

Why can't we agree?

Agreement making between First Nations and States

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Acknowledgement

... with respect

Context

- Advice to the NSW Government Aboriginal Affairs agency
- Agreement making:
 - What the literature tells us
 - What the experiences of other jurisdictions tell us

Today's seminar

- Why does Australia need agreements and treaties?
- What forms do agreements take?
- What is the history of agreement making in Australia?
- How does Australia differ to other jurisdictions?
- What is happening in Australia today?
- Where does Australia need to head next?

Definitions

A 'state' refers to:

A body of people occupying a definite territory and organised under one government.

In Australia, 'states' under this definition therefore include the Commonwealth of Australia (as the federal government), as well as the states and territories within the Federation (including NSW). Therefore, federal, state and territory governments in Australia are all in a position to potentially form legally enshrined agreements - including treaties - with First Nations people.

Definitions

'First Nations' refers to the hundreds of Aboriginal and Torres Strait Islander nations across Australia as the original peoples, custodians and owners of Australia, who have never ceded sovereignty.

'Sovereignty' can be referred to First Nations' pre-existing and ongoing rights to land, law-making, and governance of their own affairs (Davis & Williams, 2015).

Davis (2018) describes treaty or treaties in the following terms:

Treaties are foundational constitutional agreements between First Nations and the state that involve a redistribution of political power. Treaties are agreements aimed at settling fundamental grievances, and establishing binding frameworks of future engagement and dispute resolution. Treaties are legal frameworks, so there *will* be disputes over interpretation. Treaties are not blank canvases on which governments and overbearing bureaucrats can present the status quo.

Why treaty or grand accords?

- Moral purpose
- Un-kept promises
- Unmet promise

Long legacy of hope

“Let us live happily together as mates, let us not make it hard for each other... We want to live in a better way together, Aborigines and white men, let us not fight over anything, let us be mates.”

Lingiari 1975

Long history of broken promises

"... Captain Cook's royal instructions were that, if he found New Holland to be inhabited, he was to "take possession of convenient Situations in the Country in the Name of the King of Britain" and "**with the consent of the Natives**"; but, "if you find the Country uninhabited, you are to take possession of it for His Majesty ... as First Discoverers and Possessors"."

Pemberton (2017)

Long history of broken promises

"You are to endeavour by every possible means to open an Intercourse with the Savages Natives and to conciliate their affections, enjoining all Our Subjects to live in amity and kindness with them. And if any of Our Subjects shall wantonly destroy them, or give them any unnecessary Interruption in the exercise of their several occupations. It is our Will and Pleasure that you do cause such offenders to be brought to punishment according to the degree of the Offence. You will endeavour to procure an account of the Numbers inhabiting the Neighbourhood of the intended settlement and report your opinion to one of our Secretaries of State in what manner Our Intercourse with these people may be turned to the advantage of this country."

