the Royal Anthropological Institute* 621, 627.

<sup>31</sup> Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* (University of California Press, 1994) 36–7; Vine Deloria Jr and Raymond J DeMallie, *Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions, 1775–1979* (University of Oklahoma Press, 1999) vol 1, 14–15; See also David H Getches, Charles F Wilkinson and Robert A Williams Jr, *Cases and Materials on Federal Indian Law* (Thomson West, 5<sup>th</sup> ed, 2005) 60–2.

<sup>32</sup> Prucha (n 31) 38. See *United States Articles of Confederation* art IX.

<sup>33</sup> Barbara Graymont, 'New York State Indian Policy after the Revolution' (1976) 57(4) *New York History* 438, 449, quoting Franklin B Hough, *Proceedings of the Commissioners of Indian Affairs, Appointed by Law for the Extinction of Indian Titles in the State of New York* (Joel Munsell, 1861) vol 2, 63.

<sup>34</sup> See, eg, *Treaty of Augusta*, signed 1 November 1783.

<sup>35</sup> Randolph C Downes, 'Creek–American Relations, 1782–1790' (1937) 21(2) *Georgia Historical Quarterly* 142, 145–6.

relations were essential to the development of the country, the framers of the 1788 *United States Constitution* sought to centralise control.<sup>36</sup>

Three clauses of that document are relevant, though only two specifically refer to Native Americans. Article I § 8 vests Congress with the authority '[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes', while art I § 2 excludes 'Indians not taxed' from the population count of the House of Representatives.<sup>37</sup> Further, under the treaty clause in art II § 2, the President is authorised to make treaties 'with the [a]dvce and [c]onsent of the Senate'. The commerce and apportionment clauses suggest that Native American tribes were understood to be distinct political communities, but the failure to include reference to Native Americans in the treaty clause provoked some doubt over which level of government could negotiate treaties. Consequently, '[t]he 1780s and '90s witnessed a vibrant debate over federalism and relations with Indians'.<sup>38</sup> This was settled through the forceful assertion of federal authority. Although the treaty clause does not refer to Native Americans, President George Washington informed the Senate that he believed such treaties should be considered in the same manner as those negotiated with European nations.<sup>39</sup> After some initial pushback, Washington's position was accepted by the Senate, establishing a clear precedent that would set United States policy: the federal government alone would negotiate treaties.<sup>40</sup> Over the following decades, some 379 treaties were secured in this way.<sup>41</sup>

The US Supreme Court affirmed the distinctive status of Native American political communities and their relationship with the federal and state governments in two cases in the early 19<sup>th</sup> century. Writing for the Court, Chief Justice John Marshall drew on the commerce clause to declare that while Native American tribes were not 'foreign states', neither were they US citizens; they were 'domestic dependent nations' whose relationship with the

<sup>36</sup> Robert N Clinton, 'The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs' (1989) 69(2) *Boston University Law Review* 329, 371.

<sup>37</sup> This language is repeated in the *United States Constitution* § 2 amend XIV.

<sup>38</sup> Gregory Ablavsky, 'Beyond the Indian Commerce Clause' (2015) 124(4) *Yale Law Journal* 1012, 1039–40.

<sup>39</sup> Letter from George Washington to the United States Senate, 17 September 1789 <<https://founders.archives.gov/documents/Washington/05-04-02-0032>>.

<sup>40</sup> Prucha (n 31) 73.

<sup>41</sup> For a collection of these treaties, see Deloria and DeMallie (n 31).

United States ‘resembles that of a ward to [its] guardian’.<sup>42</sup> In signing treaties, Native American tribes did not surrender their inherent sovereignty, or their right to self-government; they remained ‘a distinct community, occupying [their] own territory ... in which the laws of [the states] can have no force’.<sup>43</sup> The commerce clause, his Honour explained, therefore vests authority to deal with Native American nations exclusively in the federal government.<sup>44</sup>

Treaty-making between the United States and Native American tribes officially ceased in 1871, when Congress passed the *Indian Appropriations Act 1871* (‘1871 Act’).<sup>45</sup> This Act declared that the federal government would no longer acknowledge or recognise any ‘Indian nation or tribe within the territory of the United States’ as an ‘independent nation’ and prohibited the federal government from negotiating treaties with such groups.<sup>46</sup> It did, however, preserve the obligations lawfully made and ratified under existing treaties,<sup>47</sup> leaving many promises made prior to 1871 legally binding on the United States today. Scholars have pointed to a confluence of factors for the cessation of treaty-making, including the rise of racist attitudes that contended Native Americans could not understand the process nor its outcomes, as well as a growing cynicism that agreements were abrogated by government at its pleasure.<sup>48</sup> The primary reason is more prosaic, however, and has nothing to do with a ‘change in the status, existence, or powers of Indian governments’;<sup>49</sup> rather, it was a result of political infighting between the organs of the US government.<sup>50</sup>

The treaty clause in art II § 2 excludes the House of Representatives from exercising any positive role in the ratification or supervision of treaties. The President is empowered to make treaties with ‘the [a]dvice and [c]onsent of the Senate’, and a treaty will not be ratified unless ‘two thirds of the Senators present concur’. Article I § 9 of the *United States Constitution* provides, however, that ‘[n]o [m]oney shall be drawn from the Treasury, but in

<sup>42</sup> *Cherokee Nation v Georgia*, 30 US (5 Peters) 1, 17–18 (1831).

<sup>43</sup> *Worcester v Georgia*, 31 US (6 Peters) 515, 520 (1832).

<sup>44</sup> *Ibid.*

<sup>45</sup> 25 USC § 71 (2012) (‘1871 Act’).

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> For discussion of these factors, see Prucha (n 31) ch 12.

<sup>49</sup> Robert J Miller, ‘Treaties between the Eastern Shawnee Tribe and the United States: Contracts between Sovereign Governments’ in Stephen Warren (ed), *The Eastern Shawnee Tribe of Oklahoma: Resilience through Adversity* (University of Oklahoma Press, 2017) 107, 112.

<sup>50</sup> Prucha (n 31) ch 12.

[c]onsequence of [a]ppropriations made by [l]aw'. Consequently, financing for negotiations and settlements, as well as the administration of Native American affairs more generally, must be approved by both houses of Congress. Concern within sections of the House of Representatives that the Senate was agreeing to extravagant treaty settlements, over which the House had no oversight, lead to a fight over the powers of each house.<sup>51</sup> Following several years of impasse, Congress eventually agreed to a compromise. The *1871 Act* did not limit the prerogatives of the President and the Senate to make and ratify treaties, but, as noted above, declared that Native American tribes would no longer be considered independent nations.<sup>52</sup>

The *1871 Act* marked a radical legal shift in the United States government's relations with Native American tribes, but practically, treaty-making continued under different terminology.<sup>53</sup> The *1871 Act* did not obviate the need for political agreements; it simply meant that negotiations with Native American polities would be conducted by the executive and then approved as legislation by Congress as a whole, rather than solely ratified by the Senate.<sup>54</sup> Indeed, some of the agreements struck after 1871 'were a direct continuation of the treaty process' and were perceived as such by both Native Americans and government officials.<sup>55</sup> For instance, Francis Prucha notes that in 1874 the House of Representatives printed a letter from the Secretary of the Interior urging ratification of a settlement with the eastern band of Shoshones in Wyoming under the title "Treaty with the Shoshone and Bannock Indians".<sup>56</sup> The tide was shifting, however, and agreements of this type finally ended in the coterminous United States at the turn of the 20<sup>th</sup> century.

In two key cases in the 1880s and 1900s, the US Supreme Court departed from the earlier Marshall decisions and rewrote Native American relations with the federal government. In *United States v Kagama* ('Kagama'),<sup>57</sup> the Court upheld a statute extending federal criminal jurisdiction for certain

<sup>51</sup> Ibid. See also Deloria and DeMallie (n 31) 233–8; Arthur Spirling, 'US Treaty Making with American Indians: Institutional Change and Relative Power, 1784–1911' (2012) 56(1) *American Journal of Political Science* 84, 87.

<sup>52</sup> Prucha (n 31) 308–10.

<sup>53</sup> Charles F Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* (Yale University Press, 1987) 101.

<sup>54</sup> Miller (n 49) 112.

<sup>55</sup> Prucha (n 31) 313; Deloria and DeMallie (n 31) 249–50.

<sup>56</sup> Prucha (n 31) 316. See also Act of 15 December 1874, ch 2, 18 Stat 291.

<sup>57</sup> 118 US 375 (1886) ('Kagama').

major crimes into Native American reservations.<sup>58</sup> Despite acknowledging that the *United States Constitution* failed to clearly provide for this authority,<sup>59</sup> the Court offered two sources for this implied legislative power. First, because Native American nations were located within the territory of the United States, authority to regulate their affairs must exist somewhere. As earlier decisions had found the states did not possess such jurisdiction, it ‘must exist in the National Government’.<sup>60</sup> Second, drawing on language used in the Marshall cases, the Court characterised Native American tribes as ‘wards of the nation’, dependent on federal government protection.<sup>61</sup> In order to provide this protection, the Court reasoned that the federal government must possess the authority to regulate the internal affairs of Native American communities.<sup>62</sup> This decision was extended several years later. In *Lone Wolf v Hitchcock*, the Court confirmed that Congress had ‘[p]lenary authority’ over Indian affairs, including the power to unilaterally abrogate treaty obligations and appropriate land without Native American consent, arising ‘by reason of its exercise of guardianship’.<sup>63</sup> The Court held further that this power was political and not subject to judicial review.<sup>64</sup> The effect was that negotiations were no longer legally necessary to take Native American land.

Federal Native American policy at the turn of the century was dominated by theories of cultural absorption and practices of assimilation. Following the decision in *Kagama*, Congress enacted the *Dawes Act 1887*,<sup>65</sup> which abolished communal ownership and divided reservations into allotments for individual Native Americans. Any land remaining after allotment was classified as ‘excess’ and sold to non-Indigenous peoples.<sup>66</sup> This law had significant consequences for the Indigenous estate: lands owned by Native Americans decreased from 138 million acres in 1887 to 52 million acres in 1934.<sup>67</sup>

<sup>58</sup> See 18 USC § 1153 (2012).

<sup>59</sup> *Kagama* (n 57) 378–80 (Miller J for the Court).

<sup>60</sup> *Ibid* 380.

<sup>61</sup> *Ibid* 382.

<sup>62</sup> *Ibid* 384. For criticism of this decision see, eg, Philip P Frickey, ‘Domesticating Federal Indian Law’ (1996) 81(1) *Minnesota Law Review* 31, 34–5.

<sup>63</sup> 187 US 553, 565 (White J for the Court) (1903) (*‘Hitchcock’*). See also Walter R Echo-Hawk, *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided* (Fulcrum, 2010) ch 7.

<sup>64</sup> *Hitchcock* (n 63) 565 (White J for the Court).

<sup>65</sup> *Dawes Act 1887*, ch 119, 24 Stat 388.

<sup>66</sup> *Ibid* 388.

<sup>67</sup> Janet A McDonnell, *The Dispossession of the American Indian: 1887–1934* (Indiana University Press, 1991) 121.

Although the Indian New Deal reversed some of these practices and strengthened traditional authority structures,<sup>68</sup> assimilation remained the dominant paradigm. In particular, policies from the mid-1940s sought to dismantle tribal sovereignty and end Native Americans' distinctive relationship with the federal government. Among other elements, Congress passed legislation granting state governments the power to assume jurisdiction over Native American reservations and terminated the legal status of more than 100 tribes.<sup>69</sup> However, termination did not necessarily abrogate treaties that had been negotiated. In *Menominee Tribe of Indians v United States*, the Supreme Court held that treaty obligations would only be nullified with express legislative intent.<sup>70</sup>

The 1960s and '70s saw a reappraisal. Growing appreciation that the policies of termination were morally wrong led to a shift towards 'self-determination',<sup>71</sup> under which the federal government recognised and empowered Native American communities to take a greater role in their own affairs. Limited recognition of tribal authority revived the practice of agreement-making between Native American communities and US governments, and today, tribes 'expect and demand government-to-government relations'.<sup>72</sup> Nonetheless, legal practices from the period of assimilation and absorption have altered the nature of that relationship. As a matter of law, Native American polities 'have a status higher than that of states',<sup>73</sup> and are entitled to an exclusive relationship with the federal government,<sup>74</sup> but a combination of

<sup>68</sup> 25 USC ch 14(V) (2012). See generally Graham D Taylor, *The New Deal and American Indian Tribalism: The Administration of the Indian Reorganization Act, 1934–45* (University of Nebraska Press, 1980).

<sup>69</sup> 18 USC § 1162 (2012); 25 USC §§ 1321–6 (2012); 28 USC § 1360 (2012); HR Con Res 108, 83<sup>rd</sup> Congress 67 Stat B132 (1953); Charles F Wilkinson and Eric R Biggs, 'The Evolution of the Termination Policy' (1977) 5(2) *American Indian Law Review* 139. See generally Donald L Fixico, *Termination and Relocation: Federal Indian Policy, 1945–1960* (University of New Mexico Press, 1986).

<sup>70</sup> 391 US 404, 413 (Douglas J for the Court) (1968).

<sup>71</sup> Richard Nixon, 'Special Message on Indian Affairs' (Speech, United States Congress, 8 July 1970) <<https://www.epa.gov/tribal/president-nixon-special-message-indian-affairs-july-8-1970>>; George Pierre Castile, *To Show Heart: Native American Self-Determination and Federal Indian Policy, 1960–1975* (University of Arizona Press, 1998).

<sup>72</sup> Stephen Cornell and Joseph P Kalt, 'American Indian Self-Determination: The Political Economy of a Successful Policy' (Working Paper, Harvard Kennedy School, November 2010) 3.

<sup>73</sup> *Native American Church v Navajo Tribal Council*, 272 F 2d 131, 132 (10<sup>th</sup> Cir, 1959).

<sup>74</sup> See, eg, William J Clinton, 'Memorandum on Government-to-Government Relations with Native American Tribal Governments' (Presidential Memorandum for the Heads of Executive Departments and Agencies, 29 April 1994). See also *Seminole Tribe of Florida v Florida*,

legal and political factors have changed the status and dynamics of agreements reached with Native Americans. Devolution of federal powers to state governments in areas of Native American affairs under policies of assimilation and termination, US Supreme Court decisions eroding tribal sovereignty,<sup>75</sup> and legislation weakening Indigenous land tenure, as well as the increasing complexity of personal and legal relations in modern society mean that, in practice, agreements are no longer struck solely with the federal government. Tribes across the country have signed thousands of contracts, compacts, memoranda of understanding, and other forms of agreement with state and local governments.

In some cases, intergovernmental agreements are specifically provided for by federal legislation. Under the *Indian Gaming Regulatory Act 1988*, for example, tribes must negotiate compacts with state governments concerning the regulation of casino gambling activities on reservations.<sup>76</sup> In other cases, intergovernmental agreements have been adopted as an alternative to litigation. For instance, although Native American reservations have priority in water rights over non-Indigenous users,<sup>77</sup> they often have little or no capital to construct and develop projects to take advantage of their legal entitlements.<sup>78</sup> A combination of non-Indigenous anxiety over their own weak legal position and Native American desire to secure capital to develop their resources has encouraged the development of negotiated settlements.<sup>79</sup> Since 1978, 36 'Indian water rights settlements' have been federally approved, either by Congress in statutory form or by executive order under the Departments of Justice and the Interior.<sup>80</sup> These settlements are government-to-government

517 US 44, 60 (Rehnquist CJ for the Court) (1996), quoting *County of Oneida v Oneida Indian Nation*, 470 US 226, 234 (Powell J for the Court) (1985).

