

# **TREATY COMMUNITY SEMINAR**

## **FACILITATOR'S GUIDE**



### **Acknowledgments**

This guide and kit is based on a program originally developed by ATSIC and has been modified by ANTaR for use in the non-Indigenous community. Thanks to Lyn Marlow of ATSIC's Treaty Secretariat for her assistance in facilitating the project. The kit would also not have been possible without the unstinting editorial and production support of Kathleen Gilbert. Finally, thanks to the Public Service Association of NSW, and particularly Les Carr, for printing the kit.

## FOREWORD

On behalf of ANTaR and ATSIC, we are pleased to commend this Treaty Community Seminar kit to promote understanding and discussion about treaty in the Australian community.

Since the heady days of Corroboree 2000 and the hugely successful bridge walks, a great many Australians have been asking, 'What next for the reconciliation process?'

A key recommendation of the final report of the Council for Aboriginal Reconciliation called on the Commonwealth Parliament to enact legislation 'to put in place a process which will unite all Australians by way of an agreement or treaty, through which unresolved issues of reconciliation can be resolved'. Such an agreement or treaty would fundamentally change the relationship between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians.

In June 2000 the ATSIC Board of Commissioners agreed that the treaty concept should be further advanced because of its potential, through the settlement of unresolved issues, to bring about lasting positive changes to the relationship between Indigenous and non-Indigenous Australians. At ATSIC's October 2000 meeting, the Board endorsed a broad strategy for progressing the treaty concept and approved the establishment of the National Treaty Support Group. An information package was developed to facilitate discussion of treaty within Indigenous communities.

ATSIC called on ANTaR to assist with an information and awareness strategy in the non-Indigenous community. ANTaR has produced this Treaty Community Seminar Program as one initiative in undertaking this role.

The materials in this kit have been based as closely as possible on the information included in the ATSIC package, and are designed to raise awareness and promote understanding of the issues involved in the treaty concept.

We hope this kit will be widely used by community groups across the country, and that it contributes to informed discussion on treaty among non-Indigenous Australians.

Phil Glendenning  
National President  
Australians for Native Title and  
Reconciliation

Geoff Clark  
Chairperson  
Aboriginal and Torres Strait Islander  
Commission

May 2002

## ABOUT ANTAR

Australians for Native Title and Reconciliation (ANTaR) is an independent, national network of mainly non-Indigenous organisations and individuals working in support of justice for Aboriginal and Torres Strait Islander peoples in Australia. ANTaR is not party-political and receives no government funding. The ANTaR network comprises a National Office, peak ANTaR state groups, over 200 local reconciliation groups and a huge individual supporter base.

ANTaR was formed in 1997 in response to a swell of public anger over Federal Government moves to wind back Indigenous native title rights.

ANTaR grew into a people's movement committed to the rights and perspectives of Indigenous peoples to determine their own futures with the support of the Australian people. ANTaR works in close partnership with Indigenous leaders and communities. Our policy and priorities are decided in consultation with ANTaR's Indigenous Reference Group.

ANTaR has an integral place in the Reconciliation movement in Australia and coordinates a major national community education and awareness campaign on native title and reconciliation.

Central to ANTaR's activities is the *Sea of Hands*, which first appeared in front of Parliament House in October 1997. More than 250,000 Australians have since put their signatures on hands in the *Sea of Hands* and helped in its installation around Australia. The *Sea of Hands* has become a symbol of the people's movement for Reconciliation in Australia. ANTaR was also instrumental in the Sorry Books campaign which collected personal apologies to the stolen generations from an estimated one million Australians.

For further information visit our website: <http://www.antar.org.au>

## ABOUT THE TREATY COMMUNITY SEMINAR PROGRAM

The Treaty Community Seminar Program has been designed as a do-it-yourself learning kit for use by reconciliation groups, schools and other community groups interested in exploring the issues involved in a treaty process between Indigenous and non-Indigenous Australians.

This program is based on one developed by ATSIC for use in Indigenous communities. The ATSIC program is part of ATSIC's strategy to raise awareness and promote understanding of the issues involved in a treaty process. The program aims to provide a framework for discussion of these issues.

This seminar program has been adapted by ANTaR for use in the wider Australian community. The material is as much as possible identical to information being presented to Indigenous communities by ATSIC.

The seminar program is designed to be delivered by a Facilitator and can be presented in a number of different formats to suit the circumstances and available time of particular groups.

## FACILITATOR'S ROLE

The Facilitator's role is to present information and encourage discussion. Do not expect to encounter agreement on all issues. Stress to the group that the purpose of the seminar is to enable participants to develop an understanding of the issues – not to reach any ultimate consensus.

Below are some suggestions that may be helpful.

- Develop a friendly and relaxed atmosphere.
- Ensure that everyone understands how the seminar will proceed.
- Work through the sessions in order.
- Be an active listener and encourage others to be. Acknowledging the speaker, rephrasing or summarising the ideas are useful techniques.
- Be careful of 'being the expert' - the sessions should be group discussions rather than lectures from the Facilitator.
- Use questioning to promote discussion and to assist the group to examine their assumptions and biases.
- Try to make regular summaries of positions reached.
- Make sure you have read the background material provided with the kit and can direct the group to appropriate information sources when questions or issues arise which are not adequately covered in the course content.

**The Facilitator's Response Form**, in Appendix III of this guide, has been included to allow ANTaR to monitor both the extent to which the program is used, and the response of community groups to the issues surrounding the concept of treaty. Your completion and return of this form is greatly appreciated.

At the conclusion of your seminar session(s) could you please send to the ANTaR National Office (PO Box 1176 Rozelle NSW 2039; fax: 02 9555 6991)

- your completed Facilitator's Response Form
- the results of the group activities suggested in the program.

## HOW TO USE THIS GUIDE

The Treaty Community Seminar Program has been designed for use by small to medium-sized groups. The program is delivered by a Facilitator, who does not need to have expert knowledge of the issues. This kit provides the information necessary for a Facilitator to deliver the seminar.

Additional information can be found in the sources and further resources listed on the facing page.

The kit provides relevant information about some of the issues to be considered in discussing treaty and processes to move forward, including:

- the background to the current discussion about treaty
- the history of successive Australian governments' denial of the sovereignty of Indigenous Australians as well as the history of Indigenous assertions of their rights
- why we could have a treaty
- what could be included in a treaty
- what different kinds of treaties might look like
- considerations in treaty making
- the importance of process
- the relationship between treaty and the reconciliation process.

## Program Format and Delivery

The kit is presented as a seminar and includes

1. Overhead Projector slides (you will need an overhead projector)
2. *Facilitator's Guide*. Material from the slides is reproduced in the Facilitator's Guide along with relevant additional points and information that Facilitators should draw attention to. **Appendix I** comprises **four double-sided handouts**, to be photocopied as needed.
3. Background material: 3 ATSIC publications on treaty. Please note that the ANTaR publication, *A Partnership of Equals? The Role of Formal Negotiations in Reconciliation for Australia*, is available on ANTaR's website ([www.antar.org.au](http://www.antar.org.au)).

It would also be useful to have a whiteboard and/or butcher's paper and felt pens so that discussion from the group can be summarised and recorded.

The program is flexible in terms of delivery time, and can be adjusted to suit the circumstances of particular groups. The more time available the better, as more discussion will be possible.

👤 **Single session format:** If the program is being delivered in a single 'half-day' session, the Facilitator should make the group aware that there will not be much time for group discussion and participation. If possible, consideration should be given to providing the opportunity for extra time or an additional workshop or meeting to allow further discussion.

👤 **Multi-session format:** If the program is being delivered over two or more sessions (recommended), group discussion and participation should be encouraged. The guide includes a number of group activities and exercises to assist group discussion of the issues.

👤 **Summary format:** Where time is very restricted, a limited number of slides can be used to give a brief overview of the issues. **Appendix II** lists the specific slides most appropriate for use where time is limited to an hour or less.

## SOURCES & FURTHER RESOURCES

### Sources

ATSIC, 2001, *Treaty: Issues*. ATSIC National Treaty Secretariat, Canberra.

ATSIC, 2001, *Treaty: Frequently Asked Questions*. ATSIC National Treaty Secretariat, Canberra.

ATSIC, 2001, *1938 to 2001: From Citizen to Indigenous Rights*. ATSIC National Treaty Secretariat, Canberra.

ANTaR, 2000, *A Partnership of Equals? The Role of Formal Negotiations in Reconciliation for Australia*, Sydney. (Available at [www.antar.org.au](http://www.antar.org.au))

Aboriginal and Torres Strait Islander Social Justice Commissioner, 2000, *Social Justice Report 2000*, Human Rights and Equal Opportunities Commission, Sydney.