Pemberton, 2017

Frontier wars

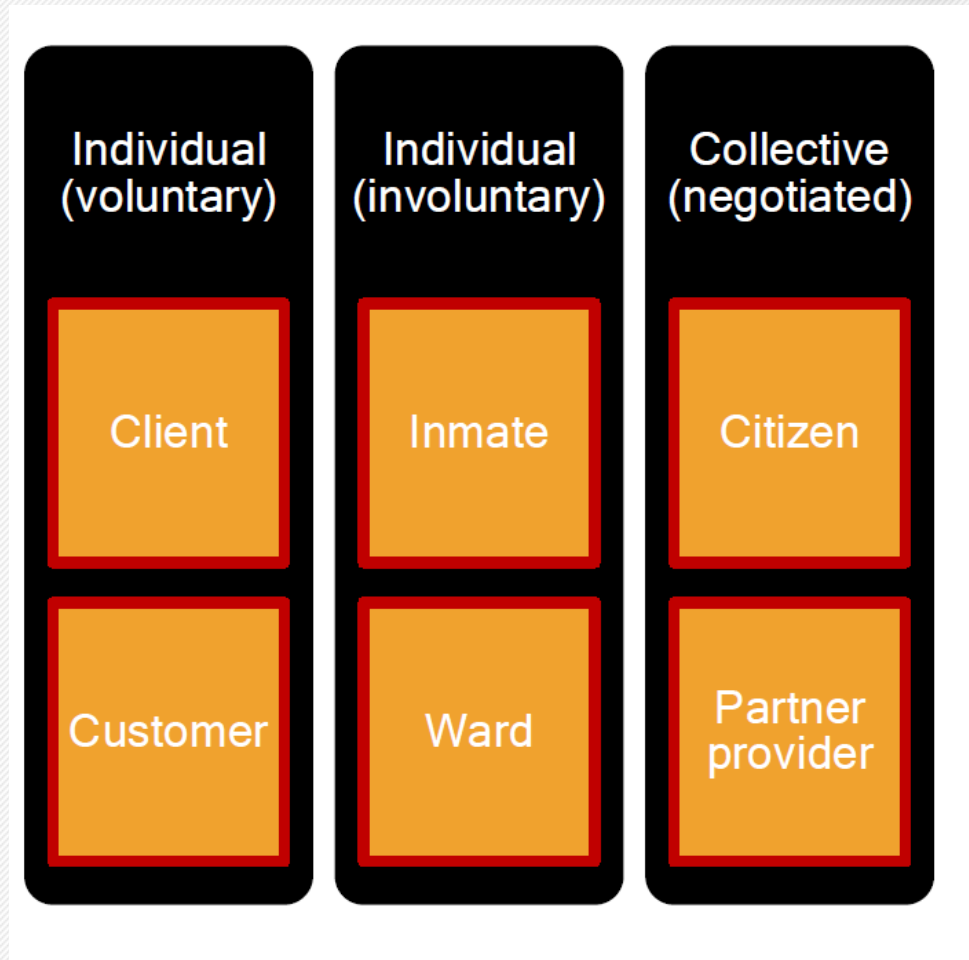
In spite of such early edicts that the First Peoples of Australia were to be treated in a 'friendly and humanitarian manner', it did not take long for the post-colonial place to descend into violent conflict whereby Indigenous resistance was met with 'extreme and disproportionate violence' (Reynolds, 1981, p.63).

Uncultivated land or uncultivated thought?

In essence, that doctrine [of *terra nullius*] asserted that, for legal purposes, the territory of the Australian Colonies had been, at the time of European settlement, unoccupied or uninhabited with the consequence that full beneficial ownership of all the lands of the Colonies vested in the Crown, unaffected by any claims of the Aboriginal inhabitants. It was that doctrine that provided the basis of the dispossession, so often by force and killing, which underlay the devastation and degradation of the Aboriginal peoples of our continent. (Deane, 2001)

Relationships with the state today

First Nations people have a number of varied relationships with the state, including:



Partnership agreements – NSW examples



- Partnership Agreement 2010-2020 between the NSW Department of Education and Training and the NSW Aboriginal Education Consultative Group Inc.;
- NSW Aboriginal Health Partnership Agreement 2015-2025 between NSW Health and the Aboriginal Health & Medical Research Council of New South Wales, representing the non-government, Aboriginal Community Controlled Health Services sector; and
- NSW Aboriginal Land Agreements – whereby the NSW Government and Local Aboriginal Land Councils can enter into voluntary and legally binding agreements to resolve land claims, under the *Aboriginal Land Rights Act 1983*.

What we don't have

Treaty | Grand settlement | Recognised sovereignty

“Aboriginal groups in Australia are yet to receive overt legal recognition of their polities by the Crown. Nevertheless, Aboriginal peoples have partially restituted Indigenous forms of governance in the interface with the nation-state, nor merely as subjects or citizens, but as unique polities based in ancient jurisdictions and expanded by recently recognised statutory and communion-law recognition.”

Langton and Palmer (2004)

Uluru Statement

- A 'Voice' to the Parliament, enshrined in the Constitution
- Makarrata
- "It can be a negotiation of peace, or a negotiation and an agreement where both parties agree to one thing so that there is no dispute or no other bad feeling," Ganambarr-Stubbs.
- Truth telling
- Healing
- Agreement making (treaties)

Across Australia

NT

- Treaty/treaties
- Treaty Commissioner
- Four Land Councils

WA

- Noongar Agreement (NTA)
- \$1.3b
- \$50m annual payments
- 320,00 hectares of land