<sup>75</sup> David E Wilkins, *American Indian Sovereignty and the US Supreme Court: The Masking of Justice* (University of Texas Press, 1997).

<sup>76</sup> 25 USC § 2710(d)(1)(C) (2012).

<sup>77</sup> *Winters v United States*, 207 US 564 (1908); *Arizona v California*, 373 US 546, 600 (Black J for the Court) (1963).

<sup>78</sup> Susan D Brienza, 'Wet Water vs Paper Rights: Indian and Non-Indian Negotiated Settlements and Their Effects' (1992) 11 *Stanford Environmental Law Journal* 151, 160.

<sup>79</sup> Robert T Anderson, 'Indian Water Rights, Practical Reasoning, and Negotiated Settlements' (2010) 98(4) *California Law Review* 1133. McCool questions whether negotiated settlements realise the goals that are ascribed to them: Daniel McCool, 'Intergovernmental Conflict and Indian Water Rights: An Assessment of Negotiated Settlements' (1993) 23(1) *Publius* 85.

<sup>80</sup> Charles V Stern, 'Indian Water Rights Settlements' (Research Report No R44148, Congressional Research Service, 29 March 2019) 6. See, eg, Act of 28 July 1978, Pub L No 95-328, 92 Stat 409; Act of 19 October 1984, Pub L No 98-530, 98 Stat 2698; Act of 24 October 1992,

agreements between tribes and the relevant state or federal government and legally protect Native American rights to water by quantifying their allocation, recognising Native American administrative control over that allocation, authorising the construction and funding of water projects, and providing development economic funds.<sup>81</sup>

These settlements and compacts are important agreements that highlight the shift in Native American relations with federal and state governments in the United States. Drawing on their status as government-to-government agreements, some scholars have characterised them as marking a ‘second treaty era’,<sup>82</sup> or a ‘modern form of treaty’.<sup>83</sup> However, while these agreements may ‘vindicate [Indigenous] sovereignty’,<sup>84</sup> they are not treaties of the form we described in Part II. Although they recognise the status and capacity of Native American political communities to negotiate and execute legal arrangements that secure valuable outcomes, they do not provide or establish institutional arrangements to exercise some form of self-government. In large part, this is because Native American sovereignty and self-government is already recognised in the United States.<sup>85</sup> While they are not treaties, then, they are beneficial, complementary settlements that demonstrate how sovereign Indigenous nations can interact with federal and state governments to realise mutually beneficial goals.

Shifting legal and political circumstances have encouraged the making of subnational agreements to realise mutual objectives, but Congress still retains authority over Native American affairs, and Native American nations continue to assert their distinctive relationship with the federal government. These two factors were critical in ensuring that the federal government was legally responsible for authorising the only modern treaty negotiated in the US. Unlike the coterminous United States, no historic treaties were reached

Pub L No 102-497, 106 Stat 3255; *Ak-Chin Water Use Amendments Act of 2000*, Pub L No 106-285, 114 Stat 878.

<sup>81</sup> Stern (n 80); Daniel McCool, *Native Waters: Contemporary Indian Water Settlements and the Second Treaty Era* (University of Arizona Press, 2002) 8 (‘*Native Waters*’).

<sup>82</sup> McCool, *Native Waters* (n 81) 8.

<sup>83</sup> Robert N Clinton, ‘Treaties with Native Nations: Iconic Historical Relics or Modern Necessity?’ in Suzan Shown Harjo (ed), *Nation to Nation: Treaties between the United States and American Indian Nations* (Smithsonian Books, 2014) 15, 32.

<sup>84</sup> David H Getches, ‘Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding Self-Government’ (1993) 1(1) *Review of Constitutional Studies* 120, 170.

<sup>85</sup> See generally Clifford M Lytle, ‘The Supreme Court, Tribal Sovereignty, and Continuing Problems of State Encroachment into Indian Country’ (1980) 8(1) *American Indian Law Review* 65.

between Native Alaskans and the federal government and very few reservations were established.<sup>86</sup> Owing to Alaska's remoteness, questions concerning Indigenous land rights were largely ignored. The 1867 *Treaty of Cession* by which the United States purchased Alaska from Russia, for instance, did not address Indigenous rights, providing simply that Native Alaskans would be subject to 'such laws and regulations as the United States may ... adopt in regard to aboriginal tribes',<sup>87</sup> while the *Organic Act 1884* ('*Organic Act*'), which instituted civil government in the territory, reserved decisions over land rights to future congressional legislation.<sup>88</sup>

Alaska achieved statehood in 1959, but Indigenous land claims were still not settled. Continuing the 'wait-and-see attitude',<sup>89</sup> the *Alaska Statehood Act 1958* ('*Alaska Statehood Act*') authorised the new state to select around 416,800 km<sup>2</sup> of federally controlled public territory,<sup>90</sup> but required it to 'forever disclaim' lands 'which may be held by any Indians, Eskimos, or Aleuts'.<sup>91</sup> Because Native Alaskan lands had not been delineated, this provision caused significant complications; Native Alaskans and the state both claimed title to the same land, and by 1966 Secretary of the Interior, Stewart Udall, was compelled to freeze land conveyances within Alaska to protect Indigenous claims.<sup>92</sup> Discovery of the largest petroleum deposit in North America at Prudhoe Bay the following year increased pressure on the land question.<sup>93</sup> Following several years of negotiations between Native Alaskans, industry representatives, and the state and federal governments, agreement

<sup>86</sup> *United States v Atlantic Richfield Co*, 435 F Supp 1009, 1015 (Fitzgerald DJ) (D Alaska, 1977).

<sup>87</sup> *Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America*, signed 30 March 1867 (entered into force 20 June 1867) art 3 ('*Treaty of Cession*').

<sup>88</sup> *Organic Act 1884*, ch 53, 23 Stat 24 ('*Organic Act*').

<sup>89</sup> Monica E Thomas, 'The Alaska Native Claims Settlement Act: Conflict and Controversy' (1986) 23(142) *Polar Record* 27, 28.

<sup>90</sup> *Alaska Statehood Act 1958*, Pub L No 85-508 § 6, 72 Stat 339, 340 ('*Alaska Statehood Act*'); Alastair Campbell and Kirk Cameron, 'Constitutional Development and Natural Resources in the North' in Dawn Alexandra Berry, Nigel Bowles and Halbert Jones (eds), *Governing the North American Arctic: Sovereignty, Security, and Institutions* (Palgrave Macmillan, 2016) 180, 182.

<sup>91</sup> *Alaska Statehood Act* (n 90) 339.

<sup>92</sup> Letter from Stewart Udall to Walter Hickel, 10 August 1967, quoted in *Alaska Native Land Claims, Hearings before the Committee on Interior and Insular Affairs United States Senate on S. 2906*, 90<sup>th</sup> Cong. 319 (1968) (prepared statement of Frederick Paul, Attorney for Arctic Slope Native Association); *Alaska v Udall*, 420 F 2d 938 (9<sup>th</sup> Cir, 1969).

<sup>93</sup> Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (WW Norton, 2005) 234.

was finally reached. In exchange for extinguishing their claims and hunting and fishing rights, Native Alaskans obtained title to about 42 million hectares (approximately 11% of the state) and received \$962.5 million in cash payments.<sup>94</sup> Alaskan state government interests were represented during the negotiations, but the *Organic Act* vested authority for determining Indigenous land rights in Congress,<sup>95</sup> meaning that the federal government was legally responsible for the settlement. The *Alaska Native Claims Settlement Act 1971* ('*Alaska Native Claims Act*')<sup>96</sup> was enacted by Congress and signed into law by President Nixon on 18 December 1971.<sup>97</sup> No equivalent legislation was passed by Alaska.

The *Alaska Native Claims Act* satisfies our definition of a treaty. First, it recognises Native Alaskans as distinctive political communities, based on their status as prior self-governing communities. Second, although the terms of the settlement were largely adopted through congressional hearings,<sup>98</sup> the structure of those hearings amounted to a form of negotiation in allowing important information and perspectives to be brought to the decision-making process. Legally, Native Alaskans did not have an ultimate vote on the settlement, but the legislation was not ratified without their support.<sup>99</sup>

Finally, both Native Alaskans and non-Indigenous peoples accepted a series of mutual obligations and responsibilities in an effort to resolve competing demands and secure the foundations for a positive relationship. Native Alaskans agreed to withdraw their claims in exchange for a package of benefits, including land and financial compensation.<sup>100</sup> Although that package is silent on the issue of self-governance rights, it does not abrogate Native Alaskans' inherent sovereignty,<sup>101</sup> and it was assumed that those powers

<sup>94</sup> 43 USC § 1605(a) (2012).

<sup>95</sup> *Organic Act* (n 88) §§ 8, 26.

<sup>96</sup> 43 USC §§ 1601–29h (2012) ('*Alaska Native Claims Act*').

<sup>97</sup> Alastair Campbell, 'The Alaska and Canadian Land Claim Settlements' in Terry Fenge and Jim Aldridge (eds), *Keeping Promises: The Royal Proclamation of 1763, Aboriginal Rights, and Treaties in Canada* (McGill-Queens' University Press, 2015) 178–9.

<sup>98</sup> See, eg, *Alaska Native Land Claims Settlement Act: Hearings before the Committee on Interior and Insular Affairs United States Senate on S 2906*, 90<sup>th</sup> Cong. (1968); *Alaska Native Land Claims, Hearings before the Subcommittee on Indian Affairs of the Comm. on Interior and Insular Affairs House of Representatives on HR 13142, HR 10193 and HR 14212*, 91<sup>st</sup> Cong. (1969).

<sup>99</sup> Thomas (n 89) 29.

<sup>100</sup> 43 USC §§ 1603, 1605 (2012).

<sup>101</sup> *Santa Clara Pueblo v Martinez*, 436 US 49, 72 (Marshall J for the Court) (1978). For a more recent affirmation of this, see *Michigan v Bay Mills Indian Community*, 572 US 782 (2014),

continued to exist.<sup>102</sup> Indeed, in implicit recognition of their inherent sovereignty, the agreement empowers Native Alaskans to exercise decision-making and control that amounts to a form of self-government through the establishment of 225 for-profit village corporations and 13 regional corporations.<sup>103</sup> Supplementary legislation and amendments to the settlement have further enhanced rights to self-government,<sup>104</sup> and demonstrated that a just relationship requires an ‘ongoing process of engagement and discussion’.<sup>105</sup> Nonetheless, the absence of explicit recognition of self-governance rights has been problematic; while the Alaska Supreme Court has determined that tribes continue to exercise decision-making authority over members and non-members subject to their jurisdiction,<sup>106</sup> the US Supreme Court has limited Native Alaskan self-governance in some areas.<sup>107</sup>

### B Canada

In the early years of settlement in Canada, agents of the Imperial Crown were solely responsible for negotiating agreements with First Nations. This approach recognised that disputes with Indigenous communities would challenge peaceful trade and orderly settlement, so sought to preclude local governments and settlers from dealing with Indigenous land.<sup>108</sup> Legally, this

where it was said that ‘courts will not lightly assume that Congress in fact intends to undermine Indian self-government’: at 790 (Kagan J for the Court).

<sup>102</sup> Robert T Anderson, ‘Sovereignty and Subsistence: Native Self-Government and Rights to Hunt, Fish, and Gather after ANCSA’ (2016) 33(2) *Alaska Law Review* 188, 219. Broader recognition of self-governance rights in the US distinguishes the *Alaska Native Claims Act* (n 96) from native title in Australia, where courts have not recognised self-government: see Hobbs and Williams (n 4) 27.

<sup>103</sup> 43 USC §§ 1606, 1607 (2012).

<sup>104</sup> See, eg, 16 USC §§ 3101–233 (2012). See also Thomas A Morehouse, ‘Sovereignty, Tribal Government, and the Alaska Native Claims Settlement Act Amendments of 1987’ (1989) 25(154) *Polar Record* 197.

<sup>105</sup> Brian Egan, ‘Resolving “the Indian Land Question”? Racial Rule and Reconciliation in British Columbia’ in Andrew Baldwin, Laura Cameron and Audrey Kobayashi (eds), *Rethinking the Great White North: Race, Nature, and the Historical Geographies of Whiteness in Canada* (UBC Press, 2011) 211, 226.

<sup>106</sup> See, eg, *John v Baker*, 982 P 2d 738 (Alaska, 1999); *Simmonds v Parks*, 329 P 2d 995 (Alaska, 2014).

<sup>107</sup> See, eg, *Alaska v Native Village of Venetie Tribal Government*, 522 US 520, 526–34 (Thomas J for the Court) (1998).

<sup>108</sup> See John Borrows, ‘Canada’s Colonial Constitution’ in John Borrows and Michael Coyle (eds), *The Right Relationship: Reimagining the Implementation of Historical Treaties* (University of Toronto Press, 2017) 17, 22–3 (‘Canada’s Colonial Constitution’).

was confirmed in the *Royal Proclamation of October 7, 1763* and the *1764 Treaty of Niagara*, where the Crown pledged to prevent colonial governments from ‘molest[ing]’ and ‘disturb[ing]’ First Nations.<sup>109</sup> At confederation in 1867, the nation-to-nation framework was entrenched; authority for negotiating treaties with Indigenous peoples fell to the Canadian government rather than the provinces. Section 91(24) of the *British North America Act 1867* (*‘British North America Act’*) empowered the new Canadian Parliament with exclusive legislative authority in respect of ‘Indians, and [l]ands reserved for the Indians’.<sup>110</sup> Relying on this power, the government signed and ratified 11 treaties with First Nations peoples to pursue settlement, agriculture, and resource development between 1871 and 1921.<sup>111</sup>

The federal government refused to enter into further treaties after this date, but a change in policy was forced by the Canadian Supreme Court’s 1973 decision in *Calder v Attorney-General of British Columbia* (*‘Calder’*),<sup>112</sup> which found that Aboriginal title remained part of Canadian law.<sup>113</sup> By this stage, however, comprehensive land claims agreements — or modern treaties — would need to include the provinces as a party to any negotiation.<sup>114</sup> From the late 19<sup>th</sup> century, a series of judicial decisions, legislative incorporation of provincial laws, and a consequent ‘increase in activities between First Nations and provincial governments’<sup>115</sup> led to the provinces taking a greater role in First Nations affairs. This shift has occurred even though the division of constitutional powers between the federal and provincial governments was retained under the *Canada Act 1982* (UK) c 11, sch B (*‘Constitution Act*

<sup>109</sup> *The Royal Proclamation of October 7, 1763*, reproduced in RSC 1985, app II. See generally John Borrows, ‘Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government’ in Michael Asch (ed), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (UBC Press, 1997) 155.

<sup>110</sup> *British North America Act 1867* (UK) 30 Vict, c 3, s 91(24) (emphasis omitted) (*‘British North America Act’*).

<sup>111</sup> Historica Canada, *Canadian Encyclopedia* (online at 28 April 2019) ‘Numbered Treaties’ <<https://www.thecanadianencyclopedia.ca/en/article/numbered-treaties>>.

