Northern Territory
Treaty Commission

Treaty Discussion Paper

June 30 2020

ACKNOWLEDGEMENT OF COUNTRY

The office of the NT Treaty Commission is located on the traditional lands of the Larrakia Nation.

We pay our respects to the Larrakia elders past and present and all the Larrakia people and to all Aboriginal First Nations peoples of the Northern Territory.

Contents

1. INTRODUCTION

Cultural Warning

Aboriginal and Torres Strait Islander people should be aware that this Discussion Paper may contain the names or images of deceased persons in photographs or printed material. All readers are warned that there may be words and descriptions which are, or may be considered, culturally insensitive.

1.1. Introduction

In a demonstration of farsighted leadership in June 2018, the Chief Minister of the Northern Territory Government and the four Chairs of the Northern Territory Aboriginal Land Councils signed the historic Barunga Agreement – A Memorandum of Understanding (MOU) (Appendix 8.1) to *"'develop a framework to negotiate a treaty with the First Nations of the Northern Territory of Australia'".*

Samuel Bush-Blanasi
Chairman Northern Land Council:

"This is a momentous day in the history of the Territory, a chance to reset the relationship between the Territory's First Nations and the Government…We've got big journey ahead of us. The MOU gives us high hopes about the future and I hope the Government stays true to spirit of the MOU."

Tony Wurramarrba
Chairman Anindilyakwa Land Council:

"We celebrate the highly significant step that has been achieved today and will work with the Northern Territory Government and other Land Councils to continue the important work required to achieve the goal of a Northern Territory Treaty."

Francis Jupurrurla Kelly
Chairman Central Land Council:

"I hope a treaty will settle us down together and bring us self-determination. Today we bounced the ball but we don't want to stay the only players in this game. The next steps must be led by Aboriginal people across the Territory so that everyone can run with the ball and have their say."

Gibson Farmer Illortaminni
Chairman Tiwi Land Council:

"We've got to be careful and understand each other about what we want, because we don't want to have the same problems we've had in the past. The MOU is a good start, but we've got a long way to go. The Government needs to be honest and transparent."

> *This is the first day of a new course for the Northern Territory. The MOU we have signed today commits us to a new path of lasting reconciliation that will heal the past and allow for a cooperative, unified future for all.*
>
> *A Territory where everyone understands our history, our role in a modern society and our united and joint future will be an important achievement for all Territorians.*
>
> Northern Territory Chief Minister
> **Hon. Michael Gunner**

1.2. The Northern Territory Treaty Commission

Professor Mick Dodson AM is the inaugural Northern Territory Treaty Commissioner and is supported by Deputy Commissioner, Ms Ursula Raymond. Professor Dodson's role is independent from all organisations and government. His appointment is made by the Treaty Commissioner Act 2020 (the Act)[1].

It is not Professor Dodson's role to negotiate a treaty, but to consult, inquire, report and make recommendations on a treaty negotiation framework to Aboriginal Territorians, the four Aboriginal Land Councils and the Northern Territory Government.

A Final Report is currently due to the Chief Minister no later than March 2022 following extensive consultation across the Northern Territory.

In precise terms, the Treaty Commissioner will consider and report on:

- Interest/support for a treaty between the Territory and Aboriginal peoples of the Northern Territory;
- What a Northern Territory treaty should seek to achieve;
- Whether there should be one or multiple treaties;
- The best model for a treaty in the Northern Territory;
- What outcomes are possible under a treaty for Aboriginal people;
- What the best process is for negotiating a treaty; and
- The potential contents of any treaty in the Northern Territory

Preliminary talks with Aboriginal organisations, in over 50 meetings and forums across the Territory, disclosed a strong Aboriginal interest in treaty. Potentially this could be a Territory-wide treaty, supported by NT legislation and detailing matters such as the negotiation framework and its structures; funding models; negotiation procedures; principles; Territory wide truth telling; mandatory terms and minimum standards. Such a treaty would be followed by substantive regional or local treaties, negotiated as a direct expression of self-determination by Aboriginal people at the regional or local level.

Preliminary talks also revealed that more time and information regarding the treaty process is required to enable its proper consideration. Resources are essential for Aboriginal people to educate themselves. First Nations and the Northern Territory Government must prepare for treaty discussions with each other. All parties must become treaty ready.