Council for Aboriginal Reconciliation, 2000, *Reconciliation: Australia's Challenge. Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament*, Canberra.

### Further Resources

Further information about the issues involved in treaty can be found at the following websites:

ANTaR:

[www.antar.org.au](http://www.antar.org.au)

ATSIC:

[www.atsic.gov.au](http://www.atsic.gov.au)

Australian Institute for Aboriginal and Torres Strait  
Islander Studies (AIATSIS)

[www.aiatsis.gov.au](http://www.aiatsis.gov.au)

British Columbia Treaty Commission:

[www.bctreaty.net](http://www.bctreaty.net)

National Treaty Support Group:

[www.treatynow.org](http://www.treatynow.org)

Office of the Aboriginal and Torres Strait Islander  
Social Justice Commissioner (HREOC)

[www.hreoc.gov.au/socialjustice](http://www.hreoc.gov.au/socialjustice)

Reconciliation Australia:

[www.reconciliation.org.au](http://www.reconciliation.org.au)





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## SESSION 1: BACKGROUND & OUTCOMES

This session provides an introduction to the seminar, including

- content and learning outcomes
- background to discussion of treaty
- ATSIC's role in the treaty process.

There are **7 OHP slides** in this session.

**Handout 1** corresponds to this session and includes supplementary information about ATSIC's role and treaty campaign strategy.

### Slide 1.1: Overview

This is a treaty community seminar designed to promote discussion and debate, and to raise awareness and understanding of treaty.

The treaty community seminars are designed to explore the concepts and benefits of a treaty or treaties between Indigenous peoples and the Commonwealth of Australia, and possible processes to achieve it.

This seminar is being held in parallel with the Aboriginal and Torres Strait Islander Commission's Treaty Information and Awareness Program which is being conducted in Indigenous communities.

### Slide 1.2: The Treaty Concept – an Introduction

It is important to understand that at this stage the treaty issue is completely open.

Consensus is currently being sought among Indigenous Australians about

- whether a treaty is the most desirable mechanism for achieving just outcomes
- the form a treaty, or treaties, would take
- Indigenous representation in any treaty negotiations.

Many possibilities are open for exploration, for example whether there is

- one treaty
- multiple treaties
- a framework agreement to be accessed over time.

#### 👉 Slide 1.2 Facilitator's notes:

Point out that the word 'treaty' is sometimes used throughout this program for the sake of simplicity, but it does not preclude the possibility of a number of treaties rather than a single treaty.

### Slide 1.3: Treaty Community Seminar Content

- Part 1: Background and Outcomes
- Part 2: Why is a Treaty Needed?
- Part 3: What is a Treaty?
- Part 4: The Process of Treaty Development

### Slide 1.4: Treaty Community Seminar Learning Outcomes

Learning outcomes from this seminar include:

- understanding the history of the struggle for a treaty by Aboriginal and Torres Strait Islander peoples
- understanding the notion of a treaty and a variety of options in the formulation of treaties and other forms of agreement
- understanding the concept of sovereignty
- examining the reasons why a treaty is being considered at this time
- examining the benefits to Aboriginal and Torres Strait Islander peoples (and all Australians) of the establishment of a treaty
- providing reflections/evaluation.

### Slide 1.5: Recent Emergence of Discussion about Treaty

During 2000, as outcomes from the Council for Aboriginal Reconciliation's 10-year reconciliation process were being finalised, a number of Indigenous leaders renewed calls for a treaty between Indigenous peoples and the Commonwealth of Australia.

At the end of 2000 the final recommendations of CAR endorsed the need for consideration of a treaty process in Australia. (See Session 4)

### Slide 1.6: Role of ATSIC in the Treaty Process

At its June 2000 meeting, the ATSIC Board of Commissioners decided that the treaty concept should be further advanced in consultation with other stakeholders, including ATSIC Regional Councils.

At their October 2000 meeting, the Board endorsed a broad strategy for progressing the treaty concept and approved the establishment of a ten-member committee, to be known as the National Treaty Support Group. A National Treaty Think Tank was also set up to support the NTSG.

#### 👤 Slide 1.6 Facilitator's notes:

Refer participants to Handout 1b for further details concerning the NTSG, NTTT and ATSIC's Treaty Strategy. Also note that the strategy includes the need for better awareness and understanding in the non-Indigenous community, and that ATSIC and Indigenous leaders have asked ANTaR to assist with community education about a treaty process in the non-Indigenous community.

### Slide 1.7: Promotion of a Process

ATSIC is ***promoting a process*** for a possible negotiation of a treaty - not negotiating a treaty itself, or a series of treaties.

ATSIC strongly believes that Aboriginal and Torres Strait Islander peoples should make the decisions about

- who will negotiate on behalf of Indigenous Australians,
- the process for negotiation, and, later,
- the structure and content of any treaty or agreements.

## SESSION 2: WHY IS TREATY NEEDED?

This session includes discussion of:

- the history of denial of Aboriginal and Torres Strait Islander sovereignty and Indigenous assertions of their rights;
- the issues of sovereignty and treaty;
- why we might have a treaty process;
- what could be included in a treaty or treaties.

There are **15 OHP slides** in this session.

**Handouts 2a, 2b** and **3a** correspond to this session and include supplementary information about the historical background to the treaty issue and possible outcomes of a treaty process.

### ***Terra nullius & Indigenous responses***

#### **Slide 2.1: Sovereignty Ignored**

Australia has never formally recognised Aboriginal and Torres Strait Islander peoples by way of a treaty or treaties.

Captain Cook's instructions were '*with the Consent of the Natives to take possession of Convenient Situations in the Country ... or, if you find the country uninhabited take possession of it*'.

Cook's disregard of these instructions was a failure to act in accordance with international law practices of the time, which did afford some recognition of Indigenous peoples' sovereignty. This is evidenced by the many treaties that were entered into by the British in Canada, the United States and New Zealand.

Source: *Treaty Issues*, ATSIC 2001

#### **Slide 2.2: Terra nullius**

The acquisition of Australia by the British was later justified by reference to the legal doctrine of *terra nullius*, which means 'empty land' and/or 'land without a sovereign'.

It was not just an argument that the land was empty, but also that there was no capacity for self-government if there were people there.

#### **Slide 2.3: The Mistake of Terra nullius**

It has been speculated that, because of *terra nullius*, the British colonial authorities and subsequent Australian governments did not enter into negotiations with Aboriginal and Torres Strait Islander peoples, who, as a result

- did not sign a surrender treaty with Australia or any of the six colonies,
- did not sign a treaty giving away any of their sovereign rights to Australia or any of the six colonies,
- could consider their options in reclaiming sovereign rights.

### Slide 2.4: History of Indigenous Assertions of Rights

In spite of the lack of recognition of Indigenous sovereignty, Indigenous people have made numerous assertions of rights and calls for negotiated agreements (including a treaty) with non-Indigenous interests. These have included:

1938	Day of Mourning & Protest
1963	Yirrkala Bark Petitions
1972	Larrakia Petition
1979-82	Makarrata ('Treaty')
1988	Barunga Statement
1993	Eva Valley Statement
1998	Kalkaringi Statement

#### 👤 Slide 2.4 Facilitator's notes:

Direct participants to Handout 2b for further details of the Indigenous assertions of rights listed in the slide.

## Treaty and sovereignty

### Slide 2.5: No Strangers to Treaties

*"What has been conspicuously lacking in the assessment of Aboriginal history is an appreciation that the Aboriginal tribes were, in effect, small nations which had long traditions of complex 'international' relations. They made war and peace, negotiated treaties, settled conflicts, arranged marriages and organized access to resources and right of way across territories."* (Henry Reynolds)

These were the characteristics of sovereignty exercised by the Indigenous peoples of Australia prior to European settlement.

### Slide 2.6: Sovereignty and the End of Terra nullius

*"The Mabo decision in 1992 threw out the notion of terra nullius. But the issue of Aboriginal Sovereignty is still open and in my view can only be resolved in some form of agreement between Aboriginal peoples and Torres Strait Islander peoples on one hand, and the Government of Australia representing the peoples of Australia on the other hand."*

(Geoff Clark, April 2000)

### Slide 2.7: Is the Issue of a Treaty and Indigenous Sovereignty always Divisive and Unhelpful?

People will argue that treaties are divisive, but:

- Divisions already exist within Australian society. The reconciliation process has been a recognition of the need to heal these divisions.
- There are arrangements with Indigenous peoples in other democracies based on the concept of 'nations' or even 'First Nations'.
- These arrangements demonstrate there is compatibility between a people's (or nation's) sovereignty and a State's sovereignty.
- A treaty could actually enhance peace and harmony in relationships between Indigenous peoples and the whole of society of which they form an essential part.
- There are already 'layers' of co-existing sovereignty within Australia's system of government (federal, state or territory & local).