<sup>112</sup> [1973] SCR 313 (*‘Calder’*).

<sup>113</sup> *Ibid* 314.

<sup>114</sup> See Historica Canada, *Canadian Encyclopedia* (online at 7 April 2019) ‘Comprehensive Land Claims: Modern Treaties’ <<https://www.thecanadianencyclopedia.ca/en/article/comprehensive-land-claims-modern-treaties>>.

<sup>115</sup> Gordon E Hannon, ‘The Divided Indivisible Crown: A Provincial Perspective on Treaty Rights’ (Conference Paper, Canadian Bar Association National Aboriginal Law Conference, April 2011) 2.

1982’),<sup>116</sup> thereby guaranteeing First Nations peoples a distinct relationship with the federal government akin to that in the United States.

Canada’s constitutional arrangements provide that exclusive legislative authority over ‘Indians, and [l]ands reserved for the Indians’ lies with the federal government.<sup>117</sup> However, an early dispute arose over which level of government obtained the beneficial interest of land surrendered under treaty. Section 109 of the *British North America Act* provides that ‘all [l]ands ... belonging to the several [p]rovinces of Canada ... at the [u]nion ... shall belong to the several [p]rovinces’, while s 92(5) grants exclusive legislative authority to the provinces over the management and sale of provincial Crown lands. Drawing on s 109, the Judicial Committee of the Privy Council held in *St Catherine’s Milling and Lumber Co v The Queen* (*‘St Catherine’s Milling’*) that while the federal Crown may enter treaties, the beneficial interest of any land obtained under settlement flows to the relevant province, not the federal government.<sup>118</sup> In reaching this decision, the Privy Council confirmed that although First Nations negotiated with and ceded territory to the central government, legally, ‘from beginning to end’ treaties were ‘a transaction between the Indians and the Crown’,<sup>119</sup> ‘not an agreement between the Government of Canada and the Ojibway people.’<sup>120</sup>

*St Catherine’s Milling* has had significant consequences for First Nations–provincial relations. The decision divided the Crown into constituent parts, vastly reducing the scope of federal authority under s 91(24) by leaving it applicable only on lands subject to Aboriginal title or reserves.<sup>121</sup> This is not a large quantum: only 4% of Crown land in the provinces is federally controlled in the form of Indian reserves, national parks, or defence force bases.<sup>122</sup> The remaining surrendered land, or land never subject to treaty — including approximately 94% of British Columbia — is legally administered by the

<sup>116</sup> *Canada Act 1982* (UK) c 11, sch B (*‘Constitution Act 1982’*).

<sup>117</sup> *Constitution Act 1867* (Imp), 30 & 31 Vict, c 3, s 91(24).

<sup>118</sup> (1888) 14 App Cas 46, 57–8 (Lord Watson for the Court) (*‘St Catherine’s Milling’*).

<sup>119</sup> Ibid 60 (Lord Watson for the Court). See also *Grassy Narrows First Nation v Ontario (Natural Resources)* [2014] 2 SCR 447, 454 [4] (McLachlin CJ for the Court) (*‘Grassy Narrows First Nation’*).

<sup>120</sup> *Grassy Narrows First Nation* (n 119) 463 [33] (McLachlin CJ for the Court), citing *St Catherine’s Milling* (n 118) 60 (Lord Watson for the Court). Cf *Keewatin v Minister of Natural Resources* [2012] 1 CNLR 13, 215 [888] (Sanderson JJ).

<sup>121</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1116–18 [173]–[176] (Lamer CJ for Lamer CJ, Cory and Major JJ) (*‘Delgamuukw’*).

<sup>122</sup> Historica Canada, *Canadian Encyclopedia* (online at 7 April 2019) ‘Crown Land’, <<https://www.thecanadianencyclopedia.ca/en/article/crown-land/>>.

provinces.<sup>123</sup> As John Borrows notes, the decision therefore ‘eroded the promises of the Proclamation and Treaty of Niagara’, and allowed the provincial governments to grow in strength.<sup>124</sup>

Canada’s allocation of constitutional powers has caused other complications for First Nations’ relationships with federal and provincial governments. One key issue, resolution of which has greatly enhanced the scope of provincial authority over First Nations, concerned whether a provincial government possessed legislative authority over reserves. The Canadian Supreme Court considered this question in *Cardinal v Attorney-General (Alberta)* (*‘Cardinal’*).<sup>125</sup> In 1970, First Nations man Charlie Cardinal was charged with unlawful trafficking in big game for selling a piece of moose meat to a non-Indian at his home on an Indian reserve in Alberta, contrary to s 37 of the *Alberta Wildlife Act*.<sup>126</sup> There was no dispute over the facts; the question was whether the Alberta legislation was invalid by virtue of s 91(24). By 6:3, the Court held that the law was valid, finding that although provincial parliaments had no legislative authority in relation to Indians or Indian reserves, reserves were not ‘enclaves within a Province within the boundaries of which Provincial legislation could have no application.’<sup>127</sup> Rather:

Section 91(24) does not purport to define areas within a province within which the power of a province to enact legislation, otherwise within its powers, is to be excluded. Section 37 of the *Wildlife Act* does not relate to Indians, *qua* Indians, and is applicable to all Indians, including those on Reserves.<sup>128</sup>

*Cardinal* has been affirmed and extended. In *Kruger v The Queen* (*‘Kruger’*),<sup>129</sup> two Penticton First Nations people appealed their convictions for violating the British Columbia *Wildlife Act*<sup>130</sup> by killing deer on their traditional lands (legally, unoccupied Crown lands) outside hunting season. In a unanimous decision the Canadian Supreme Court upheld their convictions, holding that because the *Wildlife Act* applied uniformly throughout the territory, and was

<sup>123</sup> Ministry of Forests, Lands and Natural Resource Operations (BC), *Crown Land* (Indicators and Statistics Report, 2011) 12–13.

<sup>124</sup> Borrows, ‘Canada’s Colonial Constitution’ (n 108) 24.

<sup>125</sup> [1974] SCR 695 (*‘Cardinal’*).

<sup>126</sup> *Wildlife Act* Alta Reg 143/97, s 37.

<sup>127</sup> *Cardinal* (n 125) 703 (Martland J for Fauteux CJ, Abbott, Martland, Judson, Ritchie and Pigeon JJ).

<sup>128</sup> Ibid 696 (emphasis in original).

<sup>129</sup> [1978] 1 SCR 104 (*‘Kruger’*).

<sup>130</sup> *Wildlife Act*, RSBC 1996, c 488.

not ‘in relation to’ First Nations people, it was a law of general application.<sup>131</sup> In reaching this decision, the Court explained that ‘the fact that a law may have graver consequence to one person than to another does not, on that account alone, make the law other than of general application. There are few laws which have a uniform impact.’<sup>132</sup> Several years later in *Dick v The Queen* (‘*Dick*’),<sup>133</sup> the Court went further, declaring that to demonstrate a provincial enactment is not a law of general application requires proving that the ‘intent, purpose or policy of the legislation was to impair the status or capacities of a particular group’;<sup>134</sup> the effect of a particular law is only evidence of intent.<sup>135</sup>

In *Delgamuukw v British Columbia*,<sup>136</sup> the Canadian Supreme Court took stock of the jurisprudence and established several key points. The Court confirmed that, as found in *Cardinal*, *Kruger*, and *Dick*, provincial laws of general application apply of their own force and effect to First Nations and their lands, notwithstanding s 91(24).<sup>137</sup> Nonetheless, s 91(24) ‘protects a “core” of Indianness from provincial intrusion, through the doctrine of interjurisdictional immunity.’<sup>138</sup> As such, provincial laws that single out Indians as Indians are invalid as intruding on federal jurisdiction.<sup>139</sup> The Court also noted, however, that legislation has extended provincial authority over First Nations. Section 88 of the federal *Indian Act* referentially incorporates ‘provincial laws of general application which cannot apply to Indians and Indian lands because they touch on the Indianness at the core of s 91(24).’<sup>140</sup> As the Court explained:

[A] provincial law which regulated hunting may very well touch on this core. Although such a law would not apply to [A]boriginal people [by its own force],

<sup>131</sup> *Kruger* (n 129) 110 (Dickson J for the Court).

<sup>132</sup> *Ibid.*

<sup>133</sup> [1985] 2 SCR 309 (‘*Dick*’).

<sup>134</sup> *Ibid.* 310.

<sup>135</sup> *Ibid.* 323–4 (Beetz J for the Court).

<sup>136</sup> *Delgamuukw* (n 121).

<sup>137</sup> *Delgamuukw* (n 121) 1119–20 [179] (Lamer CJ for Lamer CJ, Cory and Major JJ).

<sup>138</sup> *Ibid.* 1119 [177] (Lamer CJ for Lamer CJ, Cory and Major JJ).

<sup>139</sup> *R v Sutherland* [1980] 2 SCR 451.

<sup>140</sup> *Delgamuukw* (n 121) 1122 [182] (Lamer CJ for Lamer CJ, Cory and Major JJ). See *Indian Act*, RSC 1985, c I-5, s 88; Kerry Wilkins, ‘Still Crazy after All These Years: Section 88 of the *Indian Act* at Fifty’ (2000) 38(2) *Alberta Law Review* 458. See also *Dick* (n 133).

it would still apply through s 88 of the *Indian Act*, being a law of general application.<sup>141</sup>

Accordingly, while the provinces have no express power to enact legislation in relation to First Nations people or reserves, laws of general application may be incorporated as federal law and apply to First Nations people, even if that law would otherwise be invalid.

Extension of provincial authority has continued. In *Canadian Western Bank v Alberta*,<sup>142</sup> the Canadian Supreme Court reassessed the constitutional doctrine of interjurisdictional immunity. Holding that the doctrine ‘must facilitate, not undermine ... “co-operative federalism”’,<sup>143</sup> the Court explained that judges ‘should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government’.<sup>144</sup> In *Tsilhqot’in Nation v British Columbia*,<sup>145</sup> the Canadian Supreme Court drew on this to greatly reduce the scope of the doctrine in First Nations matters. In a unanimous decision, the Court found that provincial legislation of general application does not just apply to reservations, but also to land held under Aboriginal title.<sup>146</sup>

Judicial decisions and the incorporation of provincial legislation have increased the scope of provincial activity on First Nations lands since 1867. When the Canadian Supreme Court recognised in *Calder* that Aboriginal title was part of Canadian law, and the federal government announced that it would negotiate comprehensive settlements with First Nations representatives,<sup>147</sup> it was clear that the provinces would have to play a substantial role in any process. Indeed, early treaty negotiations arose immediately from disputes over provincial activities. The *James Bay and Northern Quebec Agreement*, for

<sup>141</sup> *Delgamuukw* (n 121) 1122 [182] (Lamer CJ for Lamer CJ, Cory and Major JJ).

<sup>142</sup> [2007] 2 SCR 3.

<sup>143</sup> *Ibid* 26 [24] (Binnie and LeBel JJ for McLachlin CJ and Binnie, LeBel, Fish, Abella and Charron JJ).

<sup>144</sup> *Ibid* 33 [37] (Binnie and LeBel JJ for McLachlin CJ and Binnie, LeBel, Fish, Abella and Charron JJ) (emphasis in original).

<sup>145</sup> [2014] 2 SCR 257 (*‘Tsilhqot’in Nation’*).

<sup>146</sup> *Ibid* 302 [101] (McLachlin CJ for the Court). This is subject to the infringement test set out under s 35 of the *Constitution Act 1982* (n 116): *Tsilhqot’in Nation* (n 145) 318–19 [150]–[151] (McLachlin CJ for the Court), citing *Sparrow v The Queen* [1990] 1 SCR 1075 (*‘Sparrow’*).

<sup>147</sup> Jean Chrétien, Department of Indian Affairs and Northern Development, ‘Claims of Indian and Inuit People’ (Statement, 8 August 1973), cited in Lisa Palmer and Maureen Tehan, ‘Shared Citizenship and Self-Government in Canada: A Case Study of James Bay and Nunavik (Northern Quebec)’ in Marcia Langton et al (eds), *Settling with Indigenous People: Modern Treaty and Agreement-Making* (Federation Press, 2006) 19, 23.

instance, emerged out of a dispute over the construction of an extensive hydroelectric scheme in Northern Quebec, and settlement was eventually reached between representatives of the Cree and Inuit peoples, and Canadian and Quebec governments.<sup>148</sup> Similarly, in British Columbia, treaty processes were catalysed by First Nation challenges to logging and resource extraction,<sup>149</sup> activities regulated by the provincial government.

Since 1973, 26 comprehensive land claims and four self-government agreements between First Nations and federal and provincial governments have been negotiated and signed, and around 100 more modern treaties are at various stages of negotiation.<sup>150</sup> These treaties cover a significant area of Canada, stretching from British Columbia and Yukon in the west, to Nunavut in the north-east. Each treaty is specific to the particular First Nation, as well as to place, history and circumstance, but they all share a number of common elements relating to land ownership, resources, cultural heritage, financial compensation and reparations, and self-governance.<sup>151</sup> Although several alternative approaches to treaty-making have developed, each obtains legal force through the same procedure. The settlement must be approved by the relevant First Nation and is enacted as legislation by both the relevant provincial and federal parliaments.<sup>152</sup> The same process was adopted for treaties in the Yukon Territory.<sup>153</sup> On the other hand, while the *Nunavut Land Claims Agreement*<sup>154</sup> was negotiated with the Canadian and Northwest

<sup>148</sup> *James Bay and Northern Quebec Agreement* (signed and entered into force 11 November 1975).

<sup>149</sup> Christopher McKee, *Treaty Talks in British Columbia: Building a New Relationship* (UBC Press, 3<sup>rd</sup> ed, 2009) 26–32. See, eg, *MacMillan Bloedel Ltd v Mullin* [1985] 3 WWR 577 (BC Supreme Court).

<sup>150</sup> ‘Comprehensive Claims’, *Government of Canada* (Web Page, 13 July 2015) <<http://www.aadnc-aandc.gc.ca/eng/1100100030577/1100100030578>>.

<sup>151</sup> In relation to the process in British Columbia, see Christina Godlewska and Jeremy Webber, ‘The *Calder* Decision, Aboriginal Title, Treaties, and the Nisga’a’ in Hamar Foster, Heather Raven and Jeremy Webber (eds), *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (UBC Press, 2007) 1, 17–18.

<sup>152</sup> See, eg, *Nisga’a Final Agreement*, signed 4 May 1999 (entered into force 11 May 2000); *Nisga’a Final Agreement Act*, SBC 1999, c 2; *Nisga’a Final Agreement Act*, SC 2000, c 7.

<sup>153</sup> See, eg, *Umbrella Final Agreement* (signed and entered into force 29 May 1993) c 2; *Yukon First Nations Land Claims Settlement Act*, SC 1994, c 34; *Act Approving Yukon Land Claim Final Agreements*, RSY 2002, c 240.

<sup>154</sup> *Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada* (signed and entered into force 25 May 1993) (*‘Nunavut Land Claims Agreement’*).

