Looking Across The Tasman: Treaty, Not Federation!

George Fermanis*

I . INTRODUCTION

In ending patterns of exclusion and discrimination in Australia and accessing justice for Indigenous Australians, a treaty always struck me as an interesting idea. How would it work? Could it? From analysing other countries' treaty experiences, we can anticipate a range of specific technical and procedural issues. But I think the most interesting idea about a treaty is its ability to introduce notions of rights and sovereignty into the dialogue between Indigenous and non-Indigenous people in a way that can affect the outcomes of that discussion. This article is a brief overview of how the Treaty of Waitangi has similarly impacted notions of 'rights' in the dialogue between Indigenous and non-Indigenous peoples, in the contexts of alternative dispute resolution, self-determination, and land rights. Australia can learn much from this.

II. THE TREATY OF WAITANGI

The Treaty of Waitangi or te Teriti o Waitangi (now 'Treaty') was signed in 1840 by over 500 Maori Chiefs, with Captain William Hobson representing the Crown.[1] However, there was always an uncertainty over what was agreed to, because the document's three articles were expressed in both English and Maori.

To the English, Article 1 entails that the Maori ceded to the Crown all the rights and powers of sovereignty, absolutely and without reservation. To the Maori, Article 1 meant that only Crown governance was conceded, and that sovereignty (tino rangatiratanga) was retained over their treasures (taonga).[2] Regarding Article 2, the English believed this meant that the Maori still retained full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties. To the Maori, Article 2 also granted the Maori the accompanying natural resources along with these lands.[3] To both parties, Article 3 granted the Maori the same rights and privileges as British citizens living in Aotearoa/New Zealand.[4] However, by the late 1870s, the Treaty was declared a 'simple nullity' by the High Court.[5] This followed decades of cultural genocide post-signing conducted through law,[6] evangelism,[7] and warfare.[8]

The Treaty was no longer a 'simple nullity' after the Waitangi Tribunal was established by the Treaty of Waitangi Act 1975 (NZ),[9] mainly due to the efforts of Hon Matiu Rata of the Labour Party.[10] The Tribunal considers claims where Maori have been prejudicially affected by legislation, Crown Policy or practice; and generally only makes non-binding recommendations to the Crown.[11] Judge Durie stresses that the Tribunal is bicultural in composition and modus operandi,[12] since it provides for cultural and spiritual redress for historical violations.[13] In 1985, the Tribunal's jurisdiction was extended to cover claims on or after 6 February 1840, in a context of rising Maori protest.[14]

By 1986, this development was supported by Treaty jurisprudence. For instance, regarding section 9 of the State Owned Enterprises Act 1986 (NZ), in the Court

of Appeal in 1987, Cooke P concluded that the duty to observe Waitangi's principles,[15] as the Act demanded, was 'not a light one',[16] and 'infinitely more than a finality'.[17] This was not easily avoided; the Treaty was an 'embryo' whose principles could not be frozen in time.[18] With over thirty or so statutes enacted with reference to the Treaty since 1975,[19] the Treaty and tikanga Maori (Maori law) began to affect so many government departments.[20] It now occupied a 'legal shadowland' in New Zealand's unwritten constitution.[21] This took place in a turbulent context of increasing Maori resentment,[22] and the introduction of native title into common law.[23]

III. BACK TO AUSTRALIA

In contrast, while agreement-making is now a feature of the Australian policy landscape,[24] our historical experience of treaties is limited.[25] Only the 1835 Batman Treaty comes to mind.[26]

By treaty, I mean a political or legal agreement between governments and Indigenous peoples, which involves three things:

- A starting point of acknowledgment;
- A process of negotiation; and
- Outcomes in the form of rights, obligations and opportunities.[27]

That being said, in 1979, the National Aboriginal Conference called for a 'Treaty of Commitment' (later 'Makarrata') to be negotiated between the Commonwealth and the Aboriginal people.[28] The issue again arose with the Barunga Statement in 1988,[29] and the Council for Aboriginal Reconciliation's final report in 2000.[30]

Why should we care? We should care because Australia's laws have created patterns of exclusion and discrimination towards our Indigenous peoples.[31] And a treaty, like constitutional change, presents a way to end this pattern. Consider our founding document, the Australian Constitution. Indigenous Australians were not involved in its drafting. Its provisions reflected a disbelief in their long-term future in Australia, consistent with the doctrine of 'terra nullius', which was only overturned in 1992.[32] Despite the 1967 Referendum deleting section 127 (a racist provision), now Indigenous Austrailans are not mentioned anywhere in the Constitution. In practice, all of this has promoted their exclusion from public institutions,[33] the imposition of Indigenous policy by non-Indigenous administration,[34] and caused great socio-economic disadvantage.[35] In 2005, the gap in life expectancy between Indigenous and non-Indigenous Australians was 11.5 years for men and 9.7 years for women.[36] Australia is the only Commonwealth nation without a treaty with its Indigenous peoples.

