Sovereign, Relational, Ready: Treaty Making Two Hundred and Fifty Years Later

Introduction

Harry Hobbs, Alison Whittaker and Lindon Coombes

> You are to employ yourself diligently in exploring as great an Extent of the Coast as you can…
> You are likewise to observe the Genius, Temper, Disposition and Number of the Natives, if there be any and endeavour by all proper means to cultivate a Friendship and Alliance with them, making them presents of such Trifles as they may Value inviting them to Traffick, and Shewing them every kind of Civility and Regard; taking Care however not to suffer yourself to be surprized by them, but to be always upon your guard against any Accidents.
> You are also with the Consent of the Natives to take Possession of Convenient Situations in the Country in the Name of the King of Great Britain.[1]

So read the secret instructions delivered to Captain James Cook for his voyage to 'discover' the Great Southern Continent. Cook did encounter Aboriginal and Torres Strait Islander people on his expedition. His journal records that on 29 April 1770, at a spot now called Kurnell but known to the Gweagal as Kamay, he met two men who resisted his landing. Cook and his party lay down their oars to speak, but they could not understand each other. Throwing some beads towards the men, Cook believed 'that they beckon'd to us to come ashore'. It appears that he was mistaken, for 'as soon as we put the boat in they again came to oppose us, upon which I fir'd a musquet between the 2'.[2]

The men retired and Cook advanced. After firing a second shot that struck one of the men, Cook and his party landed. Exploring the shore, they found a few small huts along with four or five small children. Attempting to engage in trade, Cook left several strings of 'beads, ribbands and cloths' and gathered up forty or fifty spears to take back to his ship.[3] Cook was to be disappointed. The next day he wrote that 'the strings of beads we had left with the children last night were found laying in the hut this morning. Probably the natives were afraid to take them away'.[4] This may be true. It is more likely, however, that the Gweagal were simply not interested in engaging with Cook. Doing so would have involved taking on particular obligations. As Cook lamented, 'all they seem'd to want was for us to be gone'.[5]

Within a few days Cook and the *Endeavour* did leave, following the coastline north. Several months later, on 22 August 1770 on Bedanug Island (Possession Island) off the south-western tip of Cape York, Cook claimed possession of the eastern coastline of the continent for King George III without the 'Consent of the Natives'. He called this new territory New South Wales.

The meeting between the Gweagal and Cook occurred in the absence of a shared language or 'background set of beliefs, values [and] ways of knowing'.[6] What instead occurred was the imposition of colonial violence, where one set of beliefs, values and epistemologies sought to eliminate the other. Without a common understanding it proved impossible for the parties to communicate across cultures or even approach the terms on which Cook's secret orders for Consent could begin to be negotiated.

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[1] Secret Instructions from Baron Ed Hawke, Sir Piercy Brett and Lord C Spencer to James Cook, 30 July 1768, 1-2.
[2] James Cook, *Captain Cook's Journal During his First Voyage Round the World Made in HM Bark "Endeavour" 1768-71* (WJL Wharton ed, Elliot Stock, 1893) 243.
[3] Ibid; Joseph Banks, *Journal of the Right Hon. Sir Joseph Banks During Captain Cook's First Voyage in HMS Endeavour in 1768-71 to Terra Del Fuego, Otahite, New Zealand, Australia, the Dutch East Indies, Etc.*(Joseph Dalton Hooker ed, Cambridge University Press, 2011) 266.
[4] Cook (n 2) 243.
[5] Ibid 244.
[6] Bruce Morito, *An Ethic of Mutual Respect: The Covenant Chain and Aboriginal-Crown Relations* (University of British Columbia Press, 2012) 94.