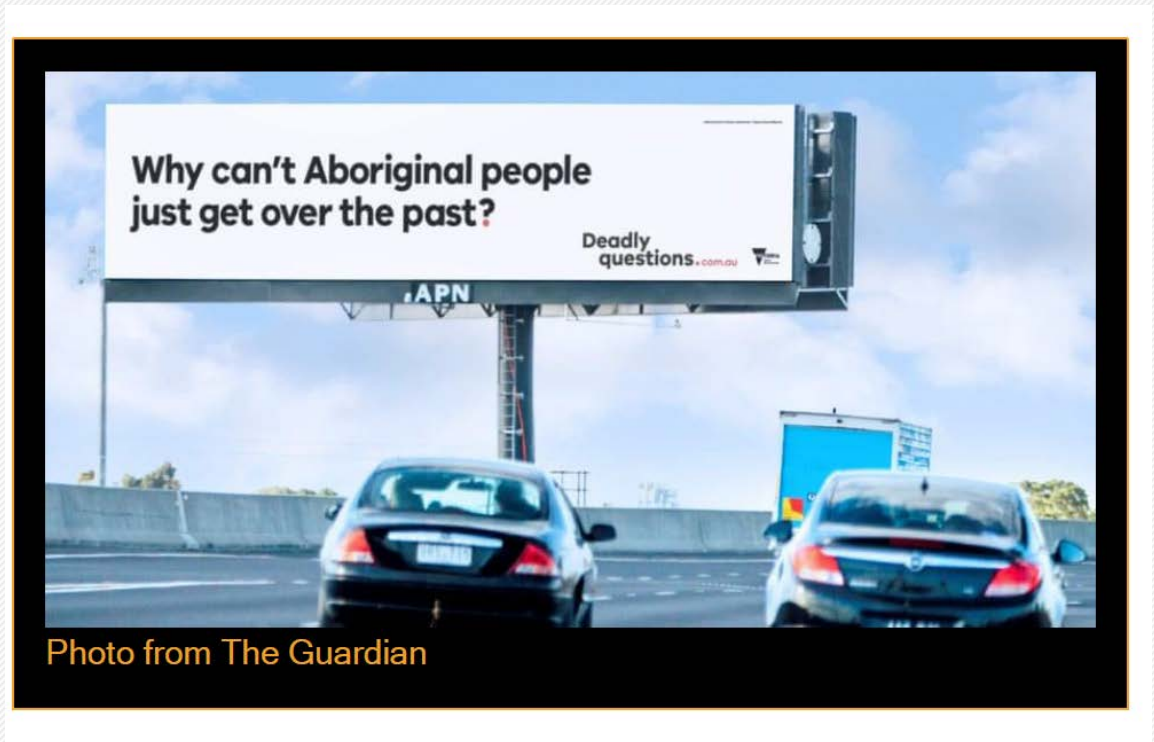
South Australia

- Commissioner (ended in March 2018)
- Buthera Agreement

Across Australia

Victoria

- *Advancing the Treaty Process with Aboriginal Victorians Bill* in 2018
- Treaty Advancement Commissioner
- Aboriginal Representative Body
- Public awareness campaign including 'Deadly Questions'



What's it going to take?

Open discussion

Barriers to be overcome

Critical success factors

Inclusions and scope

- Substantial structural reform
- Land (compensation and/or return)
- Health, housing, education, etc.
- Apology and amends for past wrongs
- Promise not repeat
- Local decision making and self determination
- Self-government (or “consideration of what Aboriginal people will manage by themselves, or in cooperation with federal and state governments” Vic.)
- “An agreement with considerable legal and moral force.” (Vic)

International

Canada

New Zealand

United States

Nordic nations

Canada

1783 Crown proclaimed it would seek 'permission' before settlement onto lands

Constitution Act of 1867 - assigned exclusive legislative authority to the Federal Parliament

Constitution Act 1982 - sought to enshrine First Nations rights into the Constitution stipulating that governments are required to consult Aboriginal peoples

Approximately 100 treaties form the basis of relationships between communities and government

New Zealand

- No recognition of Maori in the Constitution
- Treaty of Waitangi 1840
- Founding document of NZ but different interpretation and conceptions of legal status
- Despite Waitangi - still significant loss, dispossession and disadvantage
- Waitangi Tribunal 1975 - place for hearing and settling grievances
- NZ\$1b iwi property and assets

Critical to success

- Intra-community agreement
- Developing public literacy of historical truths and contemporary realities
- Transformational leadership
- Agreement of scope and footprints of change
- Two-way capacity building
- Legislative frameworks
- Transfer of power

Close

Thank you