What New Zealand shows is that while debates over sovereignty go on (as they do), the choice can be made to re-negotiate or revisit the fundamental settlement between peoples.[37] Australia has avoided this. In fact, the two were conflated when John Howard said on 29 May 2000: 'A nation … does not make a treaty with itself', even when a conception of Indigenous sovereignty meant simply inherenting authority and independence.[38]

IV. ALTERNATIVE DISPUTE RESOLUTION: TREATIES AND BARGAINING POWER

'Alternative dispute resolution' or 'ADR' has an essential role in dealing with Indigenous rights claims, because it allows parties to work collaboratively and determine their own procedural values and substantive considerations.[39] More Indigenous rights claims are dealt out of court than in court.[40] More importantly for Indigenous rights claims, ADR considers the relationship between the parties,[41] alleviates the deficiencies of judicial remedies (like evidential complexity and incorporating oral evidence),[42] and provides a forum free from colonial history.[43] In Australia, depending on the type of dispute, federal legislation requires the Crown to enter either negotiation or mediation.[44]

A treaty between governments and Indigenous peoples can strengthen the power of Indigenous peoples within such processes of negotiation, so mutual goals rather than imposed goals can be advanced.[45] Treaties do this by making sure that there is more accountability by governments for the promises made in treaty documents.[46] This is relevant because in Australia and New Zealand, power seems heavily tipped in favour of the Crown because both countries' minorities do not enjoy constitutional protection, leaving legislation as an alternative.[47] Legislation can also override rights recognised by the courts. However, politically and numerically, the Maori are a stronger minority.[48]

Yet a treaty can help. Insofar as the Tribunal is a respected neutral body and embodiment of tikanga Maori and the Treaty,[49] power is tempered by accommodating Indigenous values and culture in the

negotiation process.[50] New Zealand adopts a direct negotiation model, where negotiations begin only after claims are filed with an independent tribunal which has the power to hold hearings and make recommendations about the merits and implications of claims.[51] For claims between the Crown and Maori, this meshes the Waitangi Tribunal closely with negotiation.[52] It judges a claim's validity by a culturally neutral standard.[53] That is, claims that one party has violated the principles of a Treaty agreed to by both, so both the Maori and English texts are valued. In contrast, Australia only draws concepts from the dominant settler legal system.[54] For instance, Indigenous claimants feel disadvantaged under adversarial and 'alien concepts' of rights, when the Australian Federal Courts determine whether meditation is appropriate.[55] Indeed, the breadth of the Waitangi Tribunal's mandate to review its breaches also leads to a wider range of outcomes than in Australia, which can better accommodate the needs of the dispute.[56]

V. SELF-DETERMINATION: TREATIES AND CO-MANAGEMENT

A treaty can give rise to stronger and more capable institutions of Aboriginal governance.[57] Aboriginal governance – governance is, who has influence, who decides, and how decision makers are held accountable[58] - is essential to recognising Indigenous peoples' right to self-determination.[59] Self-determination is not necessarily secession,[60] but rather the 'freedom to determine their political status and freely pursue their economic, social and cultural development'.[61] By contrast, what we tend to see today, at best, is only consultation with Aboriginal people.[62] Self-determination is important because it promotes economic prosperity,[63] better community mental health,[64] and better leader accountability.[65] Leaders are more likely to produce decisions 'in tune with the cultural values of the community'.[66] 'Self-determination' is dynamic,[67] and is about creating a harmony between Indigenous and non-Indigenous communities, necessary for the functioning of society,[68] not a particular institutional relationship.[69] Putting this in practice takes many different forms. Self-administration and self-management, as has occurred in Australia (under Aboriginal and Torres Strait Islander Commission) is one,[70] and setting aside seats for Indigenous voters (New Zealand set four aside in 1867) is another.[71] However, this article will mainly focus on the co-management and joint management self-determination model.