## Why we could have a treaty

### Slide 2.8: Why We Could Have a Treaty: Summary

The occupation, colonisation and federation of Australia, and the subsequent dislocation of Aboriginal and Torres Strait Islander peoples occurred without their consent.

A modern treaty could provide Aboriginal and Torres Strait Islander peoples with:

- an opportunity to affirm and protect Indigenous rights
- recognition of and redress for past injustices
- an opportunity to formalise the relationship between Indigenous and non-Indigenous Australians, including a way of settling 'unfinished business'
- the necessary tools for self-determination and self-government.

A treaty would give non-Indigenous Australians:

- an historic opportunity to rectify the questionable founding of Australia in 1788, and to redress past discriminatory policies and practices
- certainty over land and resource use.

#### 👋 Slide 2.8 Facilitator's notes:

Relate the slide back to *terra nullius* and suggest that treaty offers a framework to an agreement where Indigenous rights are recognised and protected. Read through the slide emphasising the protection of Indigenous rights.

### Slide 2.9: Six Outcomes of a Treaty Process

ANTaR (Australians for Native Title and Reconciliation) proposes the following outcomes from a treaty process.

- Treaty agreements reduce or put an end to conflict over lands and resources. If economic and community development is to take place, people need to know who owns a piece of land, who has the right to the resources on it and who has law-making authority over it.
- If disputes do arise, treaties provide agreed-upon processes for resolving them.
- Because treaties are developed, and agreed to, by the parties affected, they are made to last.
- Treaties [could] entrench the rights of Indigenous peoples in a form that cannot be wiped out by the next hostile government with a temporary majority in Parliament.
- A treaty process provides an opportunity for a comprehensive, negotiated and forward-looking strategy to overcome Indigenous disadvantage.
- Treaties can even gain the support of those who do not believe in Indigenous rights, because of the opportunity they offer for 'closure'.

### Slide 2.10: Will a Treaty 'Solve' Matters?

**No!**

We shall still have to work hard to make real the opportunities that a treaty or treaties can give us all.

What a treaty can provide is a more solid and a legally-enforceable platform for all Australians to live the kinds of lives our communities desire.

We can also use the treaty negotiation process to advance 'unfinished business' such as stolen generations, land rights, self-determination and self-government. It offers a real chance to turn around Indigenous disadvantage, because strategies will be developed, implemented and controlled by Indigenous people.

👏 **Group activity:** Ask the group to discuss the following and list on butcher's paper:

- their personal and community's goals, aspirations and needs that could be included in a treaty or agreement;
- reasons to negotiate a treaty or agreement;
- positive gains a treaty might achieve.

### **Slide 2.11: A Platform for Real Self-Determination**

Aboriginal and Torres Strait Islander people are increasingly challenging negative perceptions of themselves.

They are no longer prepared to accept the 'welfare' stereotype, reinforced by programs such as CDEP (Community Development Employment Program).

A treaty process would give Indigenous people an opportunity to spell out where they want to be in the future, culturally, economically, and socially; and what their communities need to get there and sustain themselves.

These needs would include:

- their own checklist of initiatives
- reforms
- programs and resources governments will deliver
- arrangements with partner organisations.

### **Slide 2.12: Partnership - Economic Partnership, not Exclusion**

The Western Cape Communities Coexistence Agreement on Western Cape York Peninsula (discussed below) is one local example of how all parties can achieve mutual economic and social benefits through formal, legal agreements.

A treaty could provide the recognition and rights platform that ALL communities can use to negotiate their own agreements with international and domestic companies investing in resource, business and infrastructure projects.

👏 **Slide 2.12 Facilitator's notes:**

Explain and highlight that economic partnerships can achieve mutual economic and social benefits through formal and legal agreements.

## ***What could be included in a treaty***

### **Slide 2.13: The Story So Far**

Aboriginal and Torres Strait Islander peoples

- are not recognised in the Australian Constitution
- did not agree to the Federation\* creating Australia
- were not allowed to vote in the Federation\* Referendum
- have no protection of rights under the Constitution. For example, the *Native Title Act 1993*, and more particularly, the amendments to the Act of 1998, resulted in a loss of rights under the Australian legal system.

\*Federation was a nation-building process for the Australian colonists, but Aboriginal and Torres Strait Islander peoples were excluded from that process.

### Slide 2.14: Matters for Consideration in Treaty Negotiations

- formalisation of the relationship between Indigenous and non-Indigenous Australians, including a way of settling 'unfinished business'
- affirmation and protection of Indigenous rights
- recognition of and redress for past injustices
- redressing Indigenous disadvantage
- enabling self-determination and self-government
- providing certainty over land and resource use
- protection of existing and future agreements
- establishing processes for the review of agreements

#### 👏 Slide 2.14 Facilitator's notes:

Emphasise that the content of a treaty will depend on what the Aboriginal and Torres Strait Islander peoples and the Australian Government agree upon.

### Slide 2.15: What Could be Included in a Treaty

- prohibition of racial discrimination
- recognition of the rights of equality
- access to education, training and employment
- recognition of distinct Indigenous identities
- protection of Indigenous laws, cultures and languages
- law and justice issues
- resolution for the stolen generations
- control, ownership and management of land, waters and resources
- economic and social development
- reparation and compensation
- self-determination
- self-government
- constitutional recognition
- any other matter that the negotiating parties believe is relevant for inclusion

Source: *Treaty FAQs*, ATSIC

👏 **Group activity:** Ask the group to discuss what they would like to see included in a treaty and make a list on butcher's paper.



## SESSION 3: WHAT IS A TREATY?

This session includes discussion of:

- the different forms a treaty or treaties might take
- some examples of treaty agreements
- considerations in treaty making.

There are **20 OHP slides** in this session.

**Handout 3a** relates to this session.

### *What would a treaty look like?*

#### **Facilitator's notes:**

Provide a brief explanation to the group:

- The essence of a treaty is a formal **agreement** between two or more parties who seek to have their relationship with each other defined and formalised.
- The parties entering into a treaty-making process must have a clear idea as to what they want to achieve from the treaty because a treaty gives rise to binding obligations.
- The outcomes of treaty process are dependent upon the type of treaty agreed upon. As with all treaties there are possibilities and limitations as to the benefit(s) of the treaty process.

#### **Slide 3.1: Possible Kinds of Treaties**

If Aboriginal and Torres Strait Islander peoples of the Australian continent agree that they want a treaty or treaties, then there are many styles of agreement available to them.

Common forms include:

- an agreement recognised under international law
- an agreement supported by the Australian Constitution
- an agreement supported by legislation
- an agreement between parties – a contract.

Source: *Treaty Issues*, ATSIC

#### **Slide 3.1 Facilitator's notes:**

Make the point that the legal status of a treaty is something that would have to be negotiated and that there are different legal forms that a treaty could take.

Emphasise that four possible legal forms a treaty between Indigenous peoples and the Australian Government could take are:

- *an agreement under international law* – where the agreement is interpreted through the rules of international law;
- *an agreement that is supported by the Constitution* – where the agreement is interpreted by the Australian judiciary with regard to the principles of constitutional interpretation;
- *an agreement that is supported by legislation* – where the agreement is interpreted by the courts according to ordinary rules of statutory interpretation;
- *a contract* – where the judiciary interprets the agreement with reference to contract law.

Indicate that for the purpose of this session the discussion will be divided into two parts. The first relates to forms of international treaties. The second relates to forms of Australian treaties.

## International Law treaties

### Slide 3.2: International Law Treaties

A treaty, in international law, is a written agreement concluded by two or more sovereign nation states or by a sovereign state and an international organisation, such as the European Union.

### Slide 3.3: An Agreement under International Law: Points to Consider

The difficulty with this approach is that Australian governments have argued that Aboriginal and Torres Strait Islander peoples are not legally able to enter into such an agreement.

According to this view, Australia cannot make a treaty with Aboriginal and Torres Strait Islander peoples because Indigenous peoples are not considered to be separate nations.

There is a competing view that treaties made with Indigenous peoples and nations are proper matters of international law. Also, many Indigenous people do not believe that they have ever ceded original sovereignty, and see themselves as nations.