Territories governments, only the Canadian Parliament passed enabling legislation.<sup>155</sup>

#### IV TREATY-MAKING IN AUSTRALIA

In Australia, no treaties were signed at first contact or in the early years of settlement,<sup>156</sup> as formally there was no legal recognition that Indigenous communities were sovereign entities.<sup>157</sup> This reflected the views of the time. Early colonial governments did not consider the interests of Aboriginal and Torres Strait Islander peoples, expecting that they would be exterminated by the progress of civilisation.<sup>158</sup> This was understood as a two-stage process: ‘people of full descent would soon “die out”’ and Aboriginality ‘would disappear altogether through biological absorption’.<sup>159</sup> This ‘dying race’<sup>160</sup> theory is one explanation for why the drafters of the *Australian Constitution* adopted a markedly distinct approach to the allocation of legislative authority over Indigenous affairs to the United States and Canada.

The *Australian Constitution* divides responsibilities between the several states and the federal government, with the powers of the Commonwealth Parliament enumerated in ss 51 and 52. As initially drafted, s 51(xxvi) empowered the Parliament to make laws with respect to ‘[t]he people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws’, leaving responsibility for Indigenous affairs entirely in the hands of the states.<sup>161</sup> This clause excluding Indigenous peoples from the Commonwealth’s domain was not a subject of debate during the *Australian Constitution*’s drafting.<sup>162</sup> In addition, s 127 prohibited the count-

<sup>155</sup> *Nunavut Act*, SC 1993, c 28; *Nunavut Land Claims Agreement Act*, SC 1993, c 29.

<sup>156</sup> See generally Brennan et al (n 24) 12–13; Hobbs and Williams (n 4) 22–3.

<sup>157</sup> Bradford W Morse, ‘Indigenous–Settler Treaty Making in Canada’ in Marcia Langton et al (eds), *Honour among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 50, 50.

<sup>158</sup> Russell McGregor, *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory, 1880–1939* (Melbourne University Press, 1997) 14–18.

<sup>159</sup> Katherine Ellinghaus, ‘Absorbing the “Aboriginal Problem”: Controlling Interracial Marriage in Australia in the Late 19<sup>th</sup> and Early 20<sup>th</sup> Centuries’ (2003) 27 *Aboriginal History* 183, 186.

<sup>160</sup> CD Rowley, *The Destruction of Aboriginal Society: Aboriginal Policy and Practice* (Australian National University Press, 1970) vol 1, 104.

<sup>161</sup> *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 9 item 51(xxvi).

<sup>162</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 3 April 1891, 701–4; *Official Report of the National Australasian Convention Debates*, Adelaide, 17, 19 April 1897, 830–1; *Official Report of the National Australasian Convention Debates*, Melbourne, 27–8

ing of Aboriginal people in ‘reckoning the numbers of the people of the Commonwealth’. This prevented Aboriginal people from being counted in determining representation in the new national Parliament.

Unlike in the United States and Canada, Indigenous peoples were viewed as the concern of the new states. Consequently, the federal government’s only involvement in Indigenous affairs was in the Northern Territory and the Australian Capital Territory through the territories power in s 122. This changed in 1967, when the Australian public voted in a referendum to amend the *Australian Constitution* to include Indigenous Australians in determinations of population, and to empower the federal Parliament to legislate specifically for Indigenous peoples.<sup>163</sup> Even then, unlike in Canada and the United States, there was no suggestion of exclusive federal power. Instead, the effect of the amendment was to retain state legislative power, while also conferring such power on the Commonwealth.<sup>164</sup> As a result, the Australian state and national Parliaments hold concurrent power in this area, including over legislation to give effect to treaties with Aboriginal and Torres Strait Islander peoples.

Reflecting Galarrwuy Yunupingu’s position expressed in the quote at the start of this article, Aboriginal and Torres Strait Islander aspirations for treaty-making have long centred on the federal government. In 1979, for instance, the National Aboriginal Conference, an elected Indigenous body advising the federal government, passed a resolution calling for a ‘Makarrata’ between ‘the Aboriginal nation and the Australian government’.<sup>165</sup> In 1983, the Senate Standing Committee on Constitutional and Legal Affairs of the Australian Parliament delivered a report on the idea of a treaty, recommending constitutional change in order to implement a ‘compact’.<sup>166</sup> Similarly, in 1988, Prime Minister Bob Hawke adopted the *Barunga Statement*, promising to negotiate a treaty to respect and recognise Aboriginal sovereignty within the term of the Parliament.<sup>167</sup> No treaty eventuated, however, and the idea was quietly shelved

January 1898, 227–44, 245–56. See also John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Australian Book Company, 1901) 622.

<sup>163</sup> *Constitution Alteration (Aboriginals) Act 1967* (Cth).

<sup>164</sup> In the event of conflict between federal and state laws, s 109 of the *Australian Constitution* renders state laws invalid to the extent of the inconsistency.

<sup>165</sup> Julie Fenley, ‘The National Aboriginal Conference and the Makarrata: Sovereignty and Treaty Discussions, 1979–1981’ (2011) 42(3) *Australian Historical Studies* 372, 372.

<sup>166</sup> Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Two Hundred Years Later: The Feasibility of a Compact or ‘Makarrata’ between the Commonwealth and Aboriginal People* (Report, 1983) xii item 1.

<sup>167</sup> Bob Hawke (Speech, Barunga Sports and Cultural Festival, 12 June 1988).

in 1991.<sup>168</sup> Calls for a national treaty by the Council for Aboriginal Reconciliation and the Aboriginal and Torres Strait Islander Commission ('ATSIC') in the new millennium also fell on deaf ears.<sup>169</sup>

In recent years, the treaty debate has increasingly included state and territory governments. In the 2017 Uluru Statement from the Heart ('Uluru Statement'), around 250 Aboriginal and Torres Strait Islander delegates from across Australia called for the establishment of a national Makarrata Commission to 'supervise a process of agreement-making between *governments* and First Nations',<sup>170</sup> implying treaties at both the state and national level. Although the federal government has so far ignored the push for a Makarrata Commission, over the last three years Victoria,<sup>171</sup> the Northern Territory,<sup>172</sup> Queensland,<sup>173</sup> and South Australia<sup>174</sup> have officially committed to enter treaty negotiations with Aboriginal peoples.

Reflecting the political nature of these agreements, however, the situation is complex and subject to change. In June 2018, for instance, a newly elected South Australian government formally abandoned the treaty process.<sup>175</sup> Notwithstanding this step backwards, political leaders in several other states have indicated that they support treaty. For instance, the New South Wales Labor opposition had promised to hold treaty talks with Aboriginal nations

<sup>168</sup> See Alice Petrie and Michael Graham, 'Treaty Discussions in Australia: An Overview' (Research Paper No 4, Parliamentary Library and Information Service, Parliament of Victoria, May 2018) 3–4.

<sup>169</sup> *Reconciliation: Australia's Challenge* (Final Report, Council for Aboriginal Reconciliation, December 2000) ch 10 item 6; Aboriginal and Torres Strait Islander Commission and Australian Institute of Aboriginal and Torres Strait Islander Studies (eds), *Treaty: Let's Get It Right!* (Aboriginal Studies Press, 2003).

<sup>170</sup> Referendum Council, 'Uluru Statement from the Heart' (Statement, First Nations National Constitution Convention, 26 May 2017) (emphasis added) ('Uluru Statement'). The Uluru Statement also called for a national representative Indigenous body empowered to advise Parliament on laws that affect Indigenous peoples, as well as a process of local and regional truth-telling.

<sup>171</sup> *Victorian Treaty Process Act* (n 9).

<sup>172</sup> *Barunga Agreement* (n 10).

<sup>173</sup> Annastacia Palaszczuk, Jackie Trad and Leeanne Enoch, 'Historic Signing of "Tracks to Treaty" Commitment' (Media Release, 14 July 2019).

<sup>174</sup> Kyam Maher, 'Treaty Speech' (Speech, Parliament House, Adelaide, 14 December 2016); Roger Thomas, Office of the Treaty Commissioner, *Talking Treaty: Summary of Engagements and Next Steps* (Report, 21 July 2017).

<sup>175</sup> Owen (n 12).

within the state if it had won the 2019 state election.<sup>176</sup> The Tasmanian Labor opposition made a similar promise, though it failed to secure election in 2018.<sup>177</sup> Treaties are not the sole province of Labor governments. As we have argued previously and this part will outline, the size and scope of a recent agreement signed between the Noongar people and the Liberal Western Australian government reveal it as Australia's first treaty.<sup>178</sup> Its implementation, however, indicates some of the challenges of treaty-making in federations.

### A Western Australia

In 2015, the Western Australian Liberal government signed the largest and most comprehensive agreement to settle Aboriginal interests in land in Australian history with the Noongar people.<sup>179</sup> Involving 30,000 Noongar people, the settlement covers around 200,000 km<sup>2</sup> and 'includes agreement on rights, obligations and opportunities relating to land, resources, governance, finance, and cultural heritage', amounting to a total value of about \$1.3 billion.<sup>180</sup> In exchange for this package, the Noongar people have agreed to surrender all current and future claims relating to historic and contemporary dispossession.<sup>181</sup>

Conducted under the framework of the *Native Title Act 1993* (Cth) ('*Native Title Act*'), the *Noongar Treaty* takes the form of six Indigenous Land Use Agreements ('ILUA').<sup>182</sup> Although not reached under a specific treaty process, the settlement's size and scope indicate that it is Australia's first treaty. It recognises the Noongar people as a distinct political community, was reached via a process of political negotiation respectful of each party's equality of standing, and settles Noongar and non-Indigenous claims by recognising and establishing a limited form of self-governance as well as providing financing

<sup>176</sup> Calla Wahlquist, 'NSW Labor Plans to Sign Treaty Recognising Indigenous Ownership', *The Guardian* (online, 25 January 2018) <<https://www.theguardian.com/australia-news/2018/jan/25/nsw-labor-plans-to-sign-treaty-recognising-indigenous-ownership>>.

<sup>177</sup> Matthew Denholm, 'Tasmanian Labor Promises Aboriginal Treaty Talks', *The Australian* (online, 1 June 2017) <<http://perma.cc/4F4P-T67U>>.

<sup>178</sup> Hobbs and Williams (n 4) 1. Cf Hannah McGlade, 'The *McGlade* Case: A Noongar History of Land, Social Justice and Activism' (2017) 43(2) *Australian Feminist Law Journal* 185, 210.

<sup>179</sup> Gian De Poloni, 'WA Premier Signs \$1.3 Billion Noongar Native Title Settlement', *ABC News* (Web Page, 8 June 2015) <<http://perma.cc/B3SJ-KULX>>.

<sup>180</sup> Hobbs and Williams (n 4) 31.

<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid* 30.

for the autonomous operation of that administration.<sup>183</sup> It is important to acknowledge that the *Noongar Treaty* does not recognise self-government rights to the same extent as modern treaties in Canada. By formalising mechanisms of self-governance, however, it may lead to more extensive settlements in the future.<sup>184</sup>

That the settlement is properly considered a treaty was recognised by several parliamentarians at the time. Upon notification that the Noongar people had voted to accept it, Premier Colin Barnett issued a press release, noting that the ‘break-through agreement’ was ‘a historic achievement in reconciliation’ and an ‘extraordinary act of self-determination by Aboriginal people ... provid[ing] them with a real opportunity for independence’.<sup>185</sup> Later that year, Western Australian Deputy Opposition Leader Roger Cook explained in Parliament that, ‘[b]y its very nature, the Noongar agreement is in fact a classic treaty’.<sup>186</sup>

The *Noongar Treaty* reveals the complexities of treaty processes within the Australian federation. Negotiated between the Noongar people and the Western Australian government, the settlement was approved by the Noongar people before being enacted in state legislation.<sup>187</sup> Yet, the process was conducted under the framework of Commonwealth legislation, and the settlement will derive its force from registration under a Commonwealth Act.<sup>188</sup> Introducing further challenges, the treaty has not yet taken effect. In February 2018, several objections were lodged by Noongar people against registering the ILUAs with the National Native Title Tribunal — a Commonwealth adjudicatory body.<sup>189</sup> Those objections were struck out and the six

<sup>183</sup> Ibid 35–8.

<sup>184</sup> See also Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Federation Press, 2018) 238.

<sup>185</sup> Department of Premier and Cabinet (WA), ‘Noongars Vote to Accept Historic Offer’ (Media Statement, 30 March 2015) <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2015/03/Noongars-vote-to-accept-historic-offer.aspx>>.

<sup>186</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 November 2015, 8688 (RH Cook).

<sup>187</sup> *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA); *Land Administration (South West Native Title Settlement) Act 2016* (WA).

<sup>188</sup> *Native Title Act* (n 14).

<sup>189</sup> Victoria Laurie, ‘Objections Put Noongar Native Title Deal on Hold’, *The Australian* (online, 18 February 2018) <<https://perma.cc/5Y5K-PT7V>>. See also ‘ILUA Registration’, *South West Native Title Settlement* (Web Page, 11 February 2019) <<https://www.dpc.wa.gov.au/swnts/Indigenous-Land-Use-Agreements/ILUA-Registration/Pages/default.aspx>>.

ILUAs were finally registered on the Native Title Register in October 2018.<sup>190</sup> However, applications seeking judicial review of the Native Title Registrar's decision were immediately lodged in the Federal Court,<sup>191</sup> and any hearing is not expected to be held until midyear. The settlement will only commence if those applications are dismissed.

### B Victoria

The treaty process in Victoria emerged in early 2016. In February of that year, the Victorian government convened a meeting with representatives of Victorian Aboriginal communities to understand what they meant by self-determination and discuss the national constitutional recognition process. At this meeting, Aboriginal representatives derided the national recognition debate as a 'distraction',<sup>192</sup> and expressed their support for a treaty. These views were reiterated at the statewide Aboriginal Victoria Forum held in May 2016, where 500 participants unanimously agreed to advance self-determination and a treaty by establishing an Aboriginal representative body.<sup>193</sup>

The state government responded positively to these demands. It established an Aboriginal Treaty Working Group to consult with Aboriginal Victorians over the design of an appropriate body to represent them in treaty negotiations, and to advise the Minister for Aboriginal Affairs on progress towards a treaty as well as 'the broader self-determination agenda'.<sup>194</sup> The Working Group is composed entirely of Aboriginal people with a balance

<sup>190</sup> National Native Title Tribunal, 'South West Indigenous Land Use Agreements Registered' (Media Release, 17 October 2018) <<http://www.nntt.gov.au/News-and-Publications/latest-news/Pages/South-West-Indigenous-Land-Use-Agreements-Registered.aspx>>.

<sup>191</sup> Calla Wahlquist, "It Is Not about Money": Australia's Largest Native Title Settlement Challenged Again', *The Guardian* (online, 30 November 2018) <<https://www.theguardian.com/australia-news/2018/nov/30/it-is-not-about-money-australias-largest-native-title-settlement-challenged-again>>.

<sup>192</sup> Hamish Fitzsimmons, 'Victorian Government to Begin Talks with First Nations on Australia's First Indigenous Treaty', *ABC News* (Web Page, 26 February 2016) <<http://www.abc.net.au/news/2016-02-26/victoria-to-begin-talks-for-first-indigenous-treaty/7202492>>. See also Mark McMillan, 'Is Federalism Being Undermined in the Current Surge to "Recognise" Indigenous Australians in (and into) the Commonwealth Constitution?' (2016) 8(25) *Indigenous Law Bulletin* 15, 18–19.