Co-management and joint management is where a commission or board is established with both Indigenous and government appointees to facilitate collaborative relationships.[72] This is a necessity because Indigenous communities often need access to land beyond what they have been allocated.[73] Co-management is acknowledged to be a softer model of sovereignty: final decisions often remain with government, who generally loath acknowledging Indigenous consent.[74]

The co-management model in Tongagiro National Park (established 1894[75]) in New Zealand demonstrates the impact of the Treaty in promoting Indigenous self-determination and participation. Ruru terms it a significant 'mind-shift' from monetary gain through tourism.[76] Tongagiro is a volcanic mountain that lies in the middle of the North Island and its peak is sacred to the Ngati Tuwharetoa iwi,[77] because mountains are tupuna (ancestors).[78] Mountains are mainly managed by the *National Parks Act 1980* (NZ) and the Conservation Act 1987 (NZ).[79] Section 4 of the *Conservation Act 1987* (NZ) states that: 'This Act shall so be interpreted and administered as to give effect to [the Treaty's] principles'.[80] In recent years, the Treaty mention in statute has compelled the Department of Conservation and other associated bodies with national park management responsibilities to contextualise that direction.[81] Besides partnerships (arguably narrower

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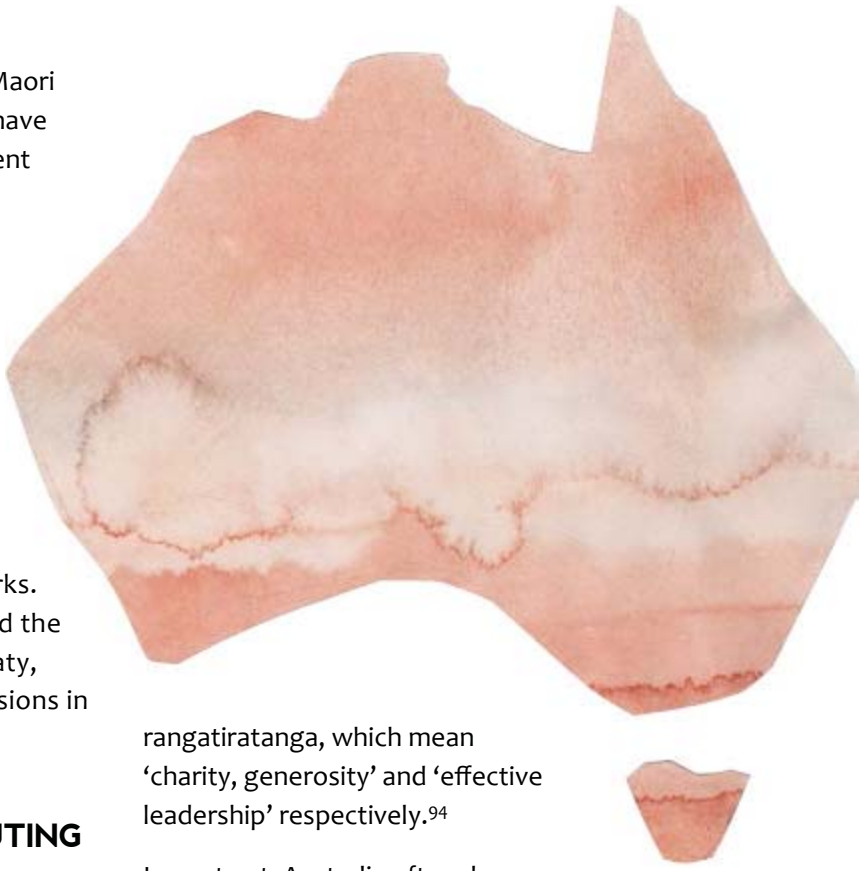
than hoped) like committing staff to undertake Maori cultural and language training,[82] positive trends have occurred with regard to national park management plans.[83] For instance, 2003 draft plans for the Tongariro, contain extensive reference to Treaty principles and how they should be applied. For example, it lists 'development issues' which need to be 'resolved to the satisfaction of iwi and the department'.[84] Despite falling short of Australia's co-management,[85] and giving equal recognition to the Maori environment management ethic,[86] it is dramatic progress. In Australia, there have been extensive negotiations over the joint management of parks. Consider the Uluru-Kata Tjuta National Park and the Anangu community.[87] Hopefully through a Treaty, Australia can have its own unforeseen progressions in its current models.