First Nations and the Northern Territory government face an opportunity of immense historical and symbolic significance to negotiate a treaty or treaties. Of equal importance is the prevailing view that any treaty must be practical and lead to material improvements in the lives of children and grandchildren. Aboriginal people are looking, realistically, to the future.

[1] S 7 and 23, Treaty Commissioner Act 2020

1.3. Consultation arrangements

This public Discussion Paper is to inform an extensive, Territory-wide community consultation process with First Nations Territorians, led by the Treaty Commissioner, to assess whether a consensus or majority view exists on all or any of the matters included in this Discussion Paper. All Aboriginal people need to be heard through this consultation process, including women, boys and girls.

The Treaty consultation process needs to be inclusive, accessible and transparent to all. Relevant treaty materials will be translated, including audio translations, into major Aboriginal languages in the Northern Territory to allow informed discussion.

The Aboriginal Interpreter Service will be providing these translations and will be utilised whenever appropriate to provide on-site translations.

The Treaty Commissioner will arrange multiple methods for Aboriginal and non-Aboriginal Territorians to give feedback throughout the consultation process and will consult in person with Aboriginal Territorians in remote, regional and urban locations. The Treaty Commissioner will also invite Territorians to make written submissions and submit oral and audio-visual responses to the Discussion Paper. Consultations will follow a structured, consistent and principled process.

The Treaty Commissioner will seek advice from the four Northern Territory Land Councils and the Northern Territory Government on locations to visit for regional and remote consultations taking into account small, medium and large communities and homelands as well as resource and time constraints.

The Treaty Commissioner welcomes feedback, suggestions and ideas on the matters outlined in this Discussion Paper. We ask that written submissions be constructive and respectful. Insulting or offensive comments will not be accepted or considered as part of our consultations. Accordingly, they will not appear in the Final Report to the Northern Territory Government and the four Land Councils.

This Discussion Paper is available on the NT Treaty Commission website treatynt.com.au and its Executive Summary has been translated into audio recordings in the major Aboriginal languages.

2. EXECUTIVE SUMMARY

2.1. BACKGROUND

The treaty development process initiated by the Barunga Agreement 2018 (Appendix 8.1) rests on the Northern Territory Government's express acceptance of three foundational propositions for the treaty consultation process:

- That Aboriginal people, First Nations, were the prior owners and occupiers of the land, seas and waters that are now called the Northern Territory of Australia;
- The First Nations of the Northern Territory were self-governing in accordance with their traditional laws and custom; and
- First Nations peoples of the Northern Territory never ceded sovereignty of their land, seas and waters.

This is a great starting point for treaty discussions because these things are already agreed.

Also critical is the Northern Territory Government's agreement in the Barunga Agreement (Appendix 8.1) 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 a legacy of trauma, and loss that needs to be addressed and healed".*

The Barunga Agreement (Appendix 8.1) is very clear that: *The key objective of any treaty in the Northern Territory must be to achieve real change and substantive, long term, benefits for Aboriginal people.*

This Discussion Paper provides detailed information, and throws out questions for consultation:

- Why is a Treaty needed in the Northern Territory?
- What minimum standards should be required?
- What should the scope and content of treaty/treaties be?
- What is the legal context for treaties in the NT?
- What is national and international best practice?

The Discussion Paper also proposes options for a treaty making framework and negotiation model in the NT to be discussed during consultations.

2.2. TREATIES

The use of the word Treaty in this Discussion Paper also includes the plural "Treaties".

Following an introduction and Executive Summary, Section 3 of the Discussion Paper deals with the foundational issues of treaty. At its simplest, a treaty is an agreement between one or more parties. Modern treaties between First Nations and their colonisers are a particular type of treaty. The use of the word 'treaty' conveys the significance and distinctive standing of agreements between Indigenous peoples and the governments of States or Territories founded on the land and resources of free First Nations.