While Cook may not have appreciated the motives or responses of the Gweagal men, however, we can reconstruct what they thought of the incident. Dharawal man and Chairperson of the Gujaga Foundation, Ray Ingrey, explains:

> They saw the sails of the *Endeavour* and they thought they were low-lying clouds, and in Dharawal culture, low-lying clouds tell you that the spirits of the dead are coming back to this land, so they thought they were spirits coming back. … When they got closer they thought they were possums going up the mast … and as it got closer and closer they realised that they were actually humans. But because they were white, they thought they were spirits of the dead.[7]

The men 'were just trying to protect country in a spiritual way, because the *Endeavour* crew wasn't abiding by cultural protocols, which means you have to get permission to come on first'.[8] The men were fulfilling their duty to and as Country by protecting it from persons not authorised to enter.[9]

Over the coming years the events of that day at Kamay were repeated a thousand times across the continent. Aboriginal and Torres Strait Islander peoples actively resisted colonial intrusion, but settler diseases, frontier wars, and massacre stripped Indigenous peoples of their land and British colonists made themselves at home on a Country that was not theirs, with an assertion of sovereignty that had no grounds to be there. Cook's original failure to acknowledge and recognise the authority of the Gweagal to 'deny him entry to their territory, or to negotiate the terms on which he might enter'[10] set a path that Australia as a settler colonial state continues to follow today.

Looking back, it is clear what Cook and those that followed should have done. As Mudburra lawman Hobbles Danayari explained to Deborah Bird Rose:

> [Cook] should have askem him – one of these boss for Sydney – Aboriginal people. People were up there, Aboriginal people. He should have come up and: 'hello', you know, 'hello'. Now, asking him for his place, to come through, because Aboriginal land. Because Captain Cook didn't give him fair go – to tell him to 'good day', or 'hello', you know. Give people a fair go.[11]

Rose asked Danayari what would have happened if Cook had asked the Gweagal for permission to land. Rose recounts, 'I was told that either he would have been denied permission and therefore would have gone away, or he would have been allowed to stay but only on terms decided by the owners of country'.[12] Cook did not ask for permission to land and Australia has never asked for permission to stay. Australia has never sought to negotiate the terms on which it could be present on this continent.

Treaty and Australia

The failure to negotiate and the failure to recognise Aboriginal and Torres Strait Islander peoples as distinct political communities with an inherent right to sovereignty and self-government has structured the relationship between Aboriginal and Torres Strait Islander peoples and the Australian state. As the High Court recognised in *Mabo v Queensland (No 2)*, Australia was built on the exclusion of First

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[7] Cited in Ella Archibald-Binge, '"We're Still Here": 250 Years After Cook Landing, Aboriginal Community Reflects', *Sydney Morning Herald* (online, 29 April 2020) <https://www.smh.com.au/national/nsw/we-re-still-here-250-years-after-cook-landing-aboriginal-community-reflects-20200428-p54nzb.html>.
[8] Ibid.
[9] Shayne Williams, 'An Indigenous Australian Perspective on Cook's Arrival', *British Library* <https://www.bl.uk/the-voyages-of-captain-james-cook/articles/an-indigenous-australian-perspective-on-cooks-arrival>.
[10] Maria Nugent, *Captain Cook Was Here* (Cambridge University Press, 2009) 126.
[11] Deborah Bird Rose, 'Remembrance' (1989) 13(2) *Aboriginal History* 135, 139.
[12] Deborah Bird Rose, 'The Saga of Captain Cook Remembrance and Morality' in Bain Attwood and Fiona Magowan (eds), *Telling Stories: Indigenous History and Memory in Australia and New Zealand* (Allen & Unwin, 2001) 61, 74.

Nations peoples whose 'dispossession underwrote the development of the nation'.[13] Aboriginal and Torres Strait Islander peoples have never been content with this state of affairs. For generations they have called for meaningful political and legal reform to the structures of Australian governance, 'to empower our people and take *a rightful place* in our own country'.[14]

Calls for treaty have long been part of those demands. The first prominent call in recent memory came in 1969. That year, Jack Davis, the President of the Western Australian Aboriginal Association wrote to the Federal Council for the Advancement of Aborigines and Torres Strait Islanders to propose the negotiation of a treaty which would recognise Aboriginal peoples as the original owners of the continent.[15] Davis' call did not lead to treaty, but it prompted renewed focus on the absence of a negotiated settlement. In the years following Davis' letter, treaty would become a central element of Indigenous aspirations. Among other significant moments, treaty underlies the 1972 Larrakia petition to Queen Elizabeth II,[16] the work of the National Aboriginal Conference,[17] the 1988 Barunga Statement,[18] the Council for Australian Reconciliation's Final Report in 2000,[19] and a campaign led by the Aboriginal and Torres Strait Islander Commission in the early 2000s.[20] However, despite the committed work of Aboriginal and Torres Strait Islander peoples, no treaty process was ever established, let alone a settlement agreed.