<sup>193</sup> 'Victoria's Aboriginal Community Talks Treaty and Self-Determination', *Victorian Council of Social Service* (Web Page, 26 May 2016) <<https://vcoss.org.au/analysis/victorias-aboriginal-community-talks-treaty-and-self-determination/>>.

<sup>194</sup> Aboriginal Treaty Interim Working Group, *Aboriginal Community Consultations on the Design of a Representative Body* (Report, December 2016) 68 ('Phase 1 Consultations Report').

between male and female representatives.<sup>195</sup> It is not clan-based but is comprised of representatives of Victorian Aboriginal community organisations and members appointed in their individual capacity by the Minister for Aboriginal Affairs.<sup>196</sup> This approach has not been favoured by all; in April 2017, Gunnai and Gunditjmara woman Lidia Thorpe resigned from her position on the Working Group when she felt her cultural integrity was being compromised.<sup>197</sup>

Consultations were organised by the management consulting company EY to provide structural independence from government. Initial consultations took place at 10 locations across Victoria in the second half of 2016. Participants were asked what representation meant to them and discussed design principles as well as potential roles and functions of a putative Aboriginal representative body.<sup>198</sup> A further six consultations were held in March 2017 to refine the structure and framework of the body. Community members considered who should be eligible to vote and stand for election, as well as how the electorate should be divided.<sup>199</sup> In an effort to ‘allow the community to drive the next steps in the Treaty process’,<sup>200</sup> this latter round of consultations included a series of ‘Treaty Circles’. These community-run conversations were coordinated and supervised by self-nominated individuals who held discussions in their local area, with the aim of ‘ensuring maximum participation by as many members of the Victorian Aboriginal community as possible.’<sup>201</sup> An online ‘Message Stick’ was created to allow those unable to attend a community consultation or Treaty Circle to have their say as well.<sup>202</sup> Approx-

<sup>195</sup> See *ibid.*

<sup>196</sup> *Ibid.*

<sup>197</sup> Rachael Hocking, ‘Where Is Treaty at in Victoria?’, *NITV News* (online, 17 April 2017) <<http://www.sbs.com.au/nitv/nitv-news/article/2017/04/17/where-treaty-victoria>>. Thorpe became the first Aboriginal woman elected to the Victorian Parliament after a by-election in November 2017: Robert Burton-Bradley and Rachael Hocking, ‘Greens’ Lidia Thorpe Makes History after Northcote By-Election Win’, *NITV News* (online, 18 November 2017) <<https://www.sbs.com.au/nitv/nitv-news/article/2017/11/18/greens-lidia-thorpe-takes-early-lead-northcote-byelection>>.

<sup>198</sup> *Phase 1 Consultations Report* (n 194) 9.

<sup>199</sup> Aboriginal Treaty Interim Working Group, *Aboriginal Community Consultations on the Design of a Representative Body* (Report, June 2017) 8–9 (‘*Phase 2 Consultations Report*’).

<sup>200</sup> Aboriginal Treaty Interim Working Group, *Treaty Circle Facilitators Handbook: Building a Pathway to Treaty* (2017) 27.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.* 11.

imately 7,500 Aboriginal Victorians (out of a 2016 self-reported total of 47,788) were consulted or engaged directly through this process.<sup>203</sup>

The results of these consultations were presented to the Aboriginal Victoria Forum at the end of April 2017. At this meeting, the state government committed to provide \$28.5 million to progress the treaty process in the 2017–18 budget.<sup>204</sup> This funding included provision for an Aboriginal Community Assembly to discuss and provide further advice to the Working Group on the design of a representative body, and a Victorian Treaty Advancement Commission ('VTAC') to operationalise the outcomes of the Community Assembly.<sup>205</sup> VTAC is empowered to guide the establishment of the representative body, maintain momentum for treaty, consult with Aboriginal Victorians, provide research and advice on the process, and keep all Victorians informed.<sup>206</sup> Once the representative body is established, VTAC is to be abolished.<sup>207</sup>

All Aboriginal Victorians aged over 18 years were eligible to apply for membership of the Aboriginal Community Assembly.<sup>208</sup> Three Aboriginal Victorians reviewed all applications, and 33 people were eventually selected to ensure accurate demographic representation in the Assembly.<sup>209</sup> In November and December 2017, 31 of these members 'from across Victoria with a diversity and wealth of cultural knowledge, expertise and experience' met over six days to deliberate and provide their advice.<sup>210</sup> That same month, Jill Gallagher was appointed the Victorian Treaty Advancement Commissioner.<sup>211</sup>

<sup>203</sup> *Phase 2 Consultations Report* (n 199) 6.

<sup>204</sup> 'Victorian Government Commits \$28.5M for Treaty Discussions, amid Confusion and Criticism', *NITV News* (online, 2 May 2017) <<http://www.sbs.com.au/nitv/nitv-news/article/2017/05/01/victorian-government-commits-285m-treaty-discussions-amid-confusion-and-criticism>>.

<sup>205</sup> See 'Treaty Bodies', *Aboriginal Victoria* (Web Page) <<https://www.vic.gov.au/aboriginalvictoria/treaty/treaty-bodies.html>>.

<sup>206</sup> 'Victorian Treaty Advancement Commission', *Aboriginal Victoria* (Web Page) <<https://www.vic.gov.au/aboriginalvictoria/treaty/treaty-bodies/victorian-treaty-advancement-commission.html>>.

<sup>207</sup> *Ibid.*

<sup>208</sup> Aboriginal Community Assembly, *Report and Recommendations on the Design of the Aboriginal Representative Body* (Report, December 2017) 53.

<sup>209</sup> *Ibid* 15–18.

<sup>210</sup> Aboriginal Community Assembly, *Final Statement and Recommendations to the Aboriginal Treaty Working Group* (Report, December 2017) 3.

<sup>211</sup> Luke Donnellan, Minister for Aboriginal Affairs, 'New Commissioner to Advance Journey to Treaty' (Media Release, 13 December 2017) <<https://www.premier.vic.gov.au/new-commissioner-to-advance-journey-to-treaty/>>.

A few months later, the Victorian government signalled its continued commitment to the treaty process by providing \$9 million in the 2018–19 budget for ‘[t]reaty and self-determination’.<sup>212</sup> As the Treasury explained:

Funding will be provided for the election of an independent Aboriginal Representative Body as the voice chosen by Aboriginal Victorians to be the State’s counterpart in designing the treaty process, and to continue government preparation for the treaty. This will enable the Government and Aboriginal Representative Body to work in partnership to establish the entities, rules and resource base necessary to facilitate future treaty negotiations.<sup>213</sup>

In June 2018, the process took a considerable step forward, with the Victorian Parliament passing Australia’s first treaty bill. The *Victorian Treaty Process Act* creates a legislative basis for negotiating a treaty with Aboriginal people in the State. Under this Act, the government must recognise an Aboriginal-designed representative body that will administer a self-determination fund to support Aboriginal Victorians in treaty negotiations.<sup>214</sup> The representative body will also work with government to establish a treaty negotiation framework, which must accord with several guiding principles set out in the Act: self-determination and empowerment; fairness and equality; partnership and good faith; mutual benefit and sustainability; and transparency and accountability.<sup>215</sup>

In February 2019, details concerning the state-wide representative body were announced. Established as a not-for-profit company rather than under legislation, the First Peoples Assembly of Victoria will be independent of government. Enrolment is open now, with elections scheduled to run from 16 September – 20 October 2019.<sup>216</sup> In order to maintain the Assembly’s independence, elections will be managed by VTAC and conducted by a private company instead of the Australian Electoral Commission. Cultural authority will also be respected: 12 representatives will be elected from 12 formally recognised traditional owner groups with native title, *Traditional*

<sup>212</sup> Department of Treasury and Finance (Vic), *Victorian Budget 18/19: Getting Things Done* (Budget Paper No 3, May 2018) 3.

<sup>213</sup> *Ibid* 5.

<sup>214</sup> *Victorian Treaty Process Act* (n 9) ss 9–10.

<sup>215</sup> *Ibid* ss 21–6.

<sup>216</sup> Call Wahlquist, ‘Indigenous Recognition: What, if Anything, Will Australians Be Asked to Vote on?’ *The Guardian* (online at 16 July 2019) <<https://www.theguardian.com/australia-news/2019/jul/16/indigenous-recognition-what-if-anything-will-australians-be-asked-to-vote-on>>.

*Owner Settlement Act*,<sup>217</sup> or Registered Aboriginal Party<sup>218</sup> status. Additional reserved seats will be added as more groups are added in the future. A further 21 representatives will be elected from five voting regions based on the Aboriginal population of the region. An Elders Voice will also be established to guide the Assembly's work and provide cultural strength and integrity. Its form is still being discussed.<sup>219</sup> Significantly, the First Peoples Assembly will not then be disbanded but will continue to serve as a standing representative body of Aboriginal Victorians — a Voice to the Victorian Parliament.<sup>220</sup>

The First Peoples Assembly will not negotiate for Aboriginal Victorians, but will simply assist in developing an appropriate framework.<sup>221</sup> In the meantime, Aboriginal Victorians will need to organise their negotiating position, decide what treaty means to them, and what form a treaty or treaties should take. The final step will involve negotiations between the individual First Nations and the State. This stage could take many years.

The Commonwealth has not been involved in the Victorian process, but its spectre has influenced the discussion. As this section has noted, the process was initially catalysed by concern that the national debate on 'recognising' Aboriginal and Torres Strait Islander peoples in the *Australian Constitution* would fail to deliver meaningful reform. The federal government has also frequently been invoked by participants within Parliament. The Victorian Opposition voted against the *Victorian Treaty Process Act*, contending that any treaty process 'must be led by the [C]ommonwealth government',<sup>222</sup> while Labor politicians have questioned why this is necessary:

We are still left asking ourselves: why are we the only [C]ommonwealth country without a treaty with its First Nations people? Why would we wait for someone else to do it? Why would we as Victorians shirk that responsibility and not have our own people looked after? Why would we not lead the nation?<sup>223</sup>

<sup>217</sup> See *Traditional Owner Settlement Act 2010* (Vic) s 3 (definition of 'traditional owner group entity').

<sup>218</sup> See *Aboriginal Heritage Act 2006* (Vic) s 4 (definition of 'registered Aboriginal party'), pt 10.

<sup>219</sup> Federation of Victorian Traditional Owner Corporations, 'Talking Treaty: What Will the Proposed First Peoples Assembly of Victoria (Assembly) Do?' (Fact Sheet, 20 April 2019) <<https://www.fvtoc.com.au/blog/2019/treaty-assembly-fact-sheet>>.

<sup>220</sup> Sophie Biss, 'A Conversation with Jill Gallagher: Treaty for Victoria' *Victorian Women's Trust Journal* (Blog Post, 5 July 2019) <<https://www.vwt.org.au/a-conversation-with-jill-gallagher-treaty-for-victoria>>.

<sup>221</sup> *Victorian Treaty Process Act* (n 9) s 10.

<sup>222</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 5 June 2018, 1721 (Tim Bull).

<sup>223</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 6 June 2018, 1801 (Paul Edbrooke).

The re-election of the Labor government in November 2018 means that the treaty process remains on track.

### C Northern Territory

In September 2016, incoming Northern Territory Chief Minister Michael Gunner declared that his government would establish a subcommittee on Aboriginal affairs to ‘drive public discussions on a treaty’ between the Territory and Aboriginal peoples.<sup>224</sup> No firm commitment followed this announcement, but treaty remained on the government’s agenda. Concerns over the slow process led the Northern Land Council to hold a treaty workshop in Darwin in February 2018.<sup>225</sup> At this workshop, representatives of the government reiterated their support for a treaty process. This led to a meeting between the four Aboriginal Land Councils and the Northern Territory government in April 2018, where the parties ‘agreed to establish a working group to develop a Memorandum of Understanding about how a treaty between the government and the [Northern Territory]’s Aboriginal people should progress.’<sup>226</sup> Chief Minister Gunner and representatives of the four Land Councils signed the memorandum of understanding at the Barunga Festival in 2018 — 30 years after Prime Minister Bob Hawke’s promise that Australia would enter into a treaty with Indigenous peoples.<sup>227</sup>

The *Barunga Agreement* is intended to develop and implement a consultation process that will lead to a treaty negotiation framework.<sup>228</sup> That consultation will be led by an independent Treaty Commissioner and is expected to take several years.<sup>229</sup> The signatories have also agreed to several guiding principles, including that Aboriginal Territorians never ceded sovereignty of their lands, seas, and waters, and that a Northern Territory treaty should benefit all Territorians.<sup>230</sup> The *Barunga Agreement* is not legally enforceable

<sup>224</sup> Helen Davidson, ‘Northern Territory Labor Government Announces Majority Female Cabinet’, *The Guardian* (online at 12 September 2016) <<https://www.theguardian.com/australia-news/2016/sep/12/northern-territory-labor-government-announces-majority-female-cabinet>>.

<sup>225</sup> Harry Hobbs, ‘A Territory Treaty’ [2018] (1) *Land Rights News* 4, 4.

<sup>226</sup> Northern Land Council, ‘Land Councils and Northern Territory Agree on an MOU for Treaty’ (Media Release, 5 April 2018) <<https://www.nlc.org.au/media-publications/land-councils-and-northern-territory-agree-on-an-mou-for-treaty>>.

<sup>227</sup> Hawke (n 167).

<sup>228</sup> *Barunga Agreement* (n 10) 6.

<sup>229</sup> *Ibid* 9, 14.

<sup>230</sup> *Ibid* 6.

but all parties have signalled their commitment to implement its provisions in a ‘transparent, consultative and accountable manner’.<sup>231</sup> It envisages a treaty as a substantive concept that will empower Aboriginal communities with real decision-making authority. At the same time, it understands treaty as offering the potential to ground ‘lasting reconciliation between the First Nations of the Territory and other citizens with the object of achieving a united Northern Territory’.<sup>232</sup>

In February 2019, Yawuru professor of law Mick Dodson was appointed Treaty Commissioner.<sup>233</sup> Over 12 months, Dodson will consult with Aboriginal Territorians in order to understand their aspirations for treaty and consider an appropriate model, including whether there should be one Territory-wide treaty or multiple treaties. Within 18 months after the initial period of negotiations, Dodson must provide recommendations to the government about the best model for future negotiations. While the process is still in its preliminary stages, and will be based on the views of Aboriginal Territorians, Dodson has indicated that any treaty must acknowledge past injustices, as well as provide material benefits, likely including financial compensation.<sup>234</sup>

The Northern Territory is in a difficult constitutional position. As we explore further in Part V, its status as a territory leaves its legislative and executive authority to negotiate and execute a treaty somewhat uncertain. For this reason, the Northern Territory government has sought to include representatives of the Commonwealth in the preliminary stages. The disinclination of the current federal government has made this difficult, but members of the opposition have been involved. For instance, Indigenous Labor parliamentarians Linda Burney MP and Senators Patrick Dodson and Malarndirri McCarthy attended the Barunga Festival to witness the signing of the memorandum of understanding.<sup>235</sup> At that meeting, Opposition Leader Bill Shorten argued that treaty-making ‘between our First Australians and [all] levels of government within Australia’ is necessary for ‘proper and meaningful

<sup>231</sup> Ibid 13.

<sup>232</sup> Ibid 6.

