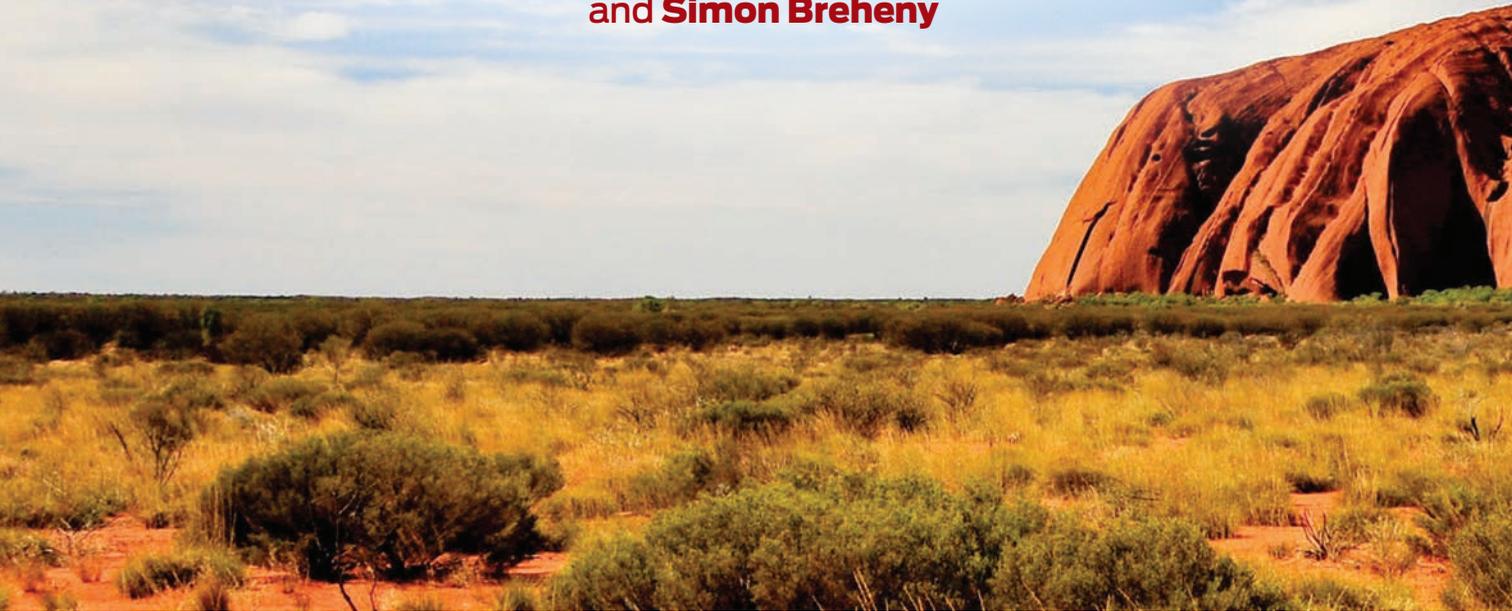


TREATY

Bill Shorten's push for a treaty with Aboriginal Australians is as divisive as it is dangerous, writes **Morgan Begg** and **Simon Breheny**



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Debate over the constitutional recognition of Aboriginal and Torres Strait Islanders has consumed Australia's political

class for almost a decade. Ever since former Prime Minister John Howard promised to recognise indigenous Australians in the constitution if the Coalition government won the 2007 election, every prime minister and opposition leader has committed to deal with the issue.

But after years of debate, the door was opened to a far more radical solution on 13 June, 2016 when opposition leader Bill Shorten indicated that a future Labor government could support a 'treaty' with Aboriginal and Torres Strait Islander peoples. This is not a new idea, but support for a treaty has fallen away in recent years, partly

due to the attention placed on, and bipartisan support for, constitutional recognition.

Now Shorten's intervention on this issue has given rise to a growing chorus of support for the concept of a treaty, and shifted focus away from constitutional recognition.

But what would a treaty with Aboriginal and Torres Strait Islanders look like? And is there any merit in the proposal?

The basic idea of a treaty is simple: It is an agreement between two or more sovereign nations. The legal technicalities are outlined in the Vienna Convention on the Law of Treaties, in which Article 2 states:



‘Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation...’

Howard delivered a typically succinct statement on the possibility of an indigenous treaty back in 2000 when he said: ‘A nation does not make a treaty with itself.’ Howard had previously expressed his reservations on the issue in 1998, stating: ‘I don’t like the idea of a treaty because it implies that we are two nations. We are not, we are one nation. We are all Australians



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before anything else, one indivisible nation.’ Howard’s thoughtful commentary highlighted the most significant issue facing those advocating a treaty - sovereignty.

A treaty is not a legally coherent concept when one of its parties is not a sovereign state. And what this reveals in the context of the

proposed indigenous treaty is perhaps the most interesting aspect of this whole debate. The more fundamental question is not whether to have a treaty, or what the terms of such a treaty might be, but whether there is a claim to indigenous sovereignty and statehood. Recognition of sovereignty must necessarily precede a treaty.

This is a very significant point. And it is of course feasible to advance such a proposal, and to make arguments in favour of it. However, the claim to sovereignty is very rarely put forward in such explicit terms. What is more common in the debate around an indigenous treaty

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is for the discussion to skip over this necessary precondition altogether, or for the discussion to revolve around a legal document which appears to bear little resemblance to a properly-defined treaty.