Government intransigence has not derailed Aboriginal and Torres Strait Islander peoples. Most recently, the idea of a treaty has been reignited by a decades long process of constitutional reform. Once again, the movement has been led by Aboriginal and Torres Strait Islander peoples, who have not waited for government to act but have instead taken control of the process and refocused it on their own priorities.

At the national level, the 2017 Uluru Statement from the Heart calls for a First Nations Voice to be put in the Australian Constitution with the power to advise the Commonwealth Parliament on laws that affect Indigenous peoples, and a Makarrata Commission to oversee a process of treaty making and truth-telling. The federal government initially dismissed the Uluru Statement.[21] Although that opposition has softened and it appears set to legislate for an Indigenous representative body, whether a First Nations Voice is established remains subject to inconsistent political will. In any event, the Commonwealth continues to ignore the push for a Makarrata Commission.[22]

At the state and territory level, the situation is distinct. While it has not been a uniform process, nor one on which there is consensus among Aboriginal and Torres Strait Islander people, steps are underway. Critically, however, treaty has only returned to the centre of political debate because of the committed

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[13] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 69 (Brennan J).
[14] *Uluru Statement from the Heart*, Uluru, 26 May 2017 <https://ulurustatement.org/>.
[15] Julie Fenley, 'The National Aboriginal Conference and the Makarrata: Sovereignty and Treaty Discussions, 1979-1981' (2011) 42(3) *Australian Historical Studies* 372, 377; Karen O'Brien, *Petitioning for Land: The Petitions of First Peoples of Modern British Colonies* (Bloomsbury, 2018) 74.
[16] Larrakia Petition to the Queen, 17 October 1972.
[17] See generally, Julie Fenley, 'The National Aboriginal Conference and the Makarrata: Sovereignty and Treaty Discussions, 1979-1981' (2011) 42(3) *Australian Historical Studies* 372.
[18] See also Prime Minister Robert Hawke (Speech, Barunga Sports and Cultural Festival, Northern Territory, 12 June 1988).
[19] Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge: Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament* (2000) 106.
[20] Hannah McGlade (ed), *Treaty – Let's Get it Right!* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2003).
[21] Prime Minister, Attorney-General, Minister for Indigenous Affairs, 'Response to the Referendum Council's Report on Constitutional Recognition' (Media Release, 26 October 2017).
[22] Ken Wyatt, 'Walk With Me, Australia: Ken Wyatt's Historic Pledge for Indigenous Recognition', *Sydney Morning Herald* (online, 10 July 2019) <https://www.smh.com.au/national/walk-with-me-australia-ken-wyatt-s-historic-pledge-for-indigenous-recognition-20190710-p525rx.html>.

and focused work of Aboriginal and Torres Strait Islander peoples expressing their frustration and anger at the government-backed model of state and Commonwealth constitutional recognition.[23]

Over the last few years, Victoria, the Northern Territory, Queensland and South Australia have formally committed to negotiating treaties with Aboriginal and Torres Strait Islander peoples.[24] Unfortunately, a change in government led South Australia to abandon the treaty process, declaring such treaties 'expensive gestures'.[25] The step backwards in South Australia reveals that there is a large gap from talking treaty to signing a meaningful and genuine agreement. However, although many challenges remain, these developments across the continent are promising. They represent the first time in Australian history that any government has opened a treaty process.

By themselves treaties cannot resolve the problems caused by colonisation, but treaties are a valuable instrument towards this broader goal. This is because these agreements represent more than a 'standard contractual commercial interaction'.[26] As an expression of sovereignty, treaties ideally articulate a particular relationship of equals predicated on a model of respect. Treaties are more than simply legal agreements; they are both 'relationship-building instruments as well as rights-defining instruments'.[27] As legal texts, treaties can empower Aboriginal and Torres Strait Islander peoples by recognising their inherent right to sovereignty and creating the space for institutions of self-government to flourish. And yet, as legal instruments treaties are also not without risk; they may be used to argue that First Nations have ceded their sovereignty, or impose inappropriate models of self-determination, such is the very unequal power of the state in these relationships.