<sup>233</sup> Michael Gunner, ‘The Territory’s First-Ever Treaty Commissioner Appointed’ (Media Release, 18 February 2019).

<sup>234</sup> Jano Gibson, ‘“Practical Benefits” and Possible Compensation on the Table for NT Treaty: Commissioner Mick Dodson’, *ABC News* (Web Page, 18 February 2019) <<https://perma.cc/M5CT-X7RJ>>.

<sup>235</sup> Bill Shorten (Speech, Barunga Festival Opening Ceremony, 9 June 2018) <<http://www.warrensnowdon.com/2018/06/10/address-to-the-barunga-festival-opening-ceremony-the-hon-bill-shorten-mp-leader-of-the-opposition/>>.

reconciliation,<sup>236</sup> suggesting that a future federal Labor government would support the Territory process.

#### D *Queensland*

The Queensland Labor government initially adopted treaty as part of their policy platform in 2016. Discussion was brief, however, consisting of a single line committing the party to commence negotiations ‘within the next term of Parliament’.<sup>237</sup> This commitment was expanded and extended in its 2017 platform, in the lead-up to the state election.

The 2017 platform provided greater detail on the government’s intentions, declaring that it would ‘establish [and] authorise a Treaty Working Group within the next term of Parliament to begin negotiations’.<sup>238</sup> The Working Group would provide advice on the process and timing for negotiations, as well as guidance on community engagement, and examine proposals for a permanent state-wide Aboriginal representative body.<sup>239</sup> The composition of the Working Group was also elaborated upon: it would comprise at least 50% women and include nominees from Traditional Owner Corporations, the Queensland Indigenous Youth Parliament, and Aboriginal Controlled Community Organisations, as well as individual persons appointed by the Minister based on their experience and expertise.<sup>240</sup> Following the Working Group’s establishment, forums would be held across the State to discuss its work and outline the next steps.<sup>241</sup>

The Queensland Labor government was returned at the 2017 state election, but no announcement regarding the treaty process was forthcoming.<sup>242</sup> Nonetheless, treaty remained party policy, and in 2018 reports indicated that a discussion paper authored by the Queensland Indigenous Labor Network explored how the State could enter into negotiations with ‘individual sover-

<sup>236</sup> Ibid.

<sup>237</sup> Queensland Labor, ‘Policy Platform 2016’ (n 11) 93 [8.190].

<sup>238</sup> Queensland Labor, ‘Putting Queenslanders First: State Platform 2017 (State Conference of the Queensland Branch of the Australian Labor Party, 28–9 July 2017) 118 [8.243].

<sup>239</sup> Ibid.

<sup>240</sup> Ibid 119 [8.244].

<sup>241</sup> Ibid 119 [8.245].

<sup>242</sup> Petrie and Graham (n 168) 10.

eign nations.<sup>243</sup> It was not until July 2019, however, that a firm commitment was issued.

On 14 July 2019, Queensland Deputy Premier Jackie Trad announced that the State would begin a conversation about a pathway to treaty with Aboriginal and Torres Strait Islander peoples.<sup>244</sup> In order to progress this commitment, the government established a bipartisan eminent panel of Indigenous and non-Indigenous leaders, co-chaired by Indigenous academic Jackie Huggins and former Attorney-General Michael Lavarch. The panel will provide leadership and engage with key stakeholders across the State in the second half of 2019. The Treaty Working Group discussed in the 2017 policy platform, has not yet been established. Once it is set up, it will lead consultations with First Nations, allowing them to discuss and reach agreement on what a treaty might contain.<sup>245</sup> A discussion paper will also be released shortly. Negotiations are unlikely to begin for several years.

Queensland has only recently formally adopted a treaty process, but the same question concerning whether it is appropriate for the State to enter negotiations with Aboriginal and Torres Strait Islander peoples has already arisen. While Premier Anastacia Palaszczuk has urged other states to consider commencing treaty negotiations,<sup>246</sup> particularly as the federal government appears to dismiss these calls,<sup>247</sup> the Liberal National opposition has suggested that it would adopt different priorities.<sup>248</sup> If the opposition wins the 2020 state election, it could abandon the process before negotiations even commence.

<sup>243</sup> Stephen Fitzpatrick and Michael McKenna, 'Queensland Considers Treaty Talks as Federal Bids Stall', *The Weekend Australian* (online at 17 July 2018) <<https://perma.cc/9T4S-GPBM>>.

<sup>244</sup> Palaszczuk, Trad and Enoch (n 173); Department of Aboriginal and Torres Strait Islander Partnerships (Qld), 'Statement of Commitment to Reframe the Relationship between Aboriginal and Torres Strait Islander Peoples and the Queensland Government' <<https://www.datsip.qld.gov.au/resources/datsima/programs/tracks-to-treaty/tracks-to-treaty-soc.pdf>>.

<sup>245</sup> Department of Aboriginal and Torres Strait Islander Partnerships (Qld), *Path to Treaty* (Web Page) <<https://www.datsip.qld.gov.au/programs-initiatives/tracks-treaty/path-treaty>>.

<sup>246</sup> Sarah Elks and Brad Norington, 'Premier Urges PM to Back Indigenous Treaty' *The Australian* (online at 16 July 2019) <<https://perma.cc/T8SK-EYRX>>.

<sup>247</sup> See Dan Conifer, 'Indigenous Constitutional Recognition to Be Put to Referendum in Next Three Years, Minister Promises', *ABC News* (Web Page, 10 July 2019) <<https://perma.cc/7UZY-L8CQ>>.

<sup>248</sup> Talissa Siganto, 'Queensland Government Announces "Conversation" to Formalise Indigenous Treaty', *ABC News* (Web Page, 14 July 2019) <<https://perma.cc/CL9N-MY7U>>.

E *South Australia*

In December 2016, the South Australian Labor government announced that it would commence discussions with three Indigenous nations whose traditional land sits within State boundaries, with the aim of finalising a treaty.<sup>249</sup> The process began two months later, when Dr Roger Thomas, a senior Kokatha and Mirning man, was appointed as Treaty Commissioner to lead consultation between Aboriginal people and the state government on a framework for a treaty.<sup>250</sup> In only a few months, Dr Thomas and his team met with over 600 people and received over 280 written submissions and responses to surveys, overwhelmingly supportive of a treaty.<sup>251</sup> Based on the Treaty Commissioner's July 2017 report, the government invited Aboriginal nations in South Australia to submit expressions of interest to 'enter a new relationship' with the State.<sup>252</sup> Following this period, a newly established Aboriginal Treaty Advisory Committee recommended three Aboriginal nations — the Narungga, Adnyamathanha, and Ngarrindjeri nations — take part.<sup>253</sup> On 22 September 2017, the first negotiations in Australia between a government and an Indigenous nation explicitly understood as treaty discussions commenced between South Australia and the Ngarrindjeri nation.<sup>254</sup>

Concern that the upcoming election might derail negotiations led the State government and Aboriginal nations to attempt to formalise the process. In February 2018, the day before the government entered caretaker mode, the Buthera Agreement between the Narungga nation and the South Australian government was signed, committing the parties to a three-year process of negotiations.<sup>255</sup> That same month, the Ngarrindjeri Regional Authority and

<sup>249</sup> Maher (n 174).

<sup>250</sup> Ruby Jones, 'Indigenous Treaty Commissioner Roger Thomas Appointed in South Australia', *ABC News* (Web Page, 28 February 2017) <<http://www.abc.net.au/news/2017-02-28/treaty-commissioner-roger-thomas/8310348>>.

<sup>251</sup> Thomas (n 174) 5–6.

<sup>252</sup> South Australian Native Title Services, 'Government Has Treaty Talks with Three SA Aboriginal Nations', (Summer 2018) *Aboriginal Way* 5.

<sup>253</sup> *Ibid.*

<sup>254</sup> Nick Grimm, 'Ngarrindjeri Regional Authority and Aboriginal Affairs Minister Meet to Mark "Historic" Negotiations', *The Murray Valley Standard* (online, 25 September 2017) <<http://www.murrayvalleystandard.com.au/story/4941413/nations-first-treaty-talks-commence/>>.

<sup>255</sup> Lucy Kingston, 'SA Government Signs Buthera Agreement with Narungga Nation', *South Australian Native Title Services* (Web Page, 17 February 2018) <<https://www.nativetitlesa.org/aboriginalway/sa-government-signs-historic-buthera-agreement-with-narungga-nation>>.

the State government signed an agreement noting the parties ‘wish to strengthen the[ir] relationship’, the State’s ‘[desire] to enter into a treaty’, and obligating the State to ‘promote a legislative structure that enables the parties to enter in the treaty negotiated between them.’<sup>256</sup>

In March 2018, the Labor government was defeated,<sup>257</sup> fuelling doubts about the viability of the process. The new Premier initially placed negotiations on hold, pending a report from Dr Thomas.<sup>258</sup> However, just two months later and on the same day that the Northern Territory government signed the *Barunga Agreement*, Premier Marshall declared state-based treaties ‘expensive gestures’ and announced that his government would abandon the process, because treaties ‘should be negotiated at the federal level, not the state level.’<sup>259</sup>

The South Australian example again illustrates the importance of the Commonwealth in Australian understandings of treaty-making. It also reveals the fragility of existing treaty processes: treaties are political agreements that require ongoing support from both sides.<sup>260</sup> Only political and moral pressure, not legal obligation, can push participants to the table.

## V HOW SHOULD TREATIES BE PURSUED IN AUSTRALIA?

The United States and Canada offer distinct models for treaty-making in federations. In the United States, the allocation of constitutional responsibility ensured that the federal government alone negotiated treaties. In contrast, in Canada, judicial decisions and the devolution of legislative authority have transformed the relationship between First Nations and the provinces, such that modern comprehensive settlements are now negotiated with both federal and subnational governments. In the face of national inaction, a third model is developing in Australia: state- and territory-driven treaties. Is this the most

<sup>256</sup> *Negotiating a Treaty between the Ngarrindjeri People and the State of South Australia*, signed 16 February 2018.

<sup>257</sup> Antony Green, ‘Final Results of the 2018 South Australian Election’, *ABC News* (Blog Post, 23 April 2018) <<https://www.abc.net.au/news/2018-04-04/final-results-of-the-2018-south-australian-election/9612312>>.

<sup>258</sup> Rebecca Puddy, ‘South Australia’s Treaty Negotiations on Hold while Premier Considers Their Future’, *ABC News* (Web Page, 30 April 2018) <<http://www.abc.net.au/news/2018-04-30/treaty-negotiations-on-hold/9708458>>.

<sup>259</sup> Owen (n 12).

<sup>260</sup> Note that the South Australian Labor opposition has recently reaffirmed its support for treaty: ‘SA Urged to Restart Treaty Process’, *SBS News* (Web Page, 10 July 2019) <<https://www.sbs.com.au/news/sa-urged-to-restart-treaty-process>>.

desirable way for them to continue? Or should Australia adopt the approach taken in the United States or Canada? The answer to these questions relies on consideration of Australia's constitutional framework. In this part we explore the respective strengths and weaknesses of treaty-making at both levels of government. We suggest that interlocking state and federal treaties offer the best prospect for reaching an enduring settlement that meets Aboriginal and Torres Strait Islander peoples' aspirations within Australia's public law framework.

*A The Emerging Australian Approach: State- and Territory-Driven  
Treaties*

The state and territory treaty processes may have commenced in part as a response to the Commonwealth's lacklustre commitment to meaningful constitutional recognition,<sup>261</sup> but there are several important legal and political rationales for treaty negotiations to be conducted at the state level. First, the allocation of responsibilities within the Australian federation suggests that states should be central to any treaty settlement. Like the position in Canada, the distribution of legislative and executive authority in Australia leaves the states with considerable legal authority over issues relating to Aboriginal and Torres Strait Islander peoples. The Commonwealth Parliament enjoys only a concurrent power to legislate with respect to Indigenous affairs, and responsibility for many issues of concern for Indigenous peoples, including health, education, and housing, lies also with the states. Although a federal treaty could rest on the 'race power' in s 51(xxvi), acting to render invalid any inconsistent state legislation via s 109, it may not be feasible in practice. State legislation is complex, and legal challenges may result where a Commonwealth Act implementing a treaty intends to cover the field by way of using the blunt overriding force of s 109. Similarly, the terms of a treaty may include provisions relating to service delivery. As these are primarily state functions, it is appropriate that states lead, or at the very least, are substantially engaged in, negotiations. Without this, a treaty may lack the capacity to have a meaningful impact upon key state services of great importance to local Indigenous communities.

Authority over land points to a second factor in favour of state-driven treaties. Australian law has recognised many Aboriginal and Torres Strait

<sup>261</sup> Amy McQuire, 'Recognising the Truth about Treaty through a Storm of Constitutional Spin', *New Matilda* (Web Page, 4 May 2016) <<https://newmatilda.com/2016/05/04/recognising-the-truth-through-a-storm-of-constitutional-spin/>>.

Islander communities' rights to land through native title or broader complementary land settlements.<sup>262</sup> As the *Native Title Act* recognises, however, dispossession and settlement has meant that many Indigenous Australians are 'unable to assert native title rights and interests'.<sup>263</sup> For groups unable to demonstrate connection to country,<sup>264</sup> or who otherwise have not succeeded in gaining title, land will be a key element of any treaty as it would form the basis for political and economic empowerment. Significantly, most land that may be part of any agreement, including, for example, pastoral leases, is governed by state legislation,<sup>265</sup> suggesting that negotiations should be conducted 'directly with state governments'.<sup>266</sup> Fortifying this position is the fact that states also have more flexibility than the Commonwealth in conferring rights to land. Unlike the Commonwealth,<sup>267</sup> the states are not required to provide 'just terms' compensation in respect of any property acquired for the purpose of transferral to Indigenous peoples as part of a treaty settlement.

Flexibility more generally underlies the third rationale that treaties be driven at the subnational level. State constitutions are more elastic than the *Australian Constitution*, meaning that treaties at this level may potentially allow more room for innovative settlements. For instance, drawing on the structural separation of legislative, executive, and judicial powers in chs I, II and III of the *Australian Constitution*, the High Court has imposed strict constraints on the capacity of the Commonwealth to establish bodies exercising judicial power.<sup>268</sup> These restrictions would preclude a putative federal Indigenous court from exercising a combination of conciliatory or mediatory and judicial functions, and would impose strict security of tenure requirements on judicial officers, contrary to traditional Indigenous practices. Importantly, the textual division of powers at the Commonwealth level is not present at the state level. Although the High Court has drawn on ch III to place constitutional limits on state authority, those limits only relate to the capacity of state Parliaments to alter their courts in a manner that would

<sup>262</sup> See, eg, *Traditional Owner Settlement Act 2010* (Vic).

<sup>263</sup> *Native Title Act* (n 14) Preamble.

<sup>264</sup> *Ibid* s 223.

<sup>265</sup> See, eg, *Land Administration Act 1997* (WA) pt 7.

<sup>266</sup> Alexander Reilly, 'A Constitutional Framework for Indigenous Governance' (2006) 28(3) *Sydney Law Review* 403, 414.

<sup>267</sup> *Australian Constitution* s 51(xxxi).