Source: *Treaty Issues*, ATSIC

#### 👋 Slide 3.3 Facilitator's notes:

Make the point that there is a difficulty with this approach. Australian governments have argued that Aboriginal and Torres Strait Islander peoples are not legally able to enter into such agreements because they are not a separate nation.

### Slide 3.4: An Agreement under International Law - United Nations View

The United Nations *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations* supports the view that treaties with Indigenous peoples can be entered into at the international level.

It concluded that where Indigenous peoples had not entered into treaties under international law with colonising countries, they should be treated as nations and assumed to have the ability to enter into such treaties until it is proven otherwise.

*Human Rights of Indigenous Peoples*, United Nations Commission on Human Rights, Miguel Alfonso Martinez, Special Rapporteur, June 1999 (Available at [www.treatynow.org](http://www.treatynow.org))

Source: *Treaty Issues*, ATSIC

### Slide 3.5: Example of an International Treaty: The Torres Strait Treaty

The Torres Strait Treaty is an agreement between Australia and Papua New Guinea which describes the boundaries between the two countries and how the sea area may be used.

It was signed in December 1978 after long discussions between Australia and Papua New Guinea. Talks were also held between the Australian Government, the Queensland Government and Torres Strait Islander representatives.

#### 👋 Slide 3.5 Facilitator's notes:

Point out that the Torres Strait Treaty is an example of a treaty that takes into account the traditional rights of Indigenous peoples.

### **Slide 3.6: The Protected Zone**

The Protected Zone is an area of the Torres Strait recognised by Australia and Papua New Guinea in the Torres Strait Treaty as needing special attention.

The main reason for the Protected Zone is so that Torres Strait Islanders and the coastal people of Papua New Guinea can carry on their traditional way of life.

The formation of the Protected Zone has also helped to preserve and protect the land, sea and air of the Torres Strait, including the native plant and animal life.

### **Slide 3.7: Special Reference to Indigenous Peoples**

A special part of the Treaty allows free movement (without passports or visas) between Australia and Papua New Guinea for traditional activities in the Protected Zone and nearby areas.

This is only for Torres Strait Islanders and for coastal people from Papua New Guinea who live in and keep the traditions of the region.

Traditional activities under the Treaty include activities on land (such as gardening, food collection and hunting), activities on water (such as fishing for food), ceremonies or social gatherings (such as marriages) and traditional trade.

Business dealings and employment for money are not allowed as traditional activities under the Treaty.

## **Australian Law treaties**

### **Slide 3.8: Australian Law Treaties**

Treaties under Australian law may take the following forms:

- agreements supported by the Australian Constitution
- agreements supported by legislation
- contracts.

### **Slide 3.9: An Agreement Supported by the Constitution**

There are two main ways in which a treaty could be supported by the Constitution.

1. The entire text (or a portion) of a treaty could be inserted within the Constitution itself.
2. The Constitution could be amended to give the Commonwealth the power to negotiate a treaty with Aboriginal and Torres Strait Islander peoples. This would provide strong legal protection to Aboriginal and Torres Strait Islander peoples in the negotiation of such treaties.

We need to recognise that, just because the power to negotiate is there, it doesn't necessarily mean that the Commonwealth must negotiate a treaty. It presupposes, however, that if the government agrees to have a referendum to give itself this power, it is willing to make a treaty.

#### **👤 Slide 3.9 Facilitator's notes:**

Emphasise the following points:

- Amendment to the Constitution would need to be agreed to by the Australian public at a referendum.

- This would require approval from a majority of voters in a majority of states/territories.
- Most referendums have not been successful and Australians are wary of constitutional change.
- A full- or part-treaty text could be inserted into the Constitution, or the Constitution could be amended to give the Commonwealth the power to negotiate a treaty with Aboriginal and Torres Strait Islander peoples.
- The power to negotiate a treaty does not mean that the Commonwealth must negotiate a treaty.
- The benefit of having a treaty incorporated into the Constitution is the strong legal protection that is then attached to the agreement that cannot be repealed by legislation - it can only be changed by a referendum.

### **Slide 3.10: An Agreement Supported by Legislation**

A treaty may take the form of legislation.

#### **👤 Slide 3.10 Facilitator's notes:**

Make the point that an agreement of this nature requires the will of the Federal government to negotiate with Indigenous peoples and then pass the legislation. It does not need the broad support of the Australian public that is required for constitutional amendment.

Emphasise the following points:

- A positive and negative of a legislative treaty is that it can be amended by further legislation.
- The ability to amend legislation provides flexibility when new issues arise, but also means that amendments can be made without the support of Indigenous peoples. For example, the amendments to the *Native Title Act 1993* in 1998 were proposed and passed without consultation with Indigenous peoples.

### **Slide 3.11: Example of a Treaty Supported by Legislation:**

#### **Commonwealth-State Housing Agreement: 1999-2003 Bilateral Agreement with Queensland**

The CSHA is a treaty between the Australian Government and its states/territories based on the *Housing Assistance Act 1996*.

The Bilateral Agreement with Queensland focuses on key areas of strategic significance to both parties.

The Bilateral Agreement sets out the responsibilities of the parties and the terms and conditions for Australian Government financial support to the states and territories for public housing.

### **Slide 3.12: Another Agreement Supported by Legislation:**

#### **Uluru Ownership Handback: October 1985**

The agreement to hand back ownership of the area around Uluru and Kata Tjuta (Ayers Rock - Mt Olga) National Park to its traditional owners was made by the (Hawke) Commonwealth Government.

The Northern Territory Government had wanted title transferred from the Commonwealth to the Northern Territory Government. This would have given some reduced form of title to the traditional owners with Aboriginal people involved in park management, but not in control.

### **Slide 3.13: A Contract**

A treaty could take the form of a contract.

Negotiated between the Federal Government and Indigenous peoples, a contract could deal with issues identified by the parties. It would not require a parliamentary process to be implemented, just the political will of the elected government.

A contract could create legally-enforceable rights and obligations.

The provisions of the agreement and the consequences of any breach would be interpreted by the judiciary, just as they are for any contract between parties.

#### **👤 Slide 3.13 Facilitator's notes:**

Emphasise that a treaty in the form of a contract:

- does not require a parliamentary process;
- could create legally enforceable rights and obligations;
- has its provisions interpreted by the judiciary as for any other contract.

Inform the group that Indigenous peoples already enter into contracts with parties including the Federal government. A treaty in contract form would be a more comprehensive agreement and could build upon some of the agreements and contracts already in place.

### **Slide 3.14: Example of Contract Agreement: Cape York Land Council – Comalco Agreement**

This agreement was based on the Native Title rights of traditional owners of Western Cape York Peninsula. [IMAGE] CYLC - COMALCO AGREEMENT

### **Slide 3.15: Cape York Land Council – Comalco Agreement** [IMAGE] CYLC - COMALCO AGREEMENT

### **Slide 3.16: Newsletters: British Columbia Treaty Commission** [IMAGE] NISGA FINAL AGREEMENT

#### **👤 Slide 3.16 Facilitator's notes:**

Inform the group that the Nisga Final Agreement is an example of a contract, legislatively implemented and protected by the constitution. It therefore is a combination of all three possibilities for domestic treaties.

### **Slide 3.17: Newsletters: British Columbia Treaty Commission** [IMAGE] NISGA FINAL AGREEMENT

### **Slide 3.18: Parameters for Discussion on Four Possible Kinds of Treaties**

- entitlement to rights
- durability
- enforceability
- achieving government agreement
- achieving agreement with the Australian people
- closure
- recognition of sovereignty
- impact on reconciliation

👤👤 **Group activity:** Ask the group to discuss the points for and against each of the four kinds of treaties presented in this module, within the context of the outlined parameters, and list on butcher's paper.

## Considerations in treaty-making

### Slide 3.19: How Many Treaties?

A discussion about a treaty will allow us to look at the different forms a treaty may take.

It might be that there is:

- one national treaty
- a national agreement of principles that allows for treaties to be signed at the regional level
- a network of regional or local treaties.

Another issue that will need to be decided is whether there should be one treaty between Aboriginal peoples and the Federal Government and another between Torres Strait Islander peoples and the Federal Government.

Source: *Treaty FAQs*, ATSIC

#### 👏 Slide 3.19 Facilitator's notes:

Provide a brief explanation making the point that although four forms of a treaty have been outlined, there are other key areas for discussion concerning the different forms a treaty may take.