At the same time, as relational and political documents and not just legal texts, treaties offer a path for diverse political communities to engage, converse and learn to understand each other.[28] In their relational sense, a treaty is 'a way of imagining a world of human solidarity where we regard others as our relatives'.[29] It is through sitting around a table and talking that relationships built on trust and communication across and between distinct political communities can be developed. It is through those relationships that participants are able to envisage and share in the design of a shared future, where political power may be more consensually and equitably distributed,[30] or at least held to account on the basis of formal agreement.

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[23] Nayuka Gorrie, 'Fuck Your Constitutional Recognition, I Want a Treaty', *IndigenousX* (online, 17 March 2016) <https://www.vice.com/en/article/qb5zdp/fuck-your-recognition>; Amy McQuire, 'Recognising the Truth About Treaty Through a Storm of Constitutional Spin', *New Matilda* (online, 4 May 2016) <https://newmatilda.com/2016/05/04/recognising-the-truth-through-a-storm-of-constitutional-spin/>; Hamish Fitzsimons, 'Victorian Government to Begin Talks with First Nations on Australia's first Indigenous Treaty', *ABC News* (online, 26 February 2016) <https://www.abc.net.au/news/2016-02-26/victoria-to-begin-talks-for-first-indigenous-treaty/7202492>.

[24] See George Williams and Harry Hobbs, *Treaty* (Federation Press, 2nd ed, 2020).

[25] Michael Owen, 'Aboriginal People Failed by "Expensive Gesture" Treaties', *The Australian* (online, 11 June 2018) <https://www.theaustralian.com.au/nation/aboriginal-people-failed-by-expensive-gesture-treaties/news-story/84b000a2f0b81c82801d93cc9a45cb3c>.

[26] Matthew Palmer, 'Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution' (2007) 29 *Dalhousie Law Journal* 1, 29.

[27] Julie Jai, 'Bargains Made in Bad Times: How Principles from Modern Treaties can Reinvigorate Historic Treaties' in John Borrows and Michael Coyle (eds), *The Right Relationship: Reimagining the Implementation of Historic Treaties* (University of Toronto Press, 2017) 105, 139.

[28] See Harry Hobbs and Stephen Young, 'Modern Treaty Making and the Limits of the Law' (2021) 71 *University of Toronto Law Journal* 234.

[29] Robert Williams Jr, *Linking Arms Together: American Indian Visions of Law and Peace* (Oxford University Press, 1997) 94.

[30] Russel Lawrence Barsh and James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (University of California Press, 1980) 270. On how the state should conduct itself in treaty negotiations see Mark McMillan, David Foster, Ann Genovese, Shaun McVeigh and Maureen Tehan, 'Obligations of Conduct: Public Law – Treaty Advice' (2020) 44(2) *Melbourne University Law Review* (advance).

At their core, at least on the side of First Nations and Aboriginal and Torres Strait Islander communities, is the operational recognition of retained and inherent Indigenous sovereignty which makes these documents more alive and more authoritative than imposed legislative frameworks. The relational nature of treaty also means they can be critical social instruments for use by Aboriginal and Torres Strait Islander communities and nations. Consider the #NoTreesNoTreaty campaign centring around the Djab Wurrung right to refuse to engage with the Treaty-making process if the Victorian Government destroyed sacred trees.[31]

Predominant narratives of treaty making emphasise the opportunity for Australia to resolve its presence on the continent. The contributors to this volume challenge this view. Notions of finality obscure the fact that as relational instruments, treaties continually evolve and develop. They also leave no room to understand that for some First Nations, the answer to the question of whether the Australian government has legitimacy, to enter into treaty relations or to even exist, may be simply: 'no.'

The Structure of this Book

The chapters in this collection reflect on the promise, pitfalls and potential of treaty-making on this continent. They explore the institutions, frameworks and attitudes necessary to develop both the legal artifice and treaty relationship that supports and strengthens self-determination. The chapters are drawn from a workshop held at the University of Technology Sydney in November 2019, co-hosted by the Faculty of Law and the Jumbunna Institute for Indigenous Education and Research. We thank both the Law Faculty and the Jumbunna Institute for their generous financial and logistical support in hosting the workshop. In particular, we thank Brian Opeskin, Aline Roux, Caster Troy and Tegan Allen. We also thank Aunty Glendra Stubbs, who opened the workshop with a moving acknowledgment of country that explored her own aspirations for treaty and her hope for what it could deliver.