VI. TREATY INFLUENCE ON EXECUTING INTERNAL SELF-GOVERNANCE

As well as covering interactions with the nation-state, self-determination also encompasses how the Indigenous community manages itself internally.[88] New Zealand's increasing acceptance of the value of cultural norms, as caused by the Treaty, have put it one step ahead to the challenge of reconciling best practices in both Indigenous and non-Indigenous cultures to determine self-governance. For instance, tikanga Maori references have been applied consciously for the resolution of disputes in the charters of Maori governance entities like the Wakutu Incorporation and the Te Runanga a Iwi O Ngaphui.[89] While cultural mismatches can be exploited, or an awkward fit, this type of application is a step in the right direction.[90] The acceptance of Maori norms is caused by the incorporation of the Treaty in wider society and government departments. In fact, judges have been prepared to apply Maori custom even without a statutory reference, where custom is a relevant fact or the Treaty of Waitangi is a relevant consideration, forming the basis of fishing rights and title in land.[91]

However, this introduces new, unavoidable issues, like clearly defining such concepts for the purpose of commercial certainty.[92] Also, whereas Western culture tends to make a clear distinction between morality and the law, the Maori legal system sees values, practices and rules as being very much interrelated (despite Western values obviously also being values based).[93] For instance, good Maori governance principles include aroha and rangatiratanga, which mean 'charity, generosity' and 'effective leadership' respectively.[94]

In contrast, Australia often draws upon the federal nature of the *Commonwealth Constitution* as its major example of 'legal pluralism'.[95] Despite federalism containing structural features like a sharing of power, it remains a weak form of legal pluralism as both arms of the federation remain components of a single order.[96] Interestingly, in New Zealand, having a single government with which to negotiate rights can have advantages, like when the claim to rights is a single claim over the whole of the State.[97]

VII. TREATIES AND SOURCES OF INDIGENOUS LAND RIGHTS

In Australia, as per section 223(1) of the *Native Title Act 1993*, Indigenous laws and customs at the time of Crown acquisition of sovereignty have to be maintained to the present day to confirm native title.[98] This is the 'doctrine of continuity'. The Act adopts Justice Brennan's statements in *Mabo*.[99] Prior to *Mabo*, only legislation was judicially acknowledged as providing Indigenous land rights,[100] supporting its effective denial in *Milirrpum v Nabalco Pty Ltd.*[101] In practice however, the 'doctrine of continuity' has limited the content of rights to only specific laws and customs.[102] Strange results eventuate: it avoids acknowledging the unavoidable change to customs, caused by time or dispossession.[103] Post-*Mabo*, native title does not distinguish between Aboriginal title and other Aboriginal land rights.[104] In the event of a conflict, the third party interests generally prevail.[105]

In New Zealand however, the 1840 *Treaty of Waitangi* begins a series of jurisprudence so land rights include those of 'traditional law and customs' as well as those 'under [Maori] custom and usage', encompassing tikanga Maori.[106] As explained, the English version of the Treaty guaranteed the Maori 'the full exclusive and undisturbed possession' of land and resources,[107] which was affirmed in *Queen v Symonds* in 1847.[108] The idea of Maori 'custom and usage' was affirmed by the NZ Court of Appeal in *Attorney-General v Ngati Apa*,[109] after the Privy Council challenged it in *Nireaha Tamaki v Baker*.[110] Moreover, it does not appear to be necessary in New Zealand to prove continuous observance of tikanga Maori from the time of British assertion of sovereignty to the present.[111]

Regarding extinguishment, however, the Treaty's role in protection should not be overstated. This is because the absence of constitutional protections for Indigenous land rights in both countries, unlike Canada,[112] means that there are no domestic legal impediments to extinguishment or infringement of those rights by legislatures that have constitutional authority over them.[113] For instance, in 2004, the New Zealand Parliament enacted the *Foreshore and Seabed Act* (NZ),[114] extinguishing most Maori Rights to coastal lands. United Nations institutions had little binding power,[115] or persuasive value,[116] especially against a unicameral parliament.[117] Similarly, it is suggested the Howard government legislated away Indigenous rights by "constantly rationali[sing]' it as 'impediments to the free working of market forces'.[118]

VIII. CONCLUSION

While a treaty is only a piece of the puzzle, and great socio-economic disadvantage still remains in both countries' Indigenous communities; a treaty is certainly a neat way to address the practical, day-to-day issues of co-existence. Australia can learn a great deal from New Zealand's treaty experience and the way it has affected conceptions of land-rights, bargaining power imbalances, and effective self-determination. Our Trans-Tasman rivalry in all things should be a great motivator!

Detail from 'Governor Davey's Proclamation to the Aborigines,' 1830

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George Fermanis* Combined Law Candidate, UNSW

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