### Slide 3.20: Considerations in Treaty-Making

- How many treaties?
- Should there be one national treaty?
- Should there be a national agreement of principles that allows for treaties to be signed at the regional level?
- Should there be a network of regional or local treaties?
- Should there be one treaty between Aboriginal peoples and the Federal Government and another treaty between Torres Strait Islander peoples and the Federal Government?
- Who should act as a party to the treaty(s)?
- Who has the mandate to act for Aboriginal and Torres Strait Islander peoples?
- Who has the mandate to act for the Government of Australia?
- Who should administer the treaty(s) and what would its membership look like?

👏👏 **Group activity:** Spend some time working through the questions on the slide 'Considerations in Treaty Making' and summarise the main discussion points on butcher's paper.

## SESSION 4: PROCESS OF TREATY DEVELOPMENT

This session includes discussion of:

- the nature and importance of process in treaty development
- the relationship of the issue of a treaty to the reconciliation process.

There are **22 OHP slides** in this session.

**Handouts 3b** and **4** relate to this session.

### ***The importance of process***

#### **Slide 4.1: The Importance of Process**

The process of treaty development is as important as any final agreement reached. Process considerations include:

- the need for discussion
- a uniquely Australian approach
- timing
- integrity
- equality of negotiations
- representative participation

#### **Slide 4.2: The Need for Discussion**

What a treaty would do, the legal form it would take, and its content are all matters that need to be talked about and decided upon by Aboriginal and Torres Strait Islander peoples.

Source: *Treaty Issues*, ATSIC

#### **Slide 4.3: A Uniquely Australian Approach**

Australia has to find its own way forward. It is not possible to pick up a document that has worked elsewhere and simply adopt it for Australia.

Source: ANTaR

#### **Slide 4.4: Timing**

The process cannot be rushed.

Adequate time must be given to permit discussion and negotiation, to obtain advice, to explore positions, to consider, consult and reconsider, free from undue pressure or constraints, and to enable mutual understanding to be generated and legitimacy of outcomes to be achieved.

Source: ANTaR

#### **Slide 4.5: Integrity**

The integrity of the process is important.

Legitimacy and workability flow from the way things are done as much as from the words ultimately written on the document.

Source: ANTaR

#### **Slide 4.6: Equality of Negotiations**

Respect must be accorded to Indigenous preferences as to how the process should go ahead.

No so-called solutions can be imported or imposed. Resolution of outstanding issues can be achieved only through negotiation between equals.

Source: ANTaR

#### **Slide 4.7: Representative Participation**

Indigenous participation in the reconciliation and resolution processes must be representative.

While organisation of this will be complex, negotiations are unlikely to be able to proceed until there is a broad consensus about Indigenous representation.

Indigenous people must decide on an approach to concepts of individual and community representation which is culturally appropriate.

Source: ANTaR

#### **Slide 4.8: Which Parties Would Sign a Treaty?**

A national treaty would be signed on the one part by the Australian Government, and on the other by the chosen representatives of the Aboriginal peoples and the Torres Strait Islander peoples.

Who those chosen representatives would be is a matter for the Aboriginal and Torres Strait Islander peoples to discuss, debate and decide upon.

The same principles would apply to regional and local treaties.

Source: *Treaty FAQs*, ATSIC

#### **Slide 4.9: Possibly an Indigenous Convention?**

One possible approach for addressing issues of Indigenous representation and negotiation is a Convention, constituted as a formal assembly of delegates from recognised 'constituencies'.

The Convention may

- nominate an empowered negotiating team and terms
- review progress reports from the negotiating team
- exercise final decision-making over terms and whether to agree.

#### **👤 Slide 4.9 Facilitator's notes:**

Stress to the group that this is an example only and that such processes are a matter for Aboriginal and Torres Strait Islander people to determine.



#### **Slide 4.10: Issue of a 'Framework Treaty'**

Aboriginal and Torres Strait Islander communities and organisations could be invited to discuss the merits of negotiating first a national or 'framework' treaty with the Australian Government.

Such a treaty could be used as a platform for negotiating follow-on regional agreements and local agreements.

An alternative might be to negotiate treaties on a state and territory basis. Is this a practical alternative?

#### **Slide 4.11: Stages in Treaty Negotiation**

Treaty negotiations in Canadian British Columbia pass through six stages:

1. Statement of Intent
2. Preparation for negotiations
3. Negotiation of a Framework Agreement
4. Negotiation of an Agreement in Principle
5. Negotiation to finalise a treaty
6. Treaty implementation

### ***Treaty and the reconciliation process***

#### **Slide 4.12: The Council for Aboriginal Reconciliation and the Aboriginal and Torres Strait Islander Social Justice Commissioner**

In the early 1990s, two bodies were established which have subsequently defined the relationship between treaty and the reconciliation process.

- In 1991 the Council for Aboriginal Reconciliation (CAR) was set up in lieu of the treaty process promised by Prime Minister Bob Hawke in 1988. CAR was established under legislation which set a 10-year formal process for achieving reconciliation.
- In 1993 the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner was established by the Federal Government in response to issues of discrimination and disadvantage highlighted by the Royal Commission into Aboriginal Deaths in Custody and HREOC's National Inquiry into Racist Violence.

#### **Slide 4.13: Social Justice Report 2000**

The Aboriginal and Torres Strait Islander Social Justice Commissioner's *Social Justice Report 2000* focuses on reconciliation and human rights.

It expresses concern about the current lack of progress on reconciliation, and identifies a range of commitments to be made at the national level before meaningful reconciliation can be achieved.

The report calls for a commitment to overcoming Indigenous disadvantage as an urgent national priority and makes fourteen recommendations including negotiation of a national framework agreement (or treaty), an entrenched guarantee against racial discrimination, better accountability and transparency of governments, and processes to ensure more effective participation of Indigenous people in the decision-making process.

#### **Slide 4.14: Social Justice Report 2000 - Recommendations**

##### *Negotiating with Indigenous Peoples*

11. That the federal government introduce framework legislation providing legislative support for the negotiation of agreements with Indigenous peoples at the national, regional and local levels. The Council for Aboriginal Reconciliation's proposed *Reconciliation Bill 2000* is an appropriate legislative model.

12. That the federal government and COAG Council of Australian Governments) adopt the *Principles\* for Indigenous social justice and the development of relations between the Commonwealth government and Aboriginal and Torres Strait Islander Peoples* as proposed by ATSIC in *Recognition, Rights and Reform*, as forming the framework for negotiations about service delivery arrangements, regional governance and unfinished business.

*Social Justice Report 2000, Chapter 4*

#### **Slide 4.15: Documents of Reconciliation**

After years of public consultation, the Council for Aboriginal Reconciliation presented its Documents for Reconciliation to national leaders and the people of Australia at Corroboree 2000 in Sydney on 27 May 2000.

The documents comprise the *Australian Declaration Towards Reconciliation* and the *Roadmap for Reconciliation*.

#### **Slide 4.16: Documents of Reconciliation**

The *Australian Declaration Towards Reconciliation* is an aspirational statement that the Council hopes all Australians will embrace.

The *Roadmap* sets out four national strategies identifying ways governments, community groups, organisations and individuals can implement the principles of the *Declaration* to help improve the lives of Aboriginal and Torres Strait Islander people and achieve reconciliation.

#### **Slide 4.17: Recommendations of the Council for Aboriginal Reconciliation Final Report**

The final report contains six recommendations and proposed reconciliation legislation.

#### **Slide 4.18: CAR Recommendations**

1. COAG agree to implement and monitor a national framework to overcome Aboriginal and Torres Strait Islander peoples' disadvantage.
2. All parliaments and local governments pass formal motions of support.
3. The Commonwealth Parliament prepare legislation for a referendum to:
  - recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia in a new preamble to the Constitution; and
  - remove section 25 of the Constitution and introduce a new section making it unlawful to adversely discriminate against any people on the grounds of race.

#### Slide 4.19: CAR Recommendations

4. All levels of government, non-government, business, peak bodies, communities and individuals commit themselves to continuing and sustaining the process of reconciliation.
5. Each government and parliament:
  - recognise that this land and its waters were settled as colonies without treaty or consent and that to advance reconciliation it would be most desirable if there were agreements or treaties; and
  - negotiate a process through which this might be achieved that protects the political, legal, cultural and economic position of Aboriginal and Torres Strait Islander peoples.
6. The Commonwealth Parliament enact legislation (for which the Council has provided a draft in this report) to put in place a process which will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation can be resolved.

#### 👤 Slide 4.19 Facilitator's notes:

Make the point that the Council's final recommendations seek to draw attention to the many areas of 'unfinished business' of reconciliation, and that in its view, an agreement or treaty process is a central mechanism for resolving such issues.