The workshop brought together eminent and emerging Indigenous and non-Indigenous scholars and practitioners to consider the recent push towards treaty at the state and territory level. All who attended agreed that while these developments were significant, the historical and continuing absence of treaty here could pose several major challenges to treaty processes. In particular, questions were raised as to what a treaty is and what it might contain; how negotiations could be conducted in a fair and equitable manner; whether there should be one or multiple treaties; how to build support among both Indigenous and non-Indigenous communities for treaty; and how treaty can build on and enrich other Indigenous aspirations for constitutional reform.

This last point is especially important, for the Uluru Statement from the Heart calls for a careful sequencing of reforms; First Voice, then Treaty, and finally Truth.[32] For those involved in the development of the Uluru Statement, this sequencing is reflective of several brute facts resulting from the structural powerlessness that Aboriginal and Torres Strait Islander peoples face here today. Without a national representative body there is a risk that the design and powers of a Makarrata Commission will not reflect the priorities or interests of Aboriginal and Torres Strait Islander peoples. Similarly, without a strong, national voice overseeing the process of treaty making, agreements may not meet Indigenous peoples' aspirations. Unfortunately, the federal government's blithe rejection of the Uluru Statement challenges the strategy outlined in the Uluru Statement. Whether the state and territory treaty processes already underway can meet Indigenous aspirations for meaningful reform in the absence of a First Nations Voice is just one of many questions going forward.

The collection is divided into two parts, each engaging with fundamental issues that need to be considered before meaningful agreements can be struck. Part I focuses on the preliminary stages of

[31] See Madeline Hayman-Reber, 'No Trees, No Treaty: Protestors Continue to Amass at Djab Wurrung Site', *NITV* (online, 26 August 2019) <https://www.sbs.com.au/nitv/article/2019/08/22/no-trees-no-treaty-protesters-continue-amass-djab-wurrung-site>.

[32] Megan Davis, 'The Voice to Parliament: Our Plea to be Heard', *ABC Religion & Ethics* (online, 11 July 2019) <https://www.abc.net.au/religion/megan-davis-voice-to-parliament-our-plea-to-be-heard/11300474>.

treaty-making. Chapters in this part examine the steps that both First Nations and non-Indigenous people should take in order to prepare themselves for negotiations that may take many years, as well as possible frameworks through which negotiations could be structured.

In chapter 1, Daryle Rigney, Damien Bell and Alison Vivian explore how Aboriginal and Torres Strait Islander communities can become 'treaty ready'. The reporting of a rich and nuanced conversation, the chapter emphasises that treaty is not an end goal, but a political strategy aimed at realising, protecting and promoting Indigenous sovereignty. In the words of Daryle Rigney, treaty is best understood as a technology, among others, for nation-building. This understanding suggests that, when ready, Aboriginal and Torres Strait Islander communities should approach treaty talks with a clear sense of their goals and expectations. If government appears unwilling or unable to meaningfully engage with those aspirations, communities should be wary. Perhaps other strategies and approaches, like those adopted by the Ngarrindjeri and Gunditjmara—as discussed in this chapter—may be more appropriate and more effective at rebuilding Indigenous nationhood.

Treaties are agreements between two or more parties. Thus far, however, most of the attention on this continent has, appropriately, been trained on First Nations. In our second chapter, Cheryl Saunders examines the non-Indigenous party. As Saunders explains, Indigenous and Australian State treaty making is occurring in a distinct context; these are subnational processes, occurring well after colonisation that need to be accommodated within a particular constitutional framework. This structure can pose difficult questions as to how a State could or should sign and give effect to a treaty. By examining this question with reference to factors of legal validity, durability and effectiveness, Saunders ably explores both the merits and shortcomings of several courses of action.

The abandoned treaty negotiations in South Australia and the Djab Wurrung's #NoTreesNoTreaty campaign highlight that treaty processes will only succeed where both parties support the negotiations and the final settlement. Public support amongst both First Nations and non-Indigenous communities is therefore critical. One key factor in shaping community attitudes towards treaty process is the role of the fourth estate. In chapter 3, Amy Thomas, Andrew Jakubowicz and Heidi Norman examine how the Australian media has reported the political aspirations of Aboriginal and Torres Strait Islander peoples over the last 45 years. Their conclusions present sobering reading. They find that the media has often framed stories in ways that marginalise or mischaracterise those aspirations. If treaty processes are to succeed, journalists and media practitioners should reflect on their position and responsibility and meaningfully engage with First Nations peoples.