A good example of this prevarication can be found in the definition of a treaty provided by Australians Together, a reconciliation organisation with the aim of ‘bringing Indigenous and non-Indigenous Australians together’.

Calls for a treaty in Australia refer to a formal agreement between the government and Indigenous people that would have legal outcomes. A treaty in Australia could recognise Indigenous people’s history and prior occupation of this land, as well as the injustices many have endured. It could also offer a platform for addressing those injustices and help to establish a path forward based upon mutual goals, rather than ones imposed upon Indigenous people.

Other organisations and individuals promoting an indigenous treaty adhere to similar definitions.

The significance of a proposal in favour of sovereignty is one that requires very careful consideration. Sovereignty raises a very long series of questions. With whom is the Australian government negotiating? Does sovereignty mean the annexation of a proportion of the Australian landmass? If so, where? What qualifies a person for citizenship of the new sovereign entity? What will be the governance structure of the new sovereign entity? The lack of attention given to these questions is concerning given the issue’s complexity.

The description of treaty by Australians Together raises a second practical problem—content. The possible list of inclusions in a treaty

is nearly limitless, and might include a separate indigenous parliament, additional rights to land, a significant expansion of social programs provided by government, new race-based anti-discrimination provisions or recognition of indigenous culture and language.

But none of these policies appear to require sovereignty, or ‘treaty’. With the possible exception of an indigenous parliament (depending on the structure and powers of such an entity), each policy prescription is a political claim within the normal parameters of public policy and, as such, ought to be debated and decided upon through the usual political process.

▶ A TREATY FAILS THE TEST OF EQUALITY. IT WOULD BE DIVISIVE, DANGEROUS AND A PROLONGATION OF THE MISTAKES OF THE PAST.

Putting that objection to one side, the practical effect of some of these policies would be a significant increase in the level of government involvement in the lives of indigenous Australians. Given the many problems associated with government policies directed at assisting Aboriginal and Torres Strait Islanders over recent decades, it is unclear how an expansion of these programs would lift indigenous Australians out of poverty, or increase health or education outcomes.

Treaties in other countries are frequently cited as examples that Australia could follow. However, it can be seen that the relevance and success of these treaties in countries such as New Zealand and Canada are vastly overstated, and that the living standards of their indigenous populations still significantly lag behind the rest of the population, despite the existence of a

treaty or treaties.

New Zealand’s Treaty of Waitangi, so often put forward as an example that Australia should follow, was formed under very distinct and particular circumstances. Signed in 1840, the Treaty of Waitangi was signed by representatives of the British Crown and several Māori chiefs of the northern island of New Zealand. It was intended as a practical means of ending conflict between Māori tribes and settlers, but also conflict between different Māori groups, in what was known as the Musket Wars. As western weaponry began to be circulated among the natives by European traders, the battles between the tribes became devastating, resulting in the deaths of tens of thousands of Māori’s between 1807 and 1845. Many Māori chiefs signed the *Treaty of Waitangi* in order to secure peace (imposed by the newly sovereign British Crown). As a peace treaty between native tribes and a not-yet sovereign colonial force, the *Treaty of Waitangi* is of little relevance to Australia today.

While the imposition of peace was certainly beneficial for the Māori people, the Treaty of Waitangi has not delivered improved living standards, as sought by advocates of an Australian treaty. According to the International Work Group for Indigenous Affairs, ‘Māori life expectancy is still 7.3 years less than non-Māori; household income is 78 per cent of the national average; 45 per cent of Māori leave upper secondary school with no qualifications and over 50 per cent of the prison population is Māori’.

The situation is not much different in Canada. In the 18th century, British America entered into a series of peace and friendship treaties with Indigenous groups to secure the



■ Bill Shorten marches on the 50th anniversary of the Wave Hill Walk-off in Kalkarindji on Friday August 19, 2016 | AAP images

neutrality or the alliance of those groups in Britain's ongoing conflict with the French. Later treaties between the Canadian government and indigenous groups entered into post-confederation to allow for settlement and gave the Dominion large tracts of land in return for certain promises, such as the provision of food aid and education. Ever increasing sums of money spent tackling Canadian Aboriginal disadvantage – whether tied to treaty obligations or not – have outpaced the growth of the Canadian welfare state in general, and as the Fraser Institute notes, has resulted in little improvement in Aboriginal living standards or advancement.

At the heart of the push for a treaty is a deeply negative perspective on Australia, and the place of Aboriginal and Torres Strait Islanders within it. As University of New South Wales law professor George Williams wrote in 2014: 'A treaty ... could recognise the history and prior occupation of Aboriginal peoples of this continent, as well as their long-standing grievances. It could also be a means of negotiating redress for those grievances'.

While no one can doubt that certain discriminatory policies of past governments have negatively impacted indigenous Australians, the solution to the contemporary problems faced by Aboriginal and Torres Strait

Islanders cannot be the perpetuation of the attitudes that have led us to the position in which we find ourselves today. Past injustices have been caused by a belief that indigenous Australians should be treated differently from other Australians. This is both unacceptable in moral terms, and catastrophic in practical outcomes.

Rather than continuing to divide Australians according to race or skin colour or ancestry, Australian governments must adhere, in all policy areas, to the liberal democratic principle that all citizens are equal.

A treaty fails the test of equality. It would be divisive, dangerous and a prolongation of the mistakes of the past. 