The intention of such treaties is to rectify an unjust relationship resulting from colonisation. Accordingly, Indigenous treaties typically include, but are not limited to, common key elements:

- recognition of the original status of First Nations as sovereign, self-governing, political communities;
- restoration of the First Nation right to self-determination and a meaningful degree of self-government within the State or Territory;
- restoration of traditional lands and interests in natural resources;
- material reparation for irrecoverable historical losses;
- financial and material resources to enable economic independence; and
- standing and negotiation procedures based on equality and good faith

The United Nations Declaration on the Rights of Indigenous Peoples (Appendix 8.2), adopted by resolution of the General Assembly of the UN in September 2007, outlines the inherent rights of First Nations peoples that could form part of the minimum standards for NT treaties. The Declaration covers four key rights:

- self-determination;
- participation in decision making;
- protection of culture; and
- equality and non-discrimination, including the right to be free from racial discrimination.

The UN Declaration's "golden thread" is Indigenous peoples' right to their free, prior and informed consent on issues affecting them.

A treaty is not about international law or formal definitions of sovereignty. It is about the human recognition of the unique status of Australia's First Nations and the chance to define, for the first time, the terms of our relationship with the colonisers. Treaties provide an opportunity for a renewed relationship based on sound principle and practicality to correct the flaw and fill the vacuum of Australian history in the Northern Territory.

Truth telling is at the core of any treaty negotiations and is also at the heart of documenting the unfinished business. The timing for it is extremely urgent. It is of utmost importance that we must start immediately to record the stories of the hundreds of older Aboriginal First Nation Territorians' whose memories stretch back into a previous era, before those stories are gone forever. Treaty negotiations will not begin, at best, for years. Truth telling must start well before that. Truth telling must include the Stolen Generations of the Northern Territory. This Discussion Paper strongly suggests that the negotiation process and the truth telling process should start separately.

2.3. LEGAL ISSUES

Section 4 of the Discussion Paper highlights that the best way to achieve a treaty with adequate scope and contents, and protection, is through legislation enacted by the Northern Territory Government.

There is a fundamental limitation on the scope of any treaty negotiated with the Northern Territory. It is not a State within Australia's federal system. As a Commonwealth Territory, the powers exercised by the Northern Territory Government are conferred and defined by the Commonwealth under the *Northern Territory (Self Government) Act 1978*. Northern Territory legislation giving effect to a treaty must be consistent and comply with that Act and all other Commonwealth laws in operation across the Northern Territory. Other Commonwealth law includes, for example, the *Aboriginal Land Rights Act (Northern Territory) 1976* (C'th) *('Aboriginal Land Rights Act')* and the *Native Title Act 1993* (C'th). If the terms of a treaty exceed the powers of the Northern Territory, or are inconsistent with any element of Commonwealth legislation, they will have no legal effect.

The Commonwealth also has complete power over the governance of any Australian Territory under section 122 of the *Commonwealth of Australia Constitution Act 1900* (C'th) (the Constitution). The Commonwealth has the legislative power

to void any treaty enacted by the Northern Territory and to amend the *Northern Territory (Self-Government) Act*, expressly withdrawing any power to conclude a treaty with First Nations. This fact highlights the role the Commonwealth has in ensuring that any treaty with First Nations in the Northern Territory will have meaningful and lasting legal effect.

2.4. NATIONAL AND INTERNATIONAL BEST PRACTICE

Section 5 of the Discussion Paper describes some of the national and international developments in modern treaty making.

Significant modern treaty development has occurred in British Columbia, Canada and Aotearoa (New Zealand). The parties to modern treaties in British Columbia are three governments: the First Nations Government, the British Columbia Government and the Canadian Government and treaties are negotiated using their own "made-in-BC" process. Treaties are facilitated by the British Columbia Treaty Commission, which is an independent Commission where all five Commissioners are Indigenous Canadians.

There are six stages in the made-in BC negotiation process; commencing with a First Nation submitting an Intention to Negotiate and concluding with Implementation. Although each Treaty negotiation is unique, comprehensive Treaties in BC must, as a minimum, address:

- First Nations government structures and related financial arrangements;
- Jurisdiction and ownership of lands, waters and resources;
- Cash settlements;
- Processes for amendment and resolving disputes; and now
- Implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

The stages and the negotiating process are described in detail in section 5 of this Discussion Paper. Section 5 also describes Aotearoa (New Zealand's) settlement process in detail. Settlement Agreements in Aotearoa need to provide:

- An apology by the Crown and a historical account;
- Financial redress;
- Commercial redress; and
- Cultural redress (for example, the return of lands of special significance, arrangements to provide a role for Māori in the governance of resources and place name changes).