In chapter 4, Asmi Wood issues a note of caution. Wood emphasises that political commitments to meet Indigenous Peoples' aspirations have rarely been realised. This is true of Australia, as well Canada, the United States and Aotearoa New Zealand, where historic treaty relationships have not prevented the state from acting in an instrumental and discriminatory manner towards Māori/Aboriginal/First Nations peoples. On this basis, Wood argues that Aboriginal and Torres Strait Islander peoples should be wary of treaties based solely under domestic Australian law. Rather, treaty negotiations should be informed and governed by the norms and principles of international law. Recognising that Australian governments will be reluctant to allow this, Wood nonetheless encourages Indigenous involvement with international law, suggesting that it could act to mitigate problems of domestic politics and help to develop lawful relations.

The chapters in Part II examine some of the practical and conceptual challenges of treaty making here in the twenty-first century. Reflecting on developments internationally, particularly in Aotearoa New Zealand and Canada, chapters in this part also examine the broader goals of treaty, including how to develop equitable and enduring relationships.

The significance and value of formalised treaty arrangements are considered in Carwyn Jones' discussion of Te Tiriti o Waitangi in chapter 5. While acknowledging that since 1840, Te Tiriti has generally been honoured more in the breach than the observance, Jones traces recent developments in three fields that demonstrate how treaties can provide a framework to rebalance, renew and restructure

both constitutions and citizenship by instilling a treaty-based relationship between Indigenous and non-Indigenous peoples. Jones examines how innovative settlements under the Waitangi Tribunal have brought environmental management practices closer into line with Māori values and how Te Tiriti has been central to reinscribing Māori autonomy in social service delivery.

However, these successes also carry risks. Jones reminds us that treaties between Indigenous peoples and states should not be understood as a narrow set of compartmentalised agreements. Treaties are fundamentally constitutional in character, and the quality of that relationship must be maintained when interpreting and implementing treaty terms. To that end, Jones concludes by considering the work of the Matike Mai Aotearoa. Matike Mai Aotearoa's ground-breaking 2016 report develops six models aimed at restructuring the constitution of Aotearoa in a manner that does justice to Te Tiriti. Whether treaty processes on this continent lead to similar proposals or not, Jones' chapter reminds us that a treaty relationship should stengthen the legitimacy of both First Nations and non-Indigenous sources of authority, 'rather than placing them in a relationship of contestation, conflict, subjugation and domination'.[33]

Treaty processes may be underway in several States and Territories of Australia, but other governments appear to remain implacably opposed to opening talks. What can First Nations whose country is claimed by these States do? In chapter 6, Heidi Norman, Janet Hunt and Deirdre Howard-Wagner document the agency and creativity of First Nations in New South Wales who continue to assert their sovereignty in their everyday actions. Despite operating within a governance framework that denies the right to self-governance, the chapter demonstrates that First Nations are active in strengthening their political capacity and influence wherever they can. In exercising their inherent right to sovereignty, Norman, Hunt and Howard-Wagner argue that First Nations in New South Wales are engaged in nation building activities; they are acting like a nation irrespective as to whether the State recognises them as such. Nonetheless, while these steps are significant, they conclude by noting that governance frameworks will need to change. In order to realise First Nations aspirations, the State must recognise their status as political communities entitled to exercise self-governance. Treaty is the means through which that recognition can occur.

In chapter 7, Stephen Young and Harry Hobbs document and reflect on critiques levied at the modern treaty making processes in Canada. It is important to understand concerns raised over the Canadian processes, because that country serves as a model for the developing processes in this country. At the same time, it is also important to bear in mind the significant differences within which treaty processes in Australia and Canada are situated. In particular, Young and Hobbs highlight how the Uluru Statement from the Heart positions treaty as nested within a wider project of constitutional reform aimed at empowering Aboriginal and Torres Strait Islander peoples and establishing a 'fair and truthful relationship with the people of Australia'.[34] This larger project seeks to overcome some of the limitations inherent to modern treaty making.