<sup>268</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *New South Wales v Commonwealth* (1915) 20 CLR 54; *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434.

impair their institutional integrity as repositories of federal jurisdiction.<sup>269</sup> Consequently, far greater constitutional space for Indigenous dispute resolution systems exists at the state level. A state treaty could therefore recognise an Indigenous nation's inherent authority to establish dispute resolution systems consistent with their customary laws and practices, so long as those courts did not exercise federal jurisdiction and so long as they were not inconsistent with existing Commonwealth laws.

Fourth, it may also be politically appropriate for treaties to be conducted at the state level. Aboriginal and Torres Strait Islander peoples and communities are 'diverse in culture and circumstance' and consequently have very different needs and aspirations.<sup>270</sup> State-based treaties can reflect these distinctions and empower disparate Indigenous nations located across the continent to reach agreement on specific areas of concern to them. It also allows those Indigenous nations to exercise different tiers and forms of self-governance, depending on their capacity and goals.<sup>271</sup> A national or Commonwealth-based treaty, by contrast, may tend towards uniformity, leaving it unable to account for such distinctions.

The sheer number of Aboriginal and Torres Strait Islander communities across Australia points towards a fifth basis for subnational treaties. At a more prosaic level, it may simply be more feasible for states and territories to conduct negotiations, rather than require the Commonwealth to have carriage of multiple concurrent individual processes. This has certainly proved challenging in British Columbia, which is currently conducting separate negotiations with over 60 First Nations,<sup>272</sup> and has only finalised seven agreements in 25 years.<sup>273</sup> While the laboriously slow process has several causes, including the limited mandate of federal negotiators,<sup>274</sup> it is likely that fewer simultaneous negotiations involving the federal government would

<sup>269</sup> *Kable v DPP (NSW)* (1996) 189 CLR 51. See generally James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6<sup>th</sup> ed, 2015) 275–99.

<sup>270</sup> Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003) 87.

<sup>271</sup> On extant institutions of Indigenous self-governance in the absence of treaties, see Anna Dziedzic and Mark McMillan, 'Australian Indigenous Constitutions: Recognition and Renewal' (2016) 44(3) *Federal Law Review* 337; Vivian et al (n 29) 235–7.

<sup>272</sup> 'Negotiation Update', BC Treaty Commission (Web Page) <<http://www.bctreaty.ca/negotiation-update>>.

<sup>273</sup> BC Treaty Commission, *Annual Report 2018* (Report, 2018) 28.

<sup>274</sup> See, eg, Standing Senate Committee on Aboriginal Peoples, Parliament of Canada, *A Commitment Worth Preserving: Reviving the British Columbia Treaty Process* (Report, June 2012) 5.

enable settlements to be reached at a faster pace. A national treaty process could, of course, learn from and build on developments internally, but a key advantage of the existing process is that it shares burdens across jurisdictions, potentially enabling agreements to be struck in parallel.

The proliferation of treaty processes in Australia underlies a sixth potential benefit of state- and territory-driven treaties. Scholars of federalism and federal theory have often noted that dividing political authority between and across multiple decision-making centres may encourage those political units to ‘serve as a laboratory; and try novel social and economic experiments’,<sup>275</sup> enabling other communities to ‘profit by the experience of a law or a method which has worked well or ill.’<sup>276</sup> Australian treaty processes can certainly learn from useful developments internationally — the development of interim measures in British Columbia as a means to respond to lengthy negotiations would, for instance, likely prove beneficial in Victoria, the Northern Territory, and Queensland.<sup>277</sup> Those processes can, however, also learn from each other. Putative treaty processes in New South Wales, Tasmania, and elsewhere can assess and evaluate the processes conducted throughout Australia before establishing their own tailored approach. In this sense, having multiple state and territory processes fosters distinctive arrangements and (potentially) unique settlement outcomes that respond to each participant. Indeed, the Northern Territory process appears to be adopting and adapting elements from the Victorian process to the Territory’s own unique circumstances, which includes the existence of powerful Land Councils representing traditional owners.<sup>278</sup>

Relatedly, multiple separate subnational processes can foster and encourage developments across Australia in the face of Commonwealth inaction. Successful state and territory processes may also build traction and catalyse federal engagement. This is apparent in other areas, including in relation to human rights protection in Australia. The *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities 2006 Act* (Vic) were key instruments that catalysed the Rudd Government’s 2008 National Human

<sup>275</sup> *New State Ice Co v Liebmann*, 285 US 262, 311 (Brandeis J) (1932).

<sup>276</sup> James Bryce, *The American Commonwealth* (Macmillan, 3<sup>rd</sup> ed, 1895) vol 1, 353. See also Francesco Palermo and Karl Kössler, *Comparative Federalism: Constitutional Arrangements and Case Law* (Hart Publishing, 2017) 318–19.

<sup>277</sup> See Godlewska and Webber (n 151) 27.

<sup>278</sup> See *Barunga Agreement* (n 10). See also Northern Land Council, ‘A Territory Treaty’ (Media Release, 4 April 2018) <<https://www.nlc.org.au/media-publications/a-territory-treaty>>.

Rights Consultation.<sup>279</sup> While a federal bill of rights did not follow, advocates continue to draw on the positive outcomes in the Australian Capital Territory and Victoria in making their case for a federal charter.<sup>280</sup>

### B *Exclusively Federal Treaties?*

There are political and legal advantages to conducting treaties at a state level in Australia. Several challenges also exist, however, and four key reasons suggest that, similarly to the United States, treaty negotiations should be the province of the federal government.

First, state and territory borders do not correspond with or acknowledge traditional community boundaries, which often crisscross and intersect state borders. As Gerard Carney has explained, Australia's state and territory borders do not even generally derive from geographical barriers such as mountain ranges and rivers, but surveyors' best attempts to accurately measure and mark the 'celestially-described boundaries' of longitude and latitude.<sup>281</sup> In fact, emphasising the marked distance from Aboriginal and Torres Strait Islander understandings of their country, the initial western border of New South Wales was defined by the 1494 Treaty of Tordesillas, an agreement between Portugal and Spain to divide the world outside Europe, ratified by papal bull.<sup>282</sup> More than simply a historical curiosity, this fact can create real tensions for state-based treaty processes as it may mean that Aboriginal and Torres Strait Islander communities whose land stretches across jurisdictions would feel unable to participate. The challenge of maintaining governance and administrative efficacy on the one hand and, on the other, ensuring that distinct Indigenous communities are empowered to represent themselves on their own terms, is a perennial problem for Indigenous communities within the Australian federation. For instance, Trisha Gray notes that when ATSIC's electoral boundaries 'were altered to bring the Warburton/Ceduna boundary into line with the South Australian and

<sup>279</sup> See *National Human Rights Consultation* (Report, September 2009) ch 11.

<sup>280</sup> See, eg, George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (NewSouth Publishing, 4<sup>th</sup> ed, 2017).

<sup>281</sup> Gerard Carney, 'A Legal and Historical Overview of the Land Borders of the Australian States' (2016) 90(8) *Australian Law Journal* 579, 579.

<sup>282</sup> *Ibid* 581.

Western Australia border, the new line divided the Warburton mob, who refused to vote in the 1993 ATSIC election.<sup>283</sup>

This difficulty points to a second challenge. Aboriginal and Torres Strait Islander communities dissected by state and territory borders may nonetheless choose to participate in treaty processes. In doing so, however, they may find that their state negotiating partners have different ideas or approaches to negotiations, which may lead to distinct rights operating within a single Indigenous community. What Megan Davis refers to as '[t]he uncoordinated pursuit of treaty across the federation' may be particularly problematic for Indigenous communities whose traditional lands cross state borders, but the risk that some processes will result in weaker settlements than others is a problem for all state-based treaties.<sup>284</sup> Politically, varying standards in settlements across the state and territories may weaken support for treaties among Aboriginal and Torres Strait Islander peoples, putting its viability in doubt. Legally, unless state governments either agree among themselves to an appropriate standard (perhaps through the Council of Australian Governments, or commit to executing treaties in line with the standards affirmed in the *UNDRIP*),<sup>285</sup> only a Commonwealth treaty process can harmonise treaty rights across jurisdictions,<sup>286</sup> and ensure that all Indigenous nations obtain a similar set of minimum outcomes while providing opportunities for additional and distinctive provisions relating to the unique circumstances or needs of the relevant Indigenous nation.

Third, politically, some Indigenous communities may be uneasy, or even hostile, to the idea of negotiating with subnational entities. First Nations in

<sup>283</sup> Trisha Gray, 'Realistic Accommodation: The Influence of Traditional Aboriginal Political Culture on Contemporary Aboriginal Political Institutions' (Honours Thesis, Australian National University, 1994) 60, cited in Scott Bennett, *White Politics and Black Australians* (Allen & Unwin, 1999) 134. See also Aboriginal and Torres Strait Islander Commission, *Review of Boundaries: The Report of the Panel Convened by the Minister for Aboriginal and Torres Strait Islander Affairs to Review Matters Relating to the Boundaries of ATSIC's Zones, Regions and Wards* (Report, 1995) 9–10.

<sup>284</sup> Megan Davis, 'Voice, Treaty, Truth', *The Monthly* (online, July 2018) <<https://www.themonthly.com.au/issue/2018/july/1530367200/megan-davis/voice-treaty-truth>>.

<sup>285</sup> See Harry Hobbs, 'Treaty Making and the *UN Declaration on the Rights of Indigenous Peoples*: Lessons from Emerging Negotiations in Australia' (2019) 23(1–2) *International Journal of Human Rights* 174.

<sup>286</sup> Victoria, *Parliamentary Debates*, Legislative Council, 21 June 2018, 2870 (Luke O'Sullivan). See also Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (Federation Press, 2016). Mansell notes that one treaty with all Aboriginal and Torres Strait Islander peoples 'would provide a single standard of justice': at 118.

the United States and Canada draw on the historic treaties reached with agents of the federal government or British and Canadian Crowns to articulate a distinctive relationship with the state.<sup>287</sup> While this is not always recognised, it retains important rhetorical and political value to Indigenous nations, signifying both broken treaty promises and a historical standard on which to ground a more equitable contemporary relationship.<sup>288</sup> The absence of historic treaties between Aboriginal and Torres Strait Islander peoples and the British Crown or colonial governments mean Indigenous nations in Australia cannot premise their aspirations on similar grounds. Nonetheless, they maintain that sovereignty was never ceded,<sup>289</sup> conceive a treaty process as being ‘about recognition of the ongoing dimensions of that sovereignty’,<sup>290</sup> and assert that their status as prior self-governing communities entitles them to a distinctive nation-to-nation relationship.<sup>291</sup> As Galarrwuy Yunupingu noted, an agreement or treaty with a subnational entity may challenge that status, and may cause some Indigenous communities to opt out of any negotiation.<sup>292</sup> This is a risk for all state-based treaties but may be particularly challenging for Aboriginal communities in the Northern Territory and the Australian Capital Territory. As federal territories, both are subject to the exclusive jurisdiction of the Commonwealth.<sup>293</sup>

The final significant challenge facing state-driven treaties is a legal one. Unlike the situation in Canada where modern treaty settlements are constitu-

<sup>287</sup> Robert A Williams Jr, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800* (Oxford University Press, 1997); John Borrows and Michael Coyle (eds), *The Right Relationship: Reimagining the Implementation of Historic Treaties* (University of Toronto Press, 2017). See also Bruce Morito, *An Ethic of Mutual Respect: The Covenant Chain and Aboriginal–Crown Relations* (UBC Press, 2012).

<sup>288</sup> Borrows, ‘Canada’s Colonial Constitution’ (n 108) 21.

<sup>289</sup> Uluru Statement (n 170); ‘Aboriginal Sovereignty: Never Ceded’ (1988) 23(91) *Australian Historical Studies* 1.

<sup>290</sup> William Jones, ‘Recognising Aboriginal Sovereignty: Implications for the Treaty Process’ (Speech, ATSIC National Treaty Conference, 27 August 2002).

<sup>291</sup> Uluru Statement (n 170). See also Michael Dodson, ‘Aboriginal and Torres Strait Islander People and Citizenship’ (Speech, Complex Notions of Civic Identity Conference, 20 August 1993); Harry Hobbs, ‘Constitutional Recognition and Reform: Developing an Inclusive Australian Citizenship through Treaty’ (2018) 53(2) *Australian Journal of Political Science* 176, 176–82.

<sup>292</sup> See above n 1 and accompanying text.

<sup>293</sup> See *Australian Constitution* s 111.

tionally protected,<sup>294</sup> in Australia the Commonwealth Parliament may invalidate any eventual settlement. This problem is particularly acute for treaties struck at the territory level, because territories' legislative and executive authority is not inherent but is delegated from the *Australian Constitution*.<sup>295</sup> Take the Northern Territory as an example. Although the conferral of executive powers is very broad,<sup>296</sup> and its legislative authority is plenary,<sup>297</sup> the Northern Territory is subject to important limitations that mean it may not have the authority to agree to, or enact legislation to give effect to, certain terms without Commonwealth support.

Territory laws must operate consistently with, or not repugnantly to, the *Australian Constitution* as well as legislation enacted by the Commonwealth Parliament.<sup>298</sup> Although there is no Commonwealth Act precluding the enactment of legislation to give effect to a treaty, existing Commonwealth laws may prevent certain terms from being part of any settlement. For instance, ss 15AB(1)(b)(i) and 16AA of the *Crimes Act 1914* (Cth) preclude bail authorities and judicial officers from taking into account 'any form of customary law or cultural practice' as a reason for 'excusing, justifying, authorising, requiring or lessening the seriousness of the alleged criminal behaviour', subject to certain exceptions, when determining whether to grant bail or pass sentence to a person charged or convicted of an offence against a Northern Territory law. These provisions would preclude an exclusively Northern Territory treaty from empowering Aboriginal law in certain forms.

Further, even if the Northern Territory does have the authority to negotiate and execute a treaty with Aboriginal Territorians, the Commonwealth could revoke self-government powers to invalidate any treaty settlement. This is because there is no legal restraint on the Commonwealth Parliament from using its legislative powers under s 122 of the *Australian Constitution* to

<sup>294</sup> *Constitution Act 1982* (n 116) s 35. Note, however, that the protection of treaty rights is not absolute. The Canadian Supreme Court has developed a two-part test to assess whether infringement is permissible: *Sparrow* (n 146).

<sup>295</sup> *Northern Territory (Self-Government) Act 1978* (Cth) ('NT Self-Government Act'); *Australian Capital Territory (Self-Government) Act 1988* (Cth).

<sup>296</sup> See *Administration of Norfolk Island v Pitcher* (2005) 144 FCR 572, in relation to provisions of the *Norfolk Island Act 1979* (Cth).

<sup>297</sup> *NT Self-Government Act* (n 295) s 6. These powers are broadly defined and considered equivalent to those enjoyed by the states: *R v Toohey*; *Ex parte Northern Land Council* (1981) 151 CLR 170, 279 (Wilson J). See also *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 9 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ), describing the states' powers to make laws as 'plenary'.

<sup>298</sup> *A-G (NT) v Minister for Aboriginal Affairs* (1989) 25 FCR 345, 366 (Lockhart J).

override Territory legislation, or to diminish or revoke self-government over certain matters. If it was so inclined, the Commonwealth could override any or all parts of a treaty entered into with a territory.