The central learning from overseas is that treaties are a long game and take many years to negotiate. The Tla'amin Final Agreement in British Columbia, Canada took 22 years to negotiate and finalise.

2.5. PROPOSED FRAMEWORK AND MODEL FOR THE NORTHERN TERRITORY

Section 6 concludes the Discussion Paper with a suggested framework and model that may be appropriate for the Northern Territory. Both the framework and the model will be discussed at length in consultations.

2.5.1. PROPOSED FRAMEWORK

The proposed framework describes the structures, entities and the mechanisms needed to facilitate a treaty system in the NT. To get things moving, an Interim Treaty Commission headed up by Aboriginal Territorians, to aid in the development of legislation to support treaties in the NT, while at the same time do the preparatory work for the entities to be created, is proposed. The proposed Interim Treaty Commission's work will be completed once a First Nations Treaty Convention has endorsed overarching legislation and the legislation is enacted. It will then be disbanded.

The ongoing framework may include the following entities:

NT First Nations Treaty Commission (Treaty Commission)

Roles for a NT First Nations Treaty Commission may include to:

- Develop the negotiation framework in detail including all processes, systems, procedures; templates and other electronic and non-electronic resources;
- Develop and implement ongoing education and awareness programmes building on the phase 1 program delivered by the Interim Commission;
- Manage grants to First Nations, including grants to First Nations for capacity building and to "run" a treaty negotiation;
- Develop a process for treaties between First Nations and support that process;
- Develop legislation, with First Nation's representatives as significant contributors, to be enacted once treaties are signed; and
- Maintain the momentum of treaty-making and facilitate effective project management once negotiations commence.

Office of First Nations Treaty Making (Treaty Office)

Primary functions of a Treaty Office may be to:

- Lead government treaty negotiations under direction of the Minister responsible for treaty negotiations;
- Ensure the government meets its Treaty commitments in good faith and in a timely manner;
- Negotiate funding with other governments;
- Develop engagement, co-design and partnering principles that ensure Northern Territory Government agencies operate appropraitely;
- Ensure public sector capability to work with First Nations in a respectful and culturally competent manner is strengthened; and
- Ensure the engagement of public sector agencies with First Nations is meaningful.

NT First Nations Treaty Tribunal (Treaty Tribunal)

All formal agreements contain dispute resolution clauses and treaties should be no different. Most issues are expected to be settled by the parties in informal talks. But if no resolution is found, the Treaty Tribunal could be an independent tribunal with powers and functions to:

- Conciliate and arbitrate disputes either during or post-implementation.
- Make findings of fact; and
- Make recommendations for dispute resolution.

2.5.2. PROPOSED NEGOTIATING MODEL

The negotiating model describes the process, underpinned by NT legislation, to be overseen by the Treaty Commission and used by the parties (that is, a First Nation Government and the NT Government) to negotiate a treaty.

The suggested negotiation process aligns with the made-in-BC 6 steps process:

Stage 1: Statement of Intent to Negotiate;

Stage 2: Readiness to Negotiate;

Stage 3: Negotiation of a Framework Agreement;

Stage 4: Negotiation of an Agreement in Principle;

Stage 5: Negotiation to Finalise a Treaty; and

Stage 6: Implementation of the Treaty

Each stage is supported by detailed processes, information resources, templates and support mechanisms for the parties.