Those limitations are explored in more detail in the following chapter. In chapter 8, Sarah Maddison, Julia Hurst and Dale Wandin take a close look at the Victorian treaty process. Although recognising the immense challenge involved in designing an equitable and respectful treaty process over two hundred years after colonisation, Maddison, Hurst and Wandin critique the pragmatic steps adopted in Victoria. As they argue, this approach risks breaching important First Nations cultural protocols concerning who is able to speak for country. Reflecting on his experiences in a powerful personal statement, Dale Wandin describes how the process has left him, as a sovereign Wurundjeri man, feeling both isolated and disappointed. And yet, the authors do not suggest abandoning treaty. Rather, they argue that any process must be guided by those responsible for country, even if that may be difficult or may require more time.

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[33] Cite page number when known.
[34] *Uluru Statement* (n 14).

In the final two chapters we hear directly from those involved at the coal face of Australian treaty processes. In chapter 9, Northern Territory Treaty Commissioner Mick Dodson provides a valuable overview of the early steps undertaken so far in the Territory. Placing emphasis on treaty as an exercise in truth telling and nation-building, Dodson describes and outlines the structures, entities and the mechanisms that are needed to facilitate a treaty system in the Northern Territory. Although drawing inspiration from both the model in British Columbia and Victoria, it is clear that Dodson's proposed framework is grounded in the particular circumstances of the Territory. This is crucial, as the Northern Territory is uniquely placed politically, legally and socially.

Several of these distinctions pose particular challenges for a treaty process. For instance, the Territory's unicameral parliament means that treaty legislation is especially vulnerable to fluctuations in political support. The absence of an upper house leaves no opportunity for an opposition to block efforts to wind back or rescind a Treaty Act. The constitutional authority of the Northern Territory is also limited. Although considered as if it was a state for many purposes, it is not. The legislative power of the Northern Territory—including its power to enact laws to give effect to a treaty—can be altered or abolished by a simple vote in the Commonwealth Parliament. As Dodson notes, these challenges place further stress on the need to ensure that any treaty in the Northern Territory enjoys widespread support within the community and across the political spectrum.

Not all of the Northern Territory's distinctions pose disadvantages. The determination, tenacity and political sophistication of First Nations peoples over decades, as well as the pattern of colonisation in the Territory, has culminated in significant land justice. Today, almost 50 per cent of the Northern Territory has been returned to First Nations peoples. While this is far less than they are entitled and ownership is not consistent across communities, it demonstrates that for many Indigenous nations a major goal of treaty has already been realised. In circumstances where land justice has been a considerable stumbling block in treaty processes in Canada, a Northern Territory treaty or treaties may be achievable.

This is not to say that a modern treaty will be simple. In chapter 10, former Victorian Treaty Commissioner and proud Gunditjmara woman, Jill Gallagher offers a wonderfully detailed inside view of the complexities involved in talking treaty in and to contemporary Australia. Gallagher traces her movements and meetings across the state, highlighting the fundamental position that engagement never stops; 'community needs to hear from you again and again'.[35] Gallagher does not shy away from the challenges, acknowledging that legacies of racist law and policy making has alienated the Aboriginal community in Victoria. Nonetheless, after reading this chapter, it is impossible to question Gallagher's ethic or activism. The work that the Victorian Treaty Advancement Commission accomplished is impressive. It is now for the First Peoples Assembly to take up that mantle and continue the work towards treaty.

Dodson and Gallagher provide important empirical contributions that outline key steps undertaken and identify lessons for future processes in Australia and elsewhere. But together they do more than simply outline the treaty processes at state and territory level in Australia. These contributions, and the valuable insights into the messy business of consultation, consensus building and – hopefully – negotiated settlements that they offer, emphasise the challenges that arise in translating theory into practice.

All of the contributors to this volume agree that we are closer to treaty than we ever have been. However, they also all agree that there is a lot more work to be done before genuine and meaningful settlements can be struck. It is hoped that the negotiation of those settlements will lead to a political and moral restructuring of this colony called Australia. As Hobbles Daniyari notes, if that happens then Indigenous and non-Indigenous Australians 'we'll be friendly, we'll be love mijelb [each other] we'll be mates'.[36] If not, these initiatives will be little more than those spirits of the dead that came on ships just a few short years ago.

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[35] Cite page number when known.
[36] Rose (n 11) 142.