#### Slide 4.20: Proposed Reconciliation Legislation

The proposed legislation begins with a Preamble, followed by a preliminary section and four substantive sections.

- Part 1 - Preliminary (setting out the Council's intention and aims in recommending the legislation and guidance for its interpretation)
- Part 2 - Recognition of the Unique Status of Aboriginal and Torres Strait Islander Peoples
- Part 3 - A Process to Identify and Resolve Issues for Reconciliation
- Part 4 - A Negotiation and Agreement Process to Resolve Reconciliation Issues between Aboriginal and Torres Strait Islander Peoples and the Government
- Part 5 - A Process for Reporting on Reconciliation

#### Slide 4.21: Current State of Play

The Commonwealth Government has not yet formally responded to CAR's final recommendations.

However, the Prime Minister, John Howard, has publicly ruled out consideration of a treaty process in Australia on the basis that it would be inappropriate and divisive.

Meanwhile, ATSIC's Treaty Information and Awareness Program in Indigenous communities is continuing, and is anticipated to culminate in an Indigenous plebiscite on the issue.

#### Slide 4.22: Non-Indigenous Players

The involvement of the broader non-Indigenous community is critical to progressing the opportunities of a treaty process. Reconciliation organisations will continue to provide a vital avenue for community action. The major national and state organisations are:

- **Reconciliation Australia** – an independent, non-profit body which replaced the Council for Aboriginal Reconciliation in 2001
- **State Reconciliation Councils**
- **ANTaR** (Australians for Native Title and Reconciliation)

To become involved at a local level, contact ANTaR for the reconciliation group nearest you. (See handout)



## APPENDIX I

### HANDOUTS

- 1a Seminar Outline and Outcomes
- 1b Recent Emergence of Treaty Discussion
- 2 Treaty: Historical Background
- 3 Treaty: Possibilities and Process
- 4 Treaty and the Reconciliation Process



HANDOUT 1a

## TREATY COMMUNITY SEMINAR

Treaty community seminars are designed to promote discussion and debate, and to raise awareness and understanding of treaty.

They are opportunities for non-Indigenous Australians to explore the concepts and benefits of a treaty (or treaties) between Indigenous peoples and the Commonwealth of Australia and possible processes to achieve it.

These seminars are being held in parallel with the Aboriginal and Torres Strait Islander Commission's Treaty Information and Awareness Program which is being conducted in Indigenous communities.

**ATSIC is *promoting a process* for a possible negotiation of a treaty – not negotiating a treaty itself, or a series of treaties.**

### SEMINAR OUTLINE

#### SESSION 1: TREATY COMMUNITY SEMINAR: BACKGROUND & OUTCOMES

#### SESSION 2: WHY IS TREATY NEEDED?

- *Terra nullius* and Indigenous responses
- Treaty and sovereignty
- Why we could have a treaty
- What could be included in a treaty

#### SESSION 3: WHAT IS A TREATY?

- What would a treaty look like?
- International Law treaties
- Australian Law treaties
- Considerations in treaty-making

#### SESSION 4: THE PROCESS OF TREATY DEVELOPMENT

- The importance of process
- Treaty and the reconciliation process

### LEARNING OUTCOMES

Learning outcomes from these seminars include:

- understanding the history of the struggle for a treaty by Aboriginal and Torres Strait Islander peoples
- understanding the notion of a treaty and a variety of options in the formulation of treaties and other forms of agreement
- understanding the concept of sovereignty
- examining the reasons why a treaty is being considered at this time
- examining the benefits to Aboriginal and Torres Strait Islander peoples (and to all Australians) of the establishment of a treaty
- providing reflections/evaluation.

HANDOUT 1b

## RECENT EMERGENCE OF TREATY DISCUSSION

During 2000, as outcomes from the Council for Aboriginal Reconciliation's 10-year reconciliation process were being finalised, a number of Indigenous leaders renewed calls for a treaty between Indigenous peoples and the Commonwealth of Australia.

At the end of 2000 the final recommendations of CAR endorsed the need for consideration of a treaty.

## ATSIC'S ROLE IN THE TREATY PROCESS

At its June 2000 meeting, the ATSIC Board of Commissioners decided that the treaty concept should be further advanced in consultation with other stakeholders, including ATSIC Regional Councils.

At their October 2000 meeting, the Board endorsed a broad strategy for progressing the treaty concept and approved the establishment of a ten-member committee, to be known as the National Treaty Support Group. A National Treaty Think Tank was also set up to support the NTSG.

## THE NATIONAL TREATY SUPPORT GROUP AND THE NTTT

The National Treaty Support Group (NTSG) is charged with providing advice to ATSIC on treaty matters, in particular:

- the development of a treaty concept
- the progress of the treaty strategy endorsed by the Commission
- the convening and coordination of a national conference to further develop the treaty concept
- the allocation of tasks for think tanks
- an information and awareness campaign
- a plebiscite of Aboriginal and Torres Strait Islander peoples on the treaty.

The National Treaty Think Tank (NTTT) was formed to develop the concepts and promote discussion of the issues around establishing a treaty or treaties.

The NTTT supports the work of the NTSG, and provides advice to it.

Website: [www.treatynow.org](http://www.treatynow.org).

## TREATY STRATEGY

ATSIC's proposed initial strategy consists of three major sub-strategies.

**An Information and Awareness Strategy** aimed at two discrete groups:

- the Aboriginal and Torres Strait Islander community - to promote and create awareness of, and support for, treaty. There is little point in pursuing the issue without widespread and demonstrable Indigenous support, which can only occur with full appreciation of the treaty concept.
- the general Australian public – to promote understanding and acceptance of the need for treaty.

**A Political Strategy** aimed at convincing opinion-leaders and decision-makers, firstly, of the wisdom of pursuing the treaty concept, and secondly, of the need to enter into serious discussions with the representatives of Aboriginal and Torres Strait Islander peoples about the process for negotiating a treaty. The hoped-for outcomes include

- legal recognition of Indigenous rights
- improved service delivery
- recognition of the right of self-determination.

**Treaty Framework Development.** Concurrent with the above strategies, work will progress in-house, via the think tanks, reference groups and community meetings, and through commissioned papers on the development of a treaty framework. This will focus on key questions, such as what things could/should be included in a treaty, and the development of a process for determining who should sign a treaty.



## HANDOUT 2a

# TREATY: HISTORICAL BACKGROUND

## THE MISTAKE OF *TERRA NULLIUS*

Australia has never formally recognised Aboriginal and Torres Strait Islander peoples by way of a treaty or treaties.

Captain Cook's instructions were '*with the Consent of the Natives to take possession of Convenient Situations in the Country ... or, if you find the country uninhabited take possession of it*'. Cook's disregard of these instructions was a failure to act in accordance with international law practices of the time, which did afford some recognition of Indigenous peoples' sovereignty. This is evidenced by the many treaties that were entered into by the British in Canada, the United States and New Zealand.

The acquisition of Australia by the British was later justified by reference to the legal doctrine of *terra nullius*, which means 'empty land' and/or 'land without a sovereign'. It was not just an argument that the land was empty, but also that there was no capacity for self-government if there were people there.

It has been speculated that, because of *terra nullius*, the British colonial authorities and subsequent Australian governments did not enter into negotiations with Aboriginal and Torres Strait Islander peoples, who, as a result,

- did not sign a surrender treaty with Australia or any of the six colonies,
- did not sign a treaty giving away any of their sovereign rights to Australia or any of the six colonies,
- could consider their options in reclaiming sovereign rights.

## SELECTED HISTORICAL MOMENTS

YEAR	EVENT
1778	Captain Cook's landing in Australia
1788	Establishment of British Colony in NSW
1901	Federation
1938	Day of Mourning & Protest
1961	Federal franchise
1963	Yirrkala Bark petitions
1965	'Freedom Ride' - Charles Perkins, NSW
1966	Wave Hill strikes - Gurindji people
1967	Referendum
1969-71	Yolngu land rights proceedings against Nabalco
1971	Queensland <i>Aborigines Act</i> 1971
1972	Larrakia Petition; Aboriginal Embassy established in Canberra
1974	Woodward Royal Commission
1976	<i>Land Rights (Northern Territory) Act</i> 1976
1976	Coe vs Commonwealth - Indigenous Sovereignty
1977	National Aboriginal Conference (NAC) formed
1979-82	Makarrata ('Treaty') proposal
1980	Noonkanbah protests about mining works on a sacred site
1982	Aboriginal Tent Embassy re-established
1982	Commencement of Mabo case
1988	Barunga Statement
1990	ATSIC established
1991	Council for Aboriginal Reconciliation (CAR) established
1992	Mabo decision on <i>terra nullius</i>
1993	Eva Valley Statement
1998	Kalkaringi Statement
1999	CAR draft Reconciliation document
2000	CAR Final Report
2001	NTSG formed

**HANDOUT 2b**

## **HISTORY OF INDIGENOUS ASSERTIONS OF RIGHTS**

In spite of the lack of recognition of Indigenous sovereignty, Indigenous people have made numerous assertions of rights and calls for negotiated agreements (including a treaty) with non-Indigenous interests.