Four possible implementation points for Stage 6 are suggested:

Phase 1: Local Decision Making Agreement with the First Nation; or

Phase 2: First Nation Based Local Government; or

Phase 3: Regional Authority; or

Phase 4: Full First Nation Self Government (with agreed jurisdiction and progression options)

2.6. FEEDBACK

While the Commission will endeavour to talk to as many Aboriginal Territorians as possible over the next 18 months, we will not be able to get everywhere or talk to everyone personally. We are therefore encouraging written responses to the Discussion Paper as well as oral and audio-visual responses. We ask that all submissions be constructive and respectful. Submissions need to be provided by 30 June 2021 and can be submitted:

By Email:
to admin@treatynt.com.au or

By post to:
NT Treaty Commission
GPO Box 2096
Darwin NT 0801

Additional information can also be obtained from our web site: **www.treatynt.com.au**

3. TREATY BACKGROUND

Treaty making is one of the great achievements of human societies. It enables the deepest conflicts to be set aside in favour of respectful coexistence. It expresses the choice to live in harmony with others, rather than spill blood or exercise power using more subtle forms of violence. The act of entering into a treaty, then as now, represents a profound commitment between peoples. Once made, a treaty is broken or ignored only at the cost of a stain on the good name of the nation or government that breaks it.[2]

The Treaty Commission undertook/facilitated over 50 education and awareness sessions on treaty in 2019 and early 2020. The most common question asked by participants was "What is a treaty? We begin this Discussion Paper with information about the term treaty generally in the particular context of Indigenous peoples whose lands were colonised.

3.1. What is a treaty?

The core meaning of the word 'treaty' is simply 'an agreement'. It is reached by parties freely negotiating or 'treating' with each other to work out the terms of agreement. Other words for similar consensual arrangements include 'contract', 'compact', 'settlement', 'accord' and 'covenant'.

When it comes to agreements between the State and Indigenous groups, the term refers to a formal, legally binding instrument reached through a process of respectful political negotiation in which both sides settle outstanding claims.[3]

Treaties are accepted around the world as a way of reaching a settlement between First Nations peoples and those who have colonised their lands, as in Aotearoa (New Zealand) and Canada. Although the term 'treaty' is often associated with agreements recognised in international law, treaties are certainly not limited to the global context.

Several treaty initiatives are currently being considered in Australia.

In 2016 Victoria set out on its journey towards a treaty or treaties with Aboriginal Victorians based on a *'partnership of equality'*. Victoria explained that a key focus of that process is to ***'create a better future for all Victorians and enable true self-determination for Aboriginal people'. The injustices of the past cannot be undone.***

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[2] Highlights from the Report of the Royal Commission on Aboriginal Peoples, https://www.rcaanc-cirnac.gc.ca/eng/110010014597/1572547985018

[3] Williams, G and Hobbs, H. Treaty, p.242, Federation Press, 2020

The State is pursuing treaty because it is the right thing to do. Victoria needs a treaty or treaties that are reciprocal, and that through truth and justice provide far reaching benefits for Aboriginal Victorians. For traditional owners, Aboriginal children, elders, and stolen people; for a society that all Victorians can all be proud of; treaty will be for all Aboriginal Victorians. In the spirit of reconciliation, treaty will be for all Victorians.'[4]

Queensland started on its *'Path to Treaty'* in 2019 and is still in the very early stages of its work. Although it was ultimately abandoned in 2018, the Government of South Australia commenced a brief exploration into a Treaty process which started with Dr Roger Thomas' appointment as Treaty Commissioner in February 2017 and following widespread consultations culminated in endorsement of the Buthera Agreement with the Narungga Nation in 2018.

Use of the term treaty therefore aligns the Northern Territory with Australian and international practice.

3.1.1. Who can sign a treaty with the Northern Territory Government?

A minimum of two parties are required to make a treaty. It is suggested First Nations of the Northern Territory (either collectively or as individual First Nations) will be one party to a treaty. The Northern Territory Government will be the other party.

3.1.2. Why is a treaty needed in the Northern Territory?

This question is dealt with at length in Section 3. Briefly, a treaty or treaties may set the foundation for agreements between Aboriginal people and the Northern Territory Government. A treaty may allow parties to negotiate on an equal footing, to agree on rights and responsibilities, and to reset a relationship that was originally founded on inequality and injustice and without Aboriginal consent.

3.1.3. How can a treaty be given legal standing in the Northern Territory?

The question of the legal standing of a treaty is explored in more depth in Section 4. A treaty could be agreed/effected through:

- Legislation enacted by the Northern Territory Legislative Assembly;
- Legislation enacted by the Commonwealth Parliament; or
- If the Northern Territory became a State, entrenchment in the new State Constitution or in the Commonwealth legislation granting Statehood.

