The Making of Treaties

GRAHAM ATKINSON and **MARK BRETT** discuss native title and justice for First Australians.

The American Declaration of Independence has recently hit the headlines around the world: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights'. The election of America's first black President was seen as a fulfilment of the dreams of Martin Luther King Jr, who suggested during the civil rights movement that America had not yet lived up to its creed.

Less well reported was a speech made by Barack Obama on 25 October 2008, when he outlined a policy on Native Americans. 'We need more than just a government-to-government relationship', Obama said, 'we need a nation-to-nation relationship, and I will make sure that tribal nations have a voice in the White House'. This statement rightly implies that Indigenous rights are distinguishable from civil rights, and the issue of 'equality' for Native Americans needs to be seen from a different angle.

The advent of the Obama phenomenon is rich with both hope and irony, and his Native American policy statement evokes for us another paragraph in the Declaration of Independence:

> Nor have we been wanting in Attentions to our British Brethren. We have warned them from Time to Time of Attempts by their Legislature to extend an unwarrantable Jurisdiction over us ... which would inevitably interrupt our Connections and Correspondence. They too have been deaf to the Voice of Justice and of consanguinity.

The language of equality in the Declaration of Independence has meant different things to different generations of Americans. Reading from the perspective of Native American sovereignty, very few words needed to be changed in this paragraph: it was manifestly the case that unwarranted jurisdiction should not be extended over peoples whose kinship ties and connection to traditional lands provided the foundation of alternative sovereignties. From this perspective, the new overarching national imagination in North America therefore had to come to terms with the first nations.

In the US and Canadian contexts, it was clear that the special legal rights of Indigenous peoples derived not from their 'race' but rather, from the fact that they were descendents of the societies who had established their *sovereign systems of law* long before the competing assertions of white sovereignty arrived on the scene.

Whether or not the legal independence of the first nations was actually recognised in particular treaties, they maintained their Indigenous laws and customs within the horizon of the common law. Australia belonged within the same horizon of common law, although the applications of native title in Australia have been considerably less respectful of Indigenous sovereignties.

It is not possible to turn back the clock, but we have a great deal of unfinished business that still needs to be dealt with. Native title, for example, is not simply a recent legal invention designed to irritate miners and developers; it is both a signpost to historic injustices in the Australian story and an opportunity to put things right in the future.

Since the 1970s, various governments have introduced land rights legislation, and from the 1990s a number of significant determinations of native title have secured

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Indigenous interests over large areas, especially in remote Australia. Nevertheless, the native title system has been condemned as unjust for a number of legitimate reasons, and the legal complexities of it have brought it into disrepute among Indigenous people and non-Indigenous people alike.

To mention just one element in the current system, the legal proof required to establish a group's connection to country under the *Native Title Act* is quite bizarre. A traditional owner group who have revitalised their traditions in recent years cannot be recognised as native title holders under Australian law *unless* those traditions have been observed substantially without interruption since the assertion of British sovereignty. The legal ideal would have those traditions 'frozen in time'. These expectations seem to be underpinned by a kind of social Darwinism in which particular Aboriginal groups are rewarded for surviving the onslaught of British sovereignty.

The Social Justice Commissioner, Tom Calma, has rightly suggested that since the UN *Declaration on the Rights*

of Indigenous Peoples (2007) provides the right to revitalise Indigenous cultures, the *Native Title Act* should be amended accordingly.

There are a range of other concerns as well, such as the requirement that wherever native title rights are perceived to be in conflict with other rights, then the Indigenous rights must bow down to every other right in existence. Some of us might see this status quo as discriminatory.

The federal Attorney-General, Robert McClelland, raised some hopes early in 2008 when he delivered a speech in Brisbane arguing that native title has a significant role to play in the new chapter of Australia's story inaugurated by the apology to the Stolen Generations. He acknowledged, however, that 'we have a long way to go before we realise the full potential that native title can bring'.

The Attorney-General suggested that 'Just as an apology recognises and acknowledges the past hurt caused by the removal of children, through native title we acknowledge Indigenous people's ongoing relationship with the land'.

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The comparison has an oddly tortured logic, since the analogy would require that the federal government apologise for the removal of traditional owners from their country, causing the same kind of trauma as being removed from one's family. It is, above all, governments who have created the weakening of connection that the Federal Court is now asked to evaluate in native title cases — providing legal recognition in the form of 'positive' or 'negative' determinations. Back in 1992, Paul Keating raised another issue of recognition in his Redfern speech — recognition of who did the dispossessing, who took the traditional land, and who broke the continuities of law and custom.

Robert McLelland is, however, to be applauded when he suggests that the native title system should be seen as an avenue of economic development. What we urgently need to see is some policy and legal imagination that can close the gap between current understandings of economic development and the traditional rights to hunt, fish and gather. After all, what was taken away was a whole system of sustainable economies, not something that might be thought of as similar to a recreational right to hunt and fish. Native title has to be reconceived in a way that reflects these economic rights and interests. We need to see a range of options in settlement agreements with traditional owners that include Aboriginal people being more effectively involved in environmental management regimes, benefit-sharing arrangements and sustainable economic development.