These have included:

### **1938 Day of Mourning & Protest**

In 1937, with the 150<sup>th</sup> anniversary of British settlement looming, NSW activists Bill Ferguson and William Cooper founded the Aborigines Progressive Association and began organising a conference in Sydney for 26 January 1938. Attended by about 1000 Aboriginal people, it was called 'A Day of Mourning and Protest'. They circulated a pamphlet 'Aborigines claim citizen rights!', protesting against the discriminatory treatment of Aboriginal Australians.

### **1963 Yirrkala Bark Petitions**

The Yolngu people of Yirrkala sent the bark petitions to the House of Representatives in protest against the Commonwealth's granting of mining rights over 390 square kilometres of land excised from the Arnhem Land reserve to Nabalco. This resulted in a parliamentary inquiry which recommended that compensation was owed to the Yolngu. However, in a subsequent court case in 1971 (Milpirrpum vs Nabalco), Justice Blackburn, while acknowledging the claimants' ritual and economic use of the land and their established system of law, decided that the 'communal native title' claimed did not form part of the law of Australia.

### **1972 Larrakia Petition**

In March 1972, the Larrakia people, whose traditional territories covered the coastal area in which the city of Darwin is located, sent a petition to Prime Minister Billy McMahon requesting that a treaty process be established. The Government response stated that it was inappropriate to negotiate with British subjects as though they were foreign powers; and that it was too difficult to identify the people and groups with whom to negotiate.

### **1979-82 Makarrata ('Treaty')**

In 1979 the NAC passed a resolution calling for negotiations between the Australian Government and the NAC on behalf of Aboriginal people on the subject of a treaty. They subsequently adopted the Yolngu word 'Makarrata', meaning 'the end of a dispute and the resumption of normal relations'. Discussion continued over the next four years, but no resolution was achieved.

### **1988 Barunga Statement**

In June 1988, during Australia's bicentennial year, Prime Minister Bob Hawke was presented with a statement by the Chairmen of the Central and Northern Land Councils, Wenten Rubuntja and Galarrwuy Yunupingu, at the annual Barunga cultural and sporting festival held in the community near Katherine. The Prime Minister in turn signed a statement promising to negotiate a treaty. These negotiations never took place. Instead, in 1991 the Council for Aboriginal Reconciliation and a 10-year reconciliation process were established.

### **1993 Eva Valley Statement**

More than 400 Indigenous people from around Australia met at Eva Valley, near Katherine, in the first week of August 1993. The meeting was called in response to concerns about Commonwealth proposals for legislation on native title in the wake of the Mabo decision. A statement was issued, insisting on a national standard of rights, beyond just property interests, for all Aborigines.

### **1998 Kalkaringi Statement**

In 1998 there were moves to grant statehood to the Northern Territory, and the NT Legislative Assembly approved a Draft Constitution. Aboriginal people rejected this document, both because of its content, and because they had not been consulted. The Combined Aboriginal Nations of Central Australia met at Kalkaringi in August and drafted a statement setting out the Aboriginal position. A subsequent referendum on statehood was defeated.

Source: ATSIC

HANDOUT 3a

# TREATY: POSSIBILITIES & PROCESS

## THE STORY SO FAR

Aboriginal and Torres Strait Islander peoples:

- are not recognised in the Australian Constitution
- did not agree to the Federation\* creating Australia
- were not allowed to vote in the Federation\* Referendum
- have no protection of rights under the Constitution. For example, the *Native Title Act 1993*, and more particularly, the amendments to the Act of 1998, resulted in a loss of rights under the Australian legal system.

\*Federation was a nation-building process for the Australian colonists, but Aboriginal and Torres Strait Islander peoples were excluded from that process.

## SIX OUTCOMES OF A TREATY PROCESS

ANTaR (Australians for Native Title and Reconciliation) proposes the following outcomes from a treaty process.

- Treaty agreements reduce or put an end to conflict over lands and resources. If economic and community development is to take place, people need to know who owns a piece of land, who has the right to the resources on it and who has law-making authority over it.
- If disputes do arise, treaties provide agreed-upon processes for resolving them.
- Because treaties are developed, and agreed to, by the parties affected, they are made to last.
- Treaties [could] entrench the rights of Indigenous peoples in a form that cannot be wiped out by the next hostile government with a temporary majority in Parliament.
- A treaty process provides an opportunity for a comprehensive, negotiated and forward-looking strategy to overcome Indigenous disadvantage.
- Treaties can even gain the support of those who do not believe in Indigenous rights, because of the opportunity for 'closure' they offer.

## WHAT WOULD A TREATY LOOK LIKE?

If Aboriginal and Torres Strait Islander peoples of Australia agree that they want a treaty, then there are many styles of agreement available to them.

Common forms include:

### an agreement recognised under international law

An example of this type of treaty is *The Torres Strait Treaty*, an agreement between Australia and Papua New Guinea which describes the boundaries between the two countries and how the sea may be used. It was signed in December 1978 after long discussions between Australia and Papua New Guinea. Talks were also held between the Australian Government, the Queensland Government and Torres Strait Islander representatives.

### an agreement supported by the Australian Constitution

There are two main ways in which a treaty could be supported by the Constitution:

- The entire text, or a portion, of a treaty could be inserted within the Constitution itself.
- The Constitution could be amended to give the Commonwealth the power to negotiate a treaty with Aboriginal and Torres Strait Islander peoples.

### an agreement supported by legislation

An example is the Uluru Ownership Handback of October 1985, an agreement made by the Hawke Government, which gave ownership of the area around Uluru and Kata Tjuta (Ayers Rock – Mt Olga) National Park back to its traditional owners.

### a contract

Negotiated between the Australian Government and Indigenous peoples, the contract could deal with issues identified by the parties. It would not require a parliamentary process to be implemented, just the political will of the elected government. The contract could create legally-enforceable rights and obligations. The provisions of the agreement and the consequences of any breach would be interpreted by the judiciary, just as they are for any contract between parties. An example of a contract agreement is the Cape York Land Council – Comalco Agreement, which was based on the native title rights of traditional owners of Cape York Peninsula.

**HANDOUT 3b**

## **THE IMPORTANCE OF PROCESS**

The process of treaty development is as important as any final agreement reached. Process considerations include the following:

### **The Need for Discussion**

What a treaty would do, the legal form it would take, and its content are all matters that need to be talked about and decided upon by Aboriginal and Torres Strait Islander peoples.

### **A Uniquely Australian Approach**

Australia has to find its own way forward. It is not possible to pick up a document that has worked elsewhere and simply adopt it for Australia.

### **Timing**

The process cannot be rushed. Adequate time must be given to permit discussion and negotiation, to obtain advice, to explore positions, to consider, consult and reconsider, free from undue pressure or constraints; and to enable mutual understanding to be generated and legitimacy of outcomes to be achieved.

### **Integrity**

The integrity of the process is important. Legitimacy and workability flow from the way things are done as much as from the words ultimately written on the document.

### **Equality of Negotiations**

Respect must be accorded to Indigenous preferences as to how the process should go ahead. No so-called solutions can be imported or imposed. Resolution of outstanding issues can be achieved only through negotiation between equals.

### **Representative Participation**

Indigenous participation in the reconciliation and resolution processes must be representative. While organisation of this will be complex, negotiations are unlikely to be able to proceed until there is a broad consensus about Indigenous representation. Indigenous people must decide on an approach to concepts of individual and community representation which is culturally appropriate.

### **Which Parties Would Sign a Treaty?**

A national treaty would be signed on the one part by the Australian Government, and on the other by the chosen representatives of the Aboriginal peoples and the Torres Strait Islander peoples. Who those chosen representatives would be is a matter for the Aboriginal peoples and Torres Strait Islander peoples to discuss, debate and decide upon. The same principle would apply to regional and local treaties.