3.1.4. Are there limits to a Northern Territory treaty?

Because the Northern Territory is a territory and not a state, its ability to self-govern is granted by the *Northern Territory (Self-Government) Act* 1978 (Cth). The terms of a Northern Territory treaty cannot exceed, or be inconsistent with, what this Act allows.

Additionally, and for reasons explained more fully at Section 4, a Northern Territory treaty cannot be inconsistent with any Commonwealth legislation. Critical pieces of Commonwealth legislation in the Northern Territory that will need to be carefully considered are the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Native Title Act 1993* (Cth).

[4] Sourced from www.vic.gov.au/aboriginalvictoria/treaty

3.1.5. What would a treaty aim to achieve?

The Barunga Agreement (Appendix 8.1) made very clear that a Treaty is of much wider significance than a normal agreement between a State and Indigenous people and must provide for substantive outcomes.

"The Treaty must provide for substantive outcomes" …; and *"A Treaty is of much wider significance than a normal agreement between a State and Indigenous peoples"*

Based on our research, it is suggested that any treaty in the Northern Territory must satisfy three conditions:

- it must recognise Indigenous peoples as a polity, distinct from other citizens of the State on the basis of their status as prior self-governing communities;
- the agreement must be reached by a fair negotiation process conducted in good faith and in a manner respectful of each participant's standing as a polity; and
- the agreement must settle each party's claims in order to develop an enduring partnership based on 'mutual recognition and sharing'. A treaty must include the State recognising or establishing some form of decision-making and control for the Indigenous people that amounts to a type of self-government[5].

Detailed examples of Modern Treaties in British Columbia, Canada and Aotearoa (New Zealand) are provided in section 5.

3.2. Why Treaty?

Aboriginal people, the First Nations, were the prior owners and occupiers of the land, seas and waters that are now called the Northern Territory of Australia.

The First Nations of the Northern Territory were self-governing in accordance with their traditional laws and customs.

First Nations peoples of the Northern Territory never ceded sovereignty of the lands, seas and waters.

There are many reasons why treaties between Aboriginal Territorians and the Government(s) should be negotiated. First, it is plainly the right and moral thing to do. The fundamentally flawed process of Australia's occupation and settlement has never been rectified. Lieutenant James Cook's disregard of his instructions to find the 'Great South Land' and 'with the Consent of the Natives to take possession of Convenient Situations in the Country in the name of the King of Great Britain': and the terms of Governor Phillip's instructions, careless of any requirement for consent, remain the tarnished foundations of Australia.

Second, it is a nation building and identity strengthening exercise. It will create a stronger Aboriginal Australia, contributing to a stronger Australian Nation: unified by equality and respect for the First Nations of our land, seas and waters.

Both reasons are valid, correct and compelling.

[5] *Treaty*, Op.cit Williams, G. and Hobbs, H. Treaty, – p.17, Federation Press, 2020

However, for simplicity, this Discussion Paper focuses on three reasons for a treaty:

- To address Unfinished Business and provide justice to Aboriginal Territorians for past wrongs;
- Where there is genuine Aboriginal control and self-determination there are better outcomes; and
- Following High Court decisions, including the 2019 "Timber Creek Native Title" case[6], negotiation may be a far than litigation for all parties.

Commissioner Dodson wrote the following in a Treaty Issues Discussion Paper in 2001:

"...Aboriginal people have been disenfranchised by the tide of history. First, on the basis that their rights have never been formally recognised by the settlers or past governments. Second, their rights have been affected by the way the relationship has been one sided. History shows that Aboriginal people have been painted in a certain light. Often portrayed as the 'native savages' with no concept of 'civilised' customs. This has been misleading to both the Aborigines of the past and those of the present. History in a sense, has been the victimiser (for want of a better term) of Aboriginal people simply by maintaining the construct of Aboriginal people as savages."[7]

The deeper rationale for treaty is found in the history and law that we very briefly review. At the outset it is necessary to be mindful of the virulent racism and paternalism that has disfigured Australia's cultural landscape and our relationships with each other. Racism provided the rationale for so many paternalistic and damaging Commonwealth, State and Territory laws and policies. The story is far broader and more complex than the scope of this Discussion Paper allows. It cannot address the full extent of this sad history; but we should recall key moments/events justifying the conclusion of a treaty or treaties in the NT: on terms of equality.