This is not an idle threat; the Commonwealth has acted under s 122 to overrule Northern Territory legislation in recent times. In 1997, the Commonwealth Parliament enacted the *Euthanasia Laws Act 1997* (Cth), which overruled the *Rights of the Terminally Ill Act 1996* (NT) ('RTI Act'), and revoked the Territory's legislative authority over euthanasia.<sup>299</sup> More recently, in 2007, the Commonwealth Parliament passed a package of legislation to give effect to the Northern Territory Intervention.<sup>300</sup> It is impossible to predict whether a future Commonwealth Parliament would act in a similar way with regard to a Northern Territory treaty. Reflecting on the experience of the RTI Act, Graham Nicholson, former Northern Territory Crown Solicitor, has argued, however, that

arguments based on the importance, authority and permanency of Territory Self-Government, its basic constitutional legislation and its constitutional conventions, will carry little weight in federal circles when either the national interest or perceived federal matters are at stake, or when the subject of debate is seen by federal parliamentarians as being of sufficient interest and political value to override or simply ignore issues of Self-Government.<sup>301</sup>

Even the moral force that comes from a settlement with Aboriginal Territorians may not legally protect it from Commonwealth intrusion.

These examples indicate some of the specific challenges facing the Northern Territory treaty process, but all state- or territory-based negotiations face constitutional vulnerabilities. Indeed, the Commonwealth could overrule *any* state treaty as well. While the Commonwealth Parliament is not able to diminish or revoke the legislative power of the states, under s 109 of the *Australian Constitution*, Commonwealth legislation prevails over inconsistent

<sup>299</sup> *Euthanasia Laws Act 1997* (Cth) schs 1–2; *NT Self-Government Act* (n 295) s 50A. A recent effort to reverse this prohibition failed in the Senate by 34:36 votes: Parliament of Australia, *Journals of the Senate* (Senate Journal No 108, 15 August 2018) 3459, 3486.

<sup>300</sup> *Northern Territory National Emergency Response Act 2007* (Cth); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth); *Appropriation (Northern Territory National Emergency Response) Act (No 1) 2007–2008* (Cth); *Appropriation (Northern Territory National Emergency Response) Act (No 2) 2007–2008* (Cth).

<sup>301</sup> Graham Nicholson, *Lectures on Northern Territory Public Law* (Law Society Northern Territory, 2016) 140.

state legislation to the extent of any inconsistency. The terms of any Victorian treaty, for example, could be overridden by Commonwealth legislation grounded on the race power in s 51(xxvi). Although there is some uncertainty as to the scope of s 51(xxvi), the orthodox position is that the race power permits the Commonwealth Parliament to enact legislation that imposes a disadvantage on Aboriginal and Torres Strait Islander peoples.<sup>302</sup> This suggests that the Parliament could legislate to deny the effectiveness of the terms of a treaty signed by Victoria, or any other state. It also means that any exclusively subnational treaty must conform to existing Commonwealth legislation. Any state treaty would need to be consistent with the *Native Title Act*, for example.

In assessing the legal vulnerability of state treaty processes it is important to note that a Commonwealth treaty will not be legally impregnable. In the absence of constitutional protection of treaty rights, a future federal Parliament could enact legislation to abrogate any national treaty settlement as well. In this sense, the constitutional position of treaties with Aboriginal and Torres Strait Islander peoples will be similar to that in the United States, where the Supreme Court has held that treaty rights are defeasible by congressional action.<sup>303</sup> This vulnerability could only change if a referendum on constitutional recognition limited the race power, inserted a protection against racial discrimination, or protected treaty rights. This means that any Commonwealth treaty — like any state or territory treaty — will be vulnerable to federal legislative override.

### C Interlocking State and Federal Treaties

The distribution of powers under the *Australian Constitution* suggests that problems exist with both subnational and federal treaties. Although both processes may lead to agreements that secure vital goals for the Aboriginal and Torres Strait Islander communities that sign them, the settlements will be limited in important ways. Consider just one potential term of any treaty: recognition of Aboriginal law. Successive comprehensive inquiries have established the continuing dynamism and vitality of Aboriginal law.<sup>304</sup>

<sup>302</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 383 [94] (Gummow and Hayne JJ); Robert French, 'The Race Power: A Constitutional Chimera' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 180, 206. Cf Harry Hobbs, 'Revisiting the Scope of the Race Power after McCloy' (2016) 27(4) *Public Law Review* 264.

<sup>303</sup> *United States v Wheeler*, 435 US 313, 323 (Stewart J for the Court) (1978).

<sup>304</sup> See, eg, Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, 12 June 1986) [103]; Northern Territory Law Reform Committee, *Report on*

Unsurprisingly, legal recognition and acceptance of these systems is an aspiration of Aboriginal and Torres Strait Islander peoples.<sup>305</sup> As we noted, however, constitutional prohibitions will preclude exclusively federal treaties from recognising Indigenous dispute resolution systems, while Commonwealth legislation may prevent subnational treaties from recognising elements of Aboriginal law. This problem can be avoided by broadly adopting the Canadian approach and negotiating treaties with both the relevant subnational and national government.

Interlocking subnational–national treaties can also avoid the difficulty of existing treaty processes resulting in varied legal recognition of Indigenous rights across the country. Although specific outcomes will differ according to the unique circumstances and aspirations of each party, including the Commonwealth in each process should ensure a minimum standard for all negotiations and settlements. A minimum standard does not necessarily mean losing the advantages of laboratory federalism, however. Rather, a consistent process and clear minimum guidelines for settlement outcomes may empower Aboriginal and Torres Strait Islander communities to reach distinctive arrangements that reflect their own priorities.

One way that this could be achieved is via an Australian Treaty Commission. In the Uluru Statement, Aboriginal and Torres Strait Islander peoples called for exactly this, asking the federal government to establish a Makarrata Commission to supervise a process of agreement-making across the country. The Uluru Statement also called for a national Indigenous representative body — a First Nations Voice — empowered to advise Parliament on laws that affect Indigenous peoples.<sup>306</sup> Aboriginal and Torres Strait Islander peoples have explained that the Voice is their first priority.<sup>307</sup> Among other reasons, this is because a national representative body could ensure that the design of the Makarrata Commission reflects their own aspirations. It is, of course, vital that Aboriginal and Torres Strait Islander peoples' interests drive the design of the Commission and maintain control over its framework, but it may be appropriate for the Commission to be composed of Indigenous representatives, as well as representatives of federal, state, and local governments. This

*Aboriginal Customary Law* (Report, 2003) 10–12; Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture* (Final Report Project 94, September 2006) 80.

<sup>305</sup> See, eg, 'The Kalkaringi Statement' (1998) 4(15) *Indigenous Law Bulletin* 14; *UNDRIP* (n 22) art 27.

<sup>306</sup> Uluru Statement (n 170).

<sup>307</sup> Megan Davis, 'The Long Road to Uluru: Walking Together' (2018) 60 *Griffith Review* 13, 30.

model is similar to the British Columbia Treaty Commission,<sup>308</sup> but responds to Australia's constitutional framework. Indeed, by ensuring representatives of each tier of government are present, a Makarrata Commission would create an environment where potentially thorny issues arising from concurrent and interlocking constitutional powers over Indigenous affairs can be managed. In addition to the issues canvassed above, the presence of local government may allow treaty settlements to include particular reparative justice elements, including, for example, the renaming of creeks and other local areas.

A Makarrata Commission can also manage the risk that a significant disparity in power, resources, and capacity will affect the process and terms of any agreement. Clearly, Aboriginal and Torres Strait Islander peoples will be at a disadvantage in any negotiation, particularly if negotiations include representatives of three tiers of Australian government. A specially designed Commission empowered to ensure that all participants act in good faith and providing for internal dispute resolution without leading to an abandonment of attempts to reach settlement can minimise this risk. Formalising the Victorian negotiation framework,<sup>309</sup> or establishing structures to encourage its adoption across the country, would be a positive start.

This does not mean that existing state processes should be abandoned. Although they may not be able to deliver all outcomes desired by Aboriginal and Torres Strait Islander peoples, they are vital processes that are already engendering critical leadership and momentum in this space. In the absence of federal government involvement, they should continue. If the Commonwealth reconsiders its position, it can learn from the steps taken in Victoria, Northern Territory, Queensland, and potentially elsewhere, and respond with the national overarching structure we have proposed.

Interlocking treaties with federal, state, and potentially local governments will not avoid all difficulties, however. Two key challenges discussed above will persist. First, some Aboriginal and Torres Strait Islander communities may choose not to participate in any process that operates under Australian law. As Tanganekald, Meintang, and Boandik professor of law Irene Watson has argued, recognition of Indigenous sovereignty by or within Australian law

<sup>308</sup> The British Columbia Treaty Commission is an independent and impartial body composed of five Commissioners: two appointed by First Nations; one each by the federal and provincial governments; and one further Commissioner agreed to by the three parties. The Commission facilitates treaty negotiations by 'monitoring developments and by providing, when necessary, methods of dispute resolution': McKee (n 149) 33. See also *British Columbia Treaty Commission Act*, SC 1995, c 45, ss 4–5.

<sup>309</sup> See above n 214 and accompanying text.

‘inevitably reinstates colonial law’,<sup>310</sup> and thus leaves Indigenous peoples ‘subservient to the rules of the state’.<sup>311</sup> For scholars and activists like Watson, domestic treaty settlements fail to accord the respect Indigenous political communities deserve and will therefore fail to generate transformational change.

This anxiety may be more pronounced in any process that includes subnational governments, as Indigenous communities may be concerned that recognition of state or territory governments could detract from or diminish their inherent sovereignty.<sup>312</sup> This is a legitimate choice for a community to make. Nonetheless, as any treaty in Australia will legally be reached based on an assumption of overriding sovereignty of the state, we consider that questions or disputes over sovereignty are insoluble, and best avoided in any treaty process. As the Canadian Royal Commission on Aboriginal Peoples concluded in 1996, ‘detailed examination of sovereignty is ultimately a distraction’, for ‘[d]ifferences in deep political beliefs are best dealt with by fashioning a mutually satisfactory and peaceful coexistence’.<sup>313</sup> Treaties are political agreements that are best conceived as efforts to renegotiate the terms on which this continent is shared. This discussion can be undertaken while ‘putting to one side any questions of sovereignty’.<sup>314</sup>

Second, in the absence of constitutional amendment, any treaty settlement in Australia will remain legally vulnerable. It is important, therefore, that a political cost is imposed on a government that contemplates abrogating the terms of any treaty. One way that this could be imposed is via constitutional entrenchment of a First Nations Voice.<sup>315</sup> Proponents of the Voice have suggested that a national Indigenous representative body empowered to advise the federal Parliament on issues of concern to Aboriginal and Torres

<sup>310</sup> Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) 2.

<sup>311</sup> Ibid 91. See also Irene Watson, ‘Aboriginal Recognition: Treaties and Colonial Constitutions, “We Have Been Here Forever ...”’ (2018) 30(1) *Bond Law Review* 7, 12–13.

<sup>312</sup> See Gaynor Macdonald, ‘Indigenous Treaties Are Meaningless without Addressing the Issue of Sovereignty’, *The Conversation* (Web Page, 15 June 2018) <<https://theconversation.com/indigenous-treaties-are-meaningless-without-addressing-the-issue-of-sovereignty-98006>>.

<sup>313</sup> Canadian Royal Commission on Aboriginal Peoples, *Restructuring the Relationship* (Report Vol 2, 1996) vol 2, 18.

<sup>314</sup> Sean Brennan, Brenda Gunn and George Williams, ‘“Sovereignty” and Its Relevance to Treaty-Making between Indigenous Peoples and Australian Governments’ (2004) 26(3) *Sydney Law Review* 307, 352.

<sup>315</sup> Uluru Statement (n 170).

Strait Islander peoples will contribute to the development of a political convention that inhibits Parliament from enacting legislation contrary to Indigenous peoples' interests.<sup>316</sup> Whether such a convention develops depends on several features of the representative body, including its legitimacy within the Indigenous community, its credibility within government and the public at large, and the personal relationships between members of the body and Parliament. Ultimately, however, political conventions can be displaced. Australian governments have historically obtained political mileage by acting contrary to the interests of Aboriginal and Torres Strait Islander peoples.<sup>317</sup> It is impossible to state with any certainty that a constitutionally entrenched First Nations Voice would prevent this.

## VI CONCLUSION

In this article, we have explored three distinct approaches to treaty-making with Indigenous peoples. In the United States, while many legal agreements are negotiated at a subnational level, treaties are an exclusively federal responsibility. In Canada, modern treaties are conducted by both provincial and federal governments. In Australia, treaty processes are being driven by the states and territories. The distinction observed between the United States and Canada derives from each state's specific constitutional framework and their allocation of legislative and executive authority. The same is true in Australia. Although the ongoing processes largely reflect a political reality, they are possible due to the distribution of power under the *Australian Constitution*. Unlike the United States and Canada, both state and federal governments are empowered to negotiate treaties with Aboriginal and Torres Strait Islander peoples.

The allocation of constitutional authority in Australia provides both opportunities and challenges for Aboriginal and Torres Strait Islander peoples. Most significantly, it permits multiple treaty processes to commence even in circumstances where the Australian government refuses to countenance a national process. Conversely, it means that although state and territory treaties may lead to positive settlements that secure meaningful outcomes for Indigenous communities, those agreements may not be capable of realising all

<sup>316</sup> See, eg, Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Interim Report* (Report, July 2018) 40–5 [3.98]–[3.115].

<sup>317</sup> George Williams, 'Constitutional Recognition by Way of an Indigenous Advisory Body?' (2015) 8(18) *Indigenous Law Bulletin* 12, 12.

Indigenous aspirations. State and territory governments are precluded from including certain terms in any treaty. These complexities suggest that it is preferable for treaties to be negotiated between Aboriginal and Torres Strait Islander communities and both federal and subnational governments. This arrangement responds to the unique distribution of legislative authority in the Australian federation, enabling Indigenous communities to negotiate in a single process with each tier of government to secure a comprehensive agreement. While some Indigenous peoples and communities may be hesitant about or hostile to the idea of negotiating with second and third order tiers of government, exploration of contemporary agreement-making in the United States and Canada reveals the value of such agreements. The increasing complexity of personal and legal relations in contemporary society means that, unlike at first contact, the interests and aspirations of Indigenous and non-Indigenous peoples are intertwined, and many more parties now need to be consulted before agreements can be reached.

Aboriginal and Torres Strait Islander peoples have called on the Australian government to establish a Makarrata Commission to supervise a process of agreement-making. Reflecting the distribution of legislative authority in Australia, a Makarrata Commission could be comprised of representatives of Aboriginal and Torres Strait Islander communities and federal, state, and local governments. Potentially modelled on the British Columbia Treaty Commission, a Makarrata Commission could develop and enforce a treaty framework that encouraged all participants to negotiate in good faith. Such a Commission would be a valuable forum to drive positive and productive settlements in Australia that conform to the structures of the Australian federation.

In the meantime, the existing state- and territory-based processes have their challenges, and they may not be able to realise all Indigenous aspirations. Nonetheless, they are valuable and should continue until and unless the federal government reconsiders its position. Subnational treaties can lead to innovative settlements that secure important outcomes for the Aboriginal and Torres Strait Islander communities who sign them. Moreover, in propelling the debate forward, these processes are building pressure on recalcitrant state, territory and federal governments, and eventually may catalyse a comprehensive, unified, interlocking treaty process, supervised by a Makarrata Commission.