Especially in Victoria (the state with the worst record on land justice in all of Australia), the call for Aboriginal rights has fallen on deaf ears year after year. For that reason, back in February 2005 a state-wide meeting of traditional owners authorised a statement of land justice principles and decided to form a representative group in order to negotiate with the state government. In August 2005, at the first meeting of the reference group, representatives from each of the first nations in Victoria resolved to form the Victorian Traditional Owner Land Justice Group.

From the beginning, our advocacy has been focused on statewide policies for land justice, and not on local Aboriginal business. However, it will always be the right of each of the first nations to negotiate directly with government, and the main purpose of the Land Justice Group is to expand the options within those negotiations. As in the North American context, self-determination is primarily a right that is exercised by each of the first nations, rather than by an Aboriginal 'race'.

Given that the sovereignty of Australian governments is divided between the Commonwealth and the states, we thought long and hard about what could and should be achieved at the state level. We came up with the idea of a 'Framework Agreement' (<www.landjustice.com.au>). Available since August 2006, it has provided the structure for our negotiations with a number of Ministers.

Those negotiations moved into a new phase in 2008 with the establishment of a cabinet-authorised Steering Committee chaired by Mick Dodson. The committee will report to Cabinet by the end of the year with proposals for a Settlement Framework that will streamline negotiations with traditional owner groups in Victoria, whether they have lodged a native title claim or not.

The main purpose of the Framework is to provide better ways to resolve native title claims, including options for the ownership and joint management of Crown land. This is not just about watered-down native title rights for groups who can demonstrate continuous 'connection to country' according to the onerous standards required by the Federal Court. It is envisaged that the options within the Framework will become available to the broad range of recognised traditional owner groups across Victoria, who will each negotiate their own settlement with the state government.

As Mick Dodson has pointed out, what the Steering Committee is doing is in effect a treaty process. Most recently, he has compared the negotiations to the treaty discussions in British Columbia (*The Age*, 12 November 2008). We are negotiating a Framework that considers the full range of traditional owners' rights and interests: ownership of land, access to natural resources, control of Aboriginal cultural heritage, economic development, rights to participate in decisions about activities on Crown land, and the organisational structures that will be needed for

each traditional owner group to exercise their own self-determination.

After much debate, it has become clear that the Framework idea is the most effective way to balance the state's level of sovereignty and the sovereignty of the first nations. The Land Justice Group is participating in policy development that will allow for each of the first nations to negotiate their own land justice settlements. We have never had such an opportunity in this state, and we are on the verge of an historic step forward.

Most of us are aware that there is *another* Dodson brother who is tirelessly at work expanding the national imagination as well. In his Nulungu Lecture earlier this year, Pat Dodson spoke about the need for a national Framework, one which will eventually lead to constitutional amendments. Ultimately, a treaty process at the national level would need to secure the rights of Indigenous peoples in the federal constitution. Securing those rights simply in state or federal legislation runs the risk that such legal arrangements would suffer the same fate as the *Native Title Act* and the *Racial Discrimination Act*, which have fallen victim to the whims of successive parliaments.

As Pat Dodson has said, 'We must seek to create a National Framework that will allow us to stand within the global community as a nation that has had the courage to confront the reality of its past and to deal with that reality within a renewed dialogue'. We must take the steps that are needed 'to enable the nation to be reconciled within itself'.

The global community has now spoken through the UN *Declaration on the Rights of Indigenous Peoples*, and the Rudd government is considering endorsement of the UN declaration in line with its election promises. In so doing, the federal government should not fail to address the view expressed several times by UN bodies that the native title system in Australia does not live up to established benchmarks in human rights.

As Australia considers what route it will take to becoming a republic, there will be a unique opportunity to create a new constitution that enshrines those international standards of justice. There is a bad conscience at the base of Australian identity, and we will need a robust public debate about what constitutional elements will provide more secure foundations for a just society.

The Land Justice Group sees a state-based Framework Agreement as the first step along a road, achievable within a year, and the Victorian example could well play a significant role in the next steps to be taken at the national level. The native title system is badly in need of thorough reform, and a model for that reform could begin with state-based legislation and policy. From there, the benefits of revitalised and strengthened Indigenous cultures will flow outwards to include positive health and economic outcomes, currently afflicted by all the evidence of 'cultural stress'.

Along the way, we would do well to keep our eye on international analogies. That will keep our horizons broad. The dreaming for justice will not come to fruition in the Australian imagination until the First Australians have been granted constitutional recognition and rights, whether that is called a treaty or not.

Graham Atkinson is chair of Native Title Services Victoria and co-chair of the Victorian Traditional Owner Land Justice Group. Mark Brett, the Secretary of the Land Justice Group, teaches religion and ethics at Whitley College.