There will be constraints and challenges to the negotiation of a treaty. They will be discussed in Section 4. This section will focus on the opportunities treaty provides.

Critical to any treaty will be the exercise of self-determination in its full form, as never known since 1788. It is a right inherent in all peoples, recognised explicitly in the UN Declaration on the Rights of Indigenous Peoples. It is a right to preserve and use our lands, seas, waters and cultures; to ensure the future of our children and grandchildren, as our ancestors did from time immemorial.

[6] Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples [NO 2] [2019] HCA 19

[7] Dodson, M. Treaty Issues Discussion Paper presented to ATSIC 2001 (unpublished)

3.2.1. Unfinished Business

In the Barunga Agreement (Appendix 8.1), it was agreed:

> ***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 a legacy of trauma, and loss that needs to be addressed and healed.***

There is unfinished business in this country. We must revisit the past and we must be robust about it. Commissioner Dodson said the following in 2002 at a national Treaty Conference in Canberra:

> ***In my view what we are really talking about when we use the term 'unfinished business' is the yet to be met legitimate grievances of Aboriginal and Torres Strait Islanders arising directly from colonisation and the ongoing consequences of colonisation. It is also about confronting the legacy of the past and re-aligning the relationship between us and the people of Australia.***
>
> ***These are outstanding matters going directly to the 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 that process. Their resolution by agreement is essential to a lasting reconciliation.***[8]

Unfinished business clutters the path of Australian history. Treaties provide an opportunity for some necessary truth-telling that addresses this unfinished business and to do something about it, for a genuine renewal in the relationship between Aboriginal and non-Aboriginal Australians.

The human and material impact of the prior denial of Aboriginal rights still reverberate in the lives of Aboriginal people today. The chronic disparity of longevity between the lives of Aboriginal and non-Aboriginal Australians – in burden of disease, rates of incarceration, employment and education – is evident. Many of these present injustices are the consequences of the past and continuing colonialism.

Until there is equality in every indicator of Aboriginal health and wellbeing, there will remain unfinished business. That is a simple matter of social justice.

For all Territorians to discover how colonisation and its aftermath can be constructively addressed within a treaty framework, we must understand the perspectives of Aboriginal Territorians. We need to speak of wrongs that many would prefer to forget, including acts that were criminal by the standards of the day, let alone by the criteria which we wish to guide the future of the Northern Territory.

This section provides examples that highlight some key themes of the historical relationship between Aboriginal First Nations and the colonisers. A more detailed timeline of relevant Australian history is at Appendix 8.4.

Australia's European Colonisation

In 1768, the Lords of the British Admiralty signed Lieutenant James Cook's instructions to find the *'Great South Land'* and *'with the Consent of the Natives to take possession of Convenient Situations in the Country in the Name of the King of Great Britain'.* Britain had earlier signed treaties in North America, with King George III declaring the initial tenets of treating with North American Aboriginal peoples in the Royal Proclamation of 1763. But at no point did Lieutenant Cook offer to treat with 'the Natives', or to seek or receive any First Nation's consent. Nor did the first Governor, Captain Arthur Phillip, who was ordered ***'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'***

[8] M Dodson, unpublished speech notes to National Treaty Conference, Canberra, 27-29 August 2002

Painted warriors
Clark, J.H. 1813, Warriors of New South Wales, image. Available from: https://www.awm.gov.au/collection/C178273/. [31 March 2020]

Initially, colonisers thought that Aboriginal people would simply, conveniently, depart the stage when faced with the light of *'the dawn of liberty, civilisation, and Christianity'*. The Right Reverend Bishop Broughton contemplated the end of Aboriginal people with assurance in his evidence to the House of Commons Select Parliamentary Committee on Aboriginal Tribes (British Settlements), Westminster, 1837:

They do not so much retire as decay; wherever Europeans meet with them they appear to wear out, and gradually to decay: they diminish in numbers; they appear actually to vanish from the face of the earth. I am led to apprehend that within a very limited period, a few years … those who are most in contact with Europeans will be utterly extinct – I will not say exterminated – but they will be extinct. The Select Committee