The Sir Robert Garran Oration

Delivered by Professor Mick Dodson — Northern Territory Treaty Commissioner — at the Institute of Public Administration National Conference 'Crossroads > Future Directions' held in Darwin on 26 September 2019.

In his National Press Club address before the recent NAIDOC week, Mr Wyatt — the Minister for Indigenous Australians — said that a truth-telling process would allow we Australians to reflect upon the place of First Nations peoples and that the telling has to happen at all levels across the country. He noted that the Bringing Them Home Report opened the records of child removals, which was painful but necessary. He said that truth sets a person free, now thereby willing to listen to the truth, to find common ground to walk on.

Regarding a treaty, Mr Wyatt says it's important for states and territories to take the lead in treaties. I trust he's not implying that the Commonwealth can wash its hands on treaty-making nationwide — the Federal Parliament must be involved. I hope to outline some reasons why this is the case in this presentation.

As has been noted, our conference theme is 'Crossroads: Future Directions'. The abstract for the conference says that governments are at crossroads, and new thinking on future directions is essential in order to actually deliver the services and manage community expectations. And I couldn't agree more with respect to Indigenous affairs in this country.

As a nation, we're certainly at the crossroads when it comes to bridging the social and economic gaps between Indigenous and non-Indigenous Australians.

And as we sit at these crossroads, despite many well-meaning efforts, we still see a very uncertain future for Indigenous Australians, which in turn creates uncertainty for non-Indigenous Australians. And to resolve that uncertainty, this country needs to take a different road than the ones we have previously travelled.

To understand that uncertain future, and to reinforce the inadequacy of past policies, you need to look no further than the Closing the Gap agenda. More than 10 years on, the Prime Minister's 2019 report advises that only two of the seven targets are on track.

The coalition of Aboriginal and Torres Strait Islander peak organisations' recent partnership with the Council of Australian Governments to progress the next phase of Closing the Gap is a good start, I think, in doing things differently and travelling a different path.

However, improving services, or service delivery, is only one part of a different way of doing things and making a sustainable difference. I think a more comprehensive approach is to look at treaty or treaties.

I'm seeking to address two particular issues this morning. Firstly, why a treaty or treaties? And secondly, what are some of the challenges in achieving treaties in the Northern Territory of Australia?

The nature of treaties

But before addressing these issues, we must be clear about what we mean by 'treaty'.

So, what is it a treaty? A treaty is a settlement or agreement arrived at by treating or by negotiation. A treaty gives rise to binding obligations between the parties who make them, and it acts to formalise the relationship between the parties to the agreement or agreements.

There's a myth that treaties can only be between nation states. This is not the case, as evidenced by modern treaty-making between governments and First Nations peoples in Canada and in New Zealand. Treaties are not restricted to agreements between countries. We can negotiate treaties between states, nations, governments, and people. And treaties around the world are accepted as a way of reaching a settlement between Indigenous peoples and those who have colonised their lands — for example, New Zealand and Canada.

We can think about modern treaties with Indigenous peoples as having three key factors:

- Recognition that Indigenous peoples are distinctive, and differentiate their political communities from other citizens' within the country, state, or territory. We're not superior. We're not better. We're different.
- Secondly, settlement is reached by agreement via negotiations, and negotiations as equals in good faith in an manner that's respectful of each party's quality of standing.
- And finally, the government party recognises or establishes structures of culturally appropriate governance, with powers of decision-making and control, and provides the resources to make it happen.

So, why a treaty or treaties? Well unlike Canada, the United States, and Aotearoa New Zealand, Australia never, never formally recognised a treaty with Indigenous Australians. And in our country, it wasn't until the Mabo decision that the government recognised the property rights of Aboriginal and Torres Strait Islanders. With the exception of Australia, the British recognised these rights in all its other colonies, and the basis of British sovereignty up until the Mabo decision relied on a ruling in 1889 of the Judicial Committee on the Privy Council in the UK. The Privy Council declared that Australia was not occupied by conquest or session, but rather, and I quote, "It was practically unoccupied, without settled inhabitants or settled law at the time; it was peacefully annexed." This is essentially the doctrine of Terra Nullius, which the High Court, in the Mabo decision, overturned.