### **Issue of a 'Framework Treaty'**

Aboriginal and Torres Strait Islander communities and organisations could be invited to discuss the merits of negotiating first a national or 'framework' treaty with the Australian Government. Such a treaty could be used as a platform for negotiating follow-on regional agreements and local agreements. An alternative might be to negotiate treaties on a state and territory basis.

### **Stages in Treaty Negotiation**

Treaty negotiation is complex and requires a carefully staged process to ensure that all relevant issues are addressed. For example, treaty negotiations in Canadian British Columbia pass through six stages:

1. Statement of Intent
2. Preparation for negotiations
3. Negotiation of a Framework Agreement
4. Negotiation of an Agreement in Principle
5. Negotiation to finalise a treaty
6. Treaty implementation

## HANDOUT 4

# TREATY AND THE RECONCILIATION PROCESS

In the early 1990s, two bodies were established which have subsequently defined the relationship between treaty and the reconciliation process.

- In 1991 the **Council for Aboriginal Reconciliation** (CAR) was set up in lieu of the treaty process promised by Prime Minister Bob Hawke in 1988. CAR was established under legislation which set a 10-year formal process for achieving reconciliation.
- In 1993 the **Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner** was established by the Federal Government in response to issues of discrimination and disadvantage highlighted by the Royal Commission into Aboriginal Deaths in Custody and HREOC's National Inquiry into Racist Violence.

## SOCIAL JUSTICE REPORT 2000

The Aboriginal and Torres Strait Islander Social Justice Commissioner's *Social Justice Report 2000* focuses on reconciliation and human rights. It expresses concern about the current lack of progress on reconciliation, and identifies a range of commitments to be made at the national level before meaningful reconciliation can be achieved.

The report calls for a commitment to overcoming Indigenous disadvantage as an urgent national priority and makes 14 recommendations including negotiation of a national framework agreement (or treaty), an entrenched guarantee against racial discrimination, better accountability and transparency of governments, and processes to ensure more effective participation of Indigenous people in the decision-making process.

### Social Justice Report 2000 - Recommendations

#### *Negotiating with Indigenous Peoples*

11. That the federal government introduce framework legislation providing legislative support for the negotiation of agreements with Indigenous peoples at the national, regional and local levels. The Council for Aboriginal Reconciliation's proposed *Reconciliation Bill 2000* is an appropriate legislative model.
12. That the federal government and COAG Council of Australian Governments) adopt the *Principles for Indigenous social justice and the development of relations between the Commonwealth government and Aboriginal and Torres Strait Islander Peoples* as proposed by ATSIC in *Recognition, Rights and Reform*, as forming the framework for negotiations about service delivery arrangements, regional governance and unfinished business.

(*Social Justice Report 2000*, Chapter 4)

Social Justice Reports are produced each year. The recently released *Social Justice Report 2002* renews the call for negotiations leading to formal agreement(s).

## CAR DOCUMENTS OF RECONCILIATION

After years of public consultation, the Council for Aboriginal Reconciliation presented its Documents for Reconciliation to national leaders and the people of Australia at Corroboree 2000 in Sydney on 27 May 2000.

- The *Australian Declaration Towards Reconciliation* is an aspirational statement that the Council hopes all Australians will embrace.
- The *Roadmap* sets out four national strategies identifying ways governments, community groups, organisations and individuals can implement the principles of the *Declaration* to help improve the lives of Aboriginal and Torres Strait Islander people and achieve reconciliation.

In December 2000, the Council delivered its final report: *Reconciliation: Australia's Challenge*. The report included 6 main recommendations as well as proposed reconciliation legislation.

## Recommendations

1. COAG agree to implement and monitor a national framework to overcome Aboriginal and Torres Strait Islander peoples' disadvantage.
2. All parliaments and local governments pass formal motions of support.
3. The Commonwealth Parliament prepare legislation for a referendum to:
  - recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia in a new preamble to the Constitution; and
  - remove section 25 of the Constitution and introduce a new section making it unlawful to adversely discriminate against any people on the grounds of race.
4. All levels of government, non-government, business, peak bodies, communities and individuals commit themselves to continuing and sustaining the process of reconciliation.
5. Each government and parliament:
  - recognise that this land and its waters were settled as colonies without treaty or consent and that to advance reconciliation it would be most desirable if there were agreements or treaties; and
  - negotiate a process through which this might be achieved that protects the political, legal, cultural and economic position of Aboriginal and Torres Strait Islander peoples.
6. The Commonwealth Parliament enact legislation (for which the Council has provided a draft in this report) to put in place a process which will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation can be resolved.

## Proposed Reconciliation Legislation

The proposed legislation begins with a Preamble, followed by a preliminary section and four substantive sections.

Part 1 – Preliminary (setting out the Council's intention and aims in recommending the legislation and guidance for its interpretation)

Part 2 - Recognition of the Unique Status of Aboriginal and Torres Strait Islander Peoples

Part 3 - A Process to Identify and Resolve Issues for Reconciliation

Part 4 - A Negotiation and Agreement Process to Resolve Reconciliation Issues between Aboriginal and Torres Strait Islander Peoples and the Government

Part 5 - A Process for Reporting on Reconciliation

## CURRENT STATE OF PLAY

The Commonwealth Government has not yet formally responded to CAR's final recommendations.

The Prime Minister has, however, publicly ruled out consideration of a treaty process in Australia on the basis that it would be inappropriate and divisive.

Meanwhile, ATSIC's treaty information and awareness program in Indigenous communities is continuing, and is anticipated to culminate in an Indigenous plebiscite on the issue.

## Non-Indigenous Players

The involvement of the broader non-Indigenous community is critical to progressing the opportunities of a treaty process. Reconciliation organisations will continue to provide a vital avenue for community action. The major national and state organisations are:

- **Reconciliation Australia** - the independent, non-profit body which replaced the Council for Aboriginal Reconciliation in 2001.
- **State Reconciliation Councils**
- **ANTaR** (Australians for Native Title and Reconciliation)

To become involved at a local level, contact **ANTaR** for the reconciliation group nearest you. ([www.antar.org.au](http://www.antar.org.au); email [antar@antar.org.au](mailto:antar@antar.org.au), or phone 02 9555 6138)



## APPENDIX II

# SLIDES FOR USE IN SUMMARY FORMAT

The following is a program of slides that can be presented in one hour-long session.

As many of the slides are summaries only, Facilitators should make use of the handouts for additional information.

### 1. BACKGROUND

- Slide 1.2: The Treaty Concept – an Introduction
- Slide 1.5: Recent Emergence of Discussion about Treaty
- Slide 1.6: Role of ATSIC in the Treaty Process
- Slide 1.7: Promotion of a Process

### 2. TREATY AND SOVEREIGNTY

- Slide 2.5: No Strangers to Treaties
- Slide 2.6: Sovereignty and the End of *Terra Nullius*

### 3. WHY WE COULD HAVE A TREATY

- Slide 2.9: Six Outcomes of a Treaty Process

### 4. WHAT COULD BE INCLUDED IN A TREATY

- Slide 2.14: Matters for Consideration in Treaty Negotiations
- Slide 2.15: What Could be Included in a Treaty

### 5. WHAT WOULD A TREATY LOOK LIKE?

- Slide 3.1: Possible Kinds of Treaties

### 6. CONSIDERATIONS IN TREATY-MAKING

- Slide 3.20: Considerations in Treaty-Making

### 7. THE IMPORTANCE OF PROCESS

- Slide 4.1 The Importance of Process

### 8. TREATY AND THE RECONCILIATION PROCESS

- Slide 4.12: The Council for Aboriginal Reconciliation and the Aboriginal and Torres Strait Islander Social Justice Commissioner
- Slide 4.13: Social Justice Report 2000
- Slide 4.14: Social Justice Report 2000 – Recommendations
- Slide 4.17: Recommendations of the Council for Aboriginal Reconciliation Final Report
- Slide 4.18: CAR Recommendations
- Slide 4.19: CAR Recommendations
- Slide 4.21: Current State of Play
- Slide 4.22: Non-Indigenous Players





## APPENDIX III

# FACILITATOR'S RESPONSE FORM

Completion of this form by Facilitators will allow us to keep a record of the use of the Treaty Community Seminar Program as well as the responses of participants.

**Group/Organisation name:** .....

**Facilitator's name:** .....

**Phone:** .....

**Email:** .....

**Date:** .....

**Number of participants:** .....

**Format:**      ☐ Single session format

Duration .....

☐ Multi-session format

Number of sessions .....

Duration .....

☐ Summary format

Duration .....

**General comments about your group's experience of the Treaty Community Seminar kit:**

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## GROUP RESPONSE

### Participants' Recommendations for a Treaty Process

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