The moral dimension the Mabo decision missed

The Mabo decision hasn't delivered a just settlement of the legitimate historical grievances of Aboriginal and Torres Strait Islanders, and these claims are not defined in terms of meeting the physical needs of Indigenous peoples, but they have, for Aboriginal and Torres Strait Islanders, a moral dimension. And I posit also, a political one.

Our better-informed government policies or programs of service delivery which focus on health, housing, policing, justice, education, welfare, etc. will never, will never, meet the moral component.

To cater to the moral imperative there has to be a recognition and acceptance by governments of two necessary truths.

Firstly, Aboriginal and Torres Strait Islander societies have been injured and harmed throughout the colonisation process, and just recompense is owed.

Secondly, the status of Aboriginal and Torres Strait Islander Peoples, as First Peoples, and the distinctive rights and special status based on prior occupation that flow from that, and intensive government programs aimed at bringing about equality with other citizens will not, of itself, provide justice for Indigenous Australians. And some still think that these measures are a form of compensation for past injustices, they are not and this is due to two key issues: the adequacy of compensation, and, as I'll talk about soon, the rights of Indigenous Australians to self-determination.

Treaties will form, in a sense, the grand Reconciliation Action Plan without the assimilationists undertones. And Mr Wyatt says truth-telling will free us.

So why truth telling? …What I'd think is, as unfinished business.

The impact of Australia's colonial past on First Nations

Our nation needs to deal with our colonial past and its impact on First Nations. Every Australian must know our shared history and its deadly and ongoing impact on the Indigenous First Peoples of this land we now share.

So folks, this is what happened.

The discovery and settlement of Australia occurred in stages. Lieutenant James Cook — as he then was — [his] instructions in 1768 were to discover what was then known as New Holland. The Dutch had been here almost 200 years before Cook. Cook landed at Botany Bay on the 29th of April 1770. And by the 22nd of August 1770, they had purported to take possession of the entire Australian east coast on behalf of the British king. The First

Fleet arrived on the 26th of January 1788, and Governor Philip raised the British flag on the 7th of February 1788. The colonisation of the continent had begun.

Territories that were designated terra nullius during the colonization period were a rarity. Wherever there were people with some form of socio-political organization, the European colonists generally acquired territories by conquest or possession.

When Captain Cook left England to discover Australia, his instruction said — and I quote:

> "You are also with the consent of the natives [I'll repeat that: with the consent of the natives] to take possession of convenient situations in the country, in the name of the king of Great Britain, or if you find the country uninhabited, take possession for His Majesty by setting proper marks and inscriptions, as discoveries and Possesions."

Well, Cook ignored the natives. He cut an inscription in a tree, raised the British flag, violated international law at the time, and disregarded the instructions of his superiors.

The consent of the natives was never sought, nor obtained.

Now, I think a treaty or treaties can fix that problem.

Cook seems to have regarded Australia as terra nullius on the assertion that Aborigines lacked political organisation with settled law. This assertion relies on the erroneous view that there was, or had to be in European terms, one single Aboriginal nation. Which is nonsense.

There were over 500 self-governing Aboriginal nations with established law and political systems. Indeed the Lower Murray tribes were joined in a confederacy, thousands of years old. This was all that was required in the international law at the time. And Australia was the exception to British behavior elsewhere on the planet, particularly in Africa.

The High Court decision in Mabo, although rejecting terra nullius and recognising native title, did not, and said it could not, challenge the foundations of present Australian sovereignty. As the court said, it was a question not justiciable in municipal courts.

So, I want to know — how can the court have accepted the validity of Aboriginal and Torres Strait Islanders' rights to land but not uphold rights of governance? Why the inconsistent allegiance by the court to the occupation settlement fallacy? Indeed, who is the sovereign for Aboriginal law and customs Native Title claimants must rely on to establish their claims?

Interestingly the Northern Territory treaty process… in the process the Northern Territory government has accepted that First Nations of the Northern Territory had never surrendered or ceded their sovereignty. They've also agreed the Aboriginal people First Nations were the prior owners and occupiers of the lands, seas, and waters that are now called the Northern Territory of Australia and First Nations in the Northern Territory were self-governing for thousands of years, in accordance with their traditional laws and customs. And finally, that there has been deep injustice done to the Aboriginal people of the Northern Territory, including violent dispossession, the repression of their languages and cultures, and the forcible removal of children from their families which have left the legacy of trauma and loss that needs to be addressed and healed.

And this is an important starting point, because it means we don't have to argue about these things. They are already agreed.

And whatever the High Court has left us with post-Mabo, as to what is now the foundations of sovereignty of the Australian nation state is a complete mystery to me. The sovereign pillars of the nation state are arguably, at the very least, a little legally shaky.

A treaty with the blacks could fix that problem.

So, folks, these questions aside, we need truth-telling to appreciate what horror and devastation most of Indigenous Australia has gone through over the last 234 years.

Unfinished business and a treaty-making framework

So what do we do about the unfinished business?

P'r'haps first we can agree on what is 'unfinished business'. The Council for Aboriginal Reconciliation in their final report, didn't use that term, 'unfinished business' — when dealing with this issue, when dealing with the past. Rather, it chose to use a p'r'haps more politically friendly term: the 'unresolved issues'. And they defined it as follows:

> "Any issue whether already identified or identified through the processes of this act [remembering the council approach was for a legislative framework] that is an impediment to achieving reconciliation until it is addressed, including but not limited to the recognition of the right to equality, the protection of Aboriginal and Torres Strait Islander cultures, heritage, and intellectual property, the recognition of Aboriginal Torres Strait Islander customary law, a comprehensive agreements process for settlement of Native Title, and other land claims, regional autonomy and constitutional recognition."

In my view, what they're talking about when I use the term 'unfinished business' is the yet-to-be met legitimate grievances of Aboriginal and Torres Strait Islanders that arise from, directly from, colonisation by the British and Britain's successors, and the ongoing consequences of that colonisation. And it's also about confronting the legacy of the past of realigning the relationship between government and us and the people of Australia. And that process is what we call 'truth-telling'.

There are, folks, outstanding matters going directly to a proper relationship between Indigenous and non-Indigenous Australians and the future of that relationship.

If we are talking about treaty-making in a new Australia, these outstanding matters must be central to the process. Their resolution by agreement is essential to our escape from the ravages of the ongoing colonisation. And identifying what we're talking about, is not, in my view, too difficult — most of the work's already been done. Itemising or particularising the unfinished business, is not, in my view, the hard part. For example, dozens and dozens of transcripts in the Northern Territory land claims under the Land Rights Act are replete with evidence of this bloody past.

We need to establish the framework within which we are to proceed, and how we might address the unfinished business, as the first step, or steps, in the treaty process.

And in thinking about unfinished business, we need to address principles that might underlie a treaty in broad national terms. And in my opinion, they should include recognition that Aboriginal and Torres Strait Islander peoples are the First Peoples of Australia, and the distinct rights which flow from this. And secondly, agreement to necessary reforms for a more just society and the setting of national standards to inform state, territory, or regional treaties and other constructive agreements. And perhaps the preferred approach is for a national framework model that allows for treaty-making on a national, statewide, regional, or local basis.

Moreover, this framework could… allow for treaties that are comprehensive, deal with multiple or single issues, or merely address some specific local issue.

However, why should we do it this way? In other words, why do we need a treaty, or treaties, anyway?

A context for treaty-making in Australia

There are things about the British invasion which are uncontested, or ought to be. In the first place, the invaders, their descendants, or past government, have never formally recognised our rights. Secondly, our rights have been affected by a lopsided relationship with the newcomers, who saw us as primitives with no rights and no concept of civilized customs.

A treaty or treaties could have recognised and protected Indigenous rights and led to a just constitutional basis for the Australian Federation.

We were totally overlooked as relevant parties in the formation of the Australian Federation. If a treaty had been in place and were constituted by the principles I've already noted, the structure of Federation no doubt would

have incorporated Aboriginal rights and position in the Federal system. A national treaty could fix our racially discriminatory constitution.

And the reasonable basis for treaty is the Aboriginal and Torres Strait Islander societies have been, as I mentioned, injured and harmed throughout the colonisation process, and just recompense is owed. It's important, but it shouldn't be seen just in that basis, to recognise that a national framework treaty or agreement would allow Indigenous communities and other local, regional, state, and territory stakeholders to sign treaties in line with national minimum standards with each other at those levels.

One option for those minimum standards would be to adopt the standards contained in the United Nations' Declaration on the Rights of Indigenous Peoples which Australia has endorsed. This declaration has a golden thread running through it, of free, prior, and informed consent. And it has four key themes: self determination; participation in decision-making; respect for and protection of culture; equality and non-discrimination, including the right to be free from racial discrimination.

And finally, perhaps above all, a treaties process will deliver the ultimate certainty of the relationship between Aboriginal and Torres Strait Islanders and the rest of the country's population.

Public servants need to change the way they work

So, why am I telling you guys as public servants and administrators, from different jurisdictions across the country, all this stuff?

Well, as you well know, there are two limbs to implementing government policy: There's the work done by the elected officers, politicians and their staffers; and there's work done by the public sector, public service, or the public administration — I'm damned if I know what you call it these days!

And even when the politicians advocate a certain approach or style, public services across the country do not always embrace that style. Especially if it requires significant changes in behavior and approach.

If treaties are to be successfully negotiated and implemented in Australia, then the way the public services do business will have to change dramatically. Especially if minimum standards such as the ones referred to earlier are introduced.

And as I mentioned at the beginning, one of the features of modern treaties is that the government recognises and establishes and resources structures of culturally appropriate governance, with powers of decision-making and control. In essence, this means that power is shared. And by definition, central power is diluted.

To be honest, over time we have seen that this is something the public service has struggled with.

So, if we want treaties in this country, we want them to be implemented to the maximum effect. And we need public servants across the country to change the way they work.

You know an elderly Aboriginal man once said to W.E.H. Stanner, when Stanner asked him what he thought of European Australians — he said, "Very clever people, very hard people, plenty humbug."

So, the key questions for public servants, according to Westbury and Dillion[1], is shifting the focus of Indigenous Affairs policy from the blame-the-victim approach, namely from 'what's wrong with Indigenous cultures and communities?' to 'what constitutes appropriate and effective public policy engagement?'.

[1] Dillon, M.C. & Westbury, N.D. (2007) 'Beyond humbug: transforming government engagement with indigenous Australia'. Seaview Press: West Lakes, South Australia

Treaty-making requires readiness

In British Columbia, in Canada, they have a six-step framework for negotiating modern treaties.

And the first step was the First Nation lodging a detailed statement of intent to negotiate. The final step, and the last step, is the implementation of the treaty. And there are steps in between.

To me, the second step, which they call 'readiness to negotiate', is potentially the most important. In British Columbia, modern treaties are between First Nations, the provincial government, the government of British Columbia, and the national government — the Federal government. And all three parties have to lodge comprehensive readiness submissions and each party gets to assess the other two.

In the Northern Territory, I would say that at this point in time, no First Nation is treaty-ready. Equally, I would suggest that no other government is treaty-ready.

Self-determination and Indigenous decision-making are key

So going back to the beginning of this address, you have to ask yourself, why, despite significant financial investments over decades, Indigenous Australians are as socially and economically disadvantaged as we are compared to the rest of Australia or Australians. And to me, the key reasons are the lack of commitment to self-determination and Indigenous decision-making. Self-determination is about the right as a collective to make your own decisions and the communal rights to control your political, social, cultural, and economic development.

So, the key challenge for government and public servants when developing and implementing policies aimed at Indigenous Australians is to think of workable models of self-determination, even within existing non-treaty-based frameworks. And, as a minimum — and in the spirit of Minister Wyatt's co-design concept — that Indigenous Australians have a genuine participation in decision-making on matters impacting them.

Folks, Indigenous people of this country are undoubtedly distinctive and differentiated political communities from other citizens. However, at the same time, we are integral and an important part of this country. So, for example, we should see efforts to close the gap in Indigenous disadvantage as a nation-building exercise. And if treaties are to be part of the solution, then we should view them as nation-building exercises and in the national interest, and investment in the future if you like.

So… and there's no, absolutely no need to be afraid. As the Canadian Carol Blackburn noted: treaty should be seen as a marriage, not a divorce.

So in conclusion then, in order to take the right future direction from the crossroad, we must have truth-telling coupled with treaty-making.

Enough with the humbug. Thanks for listening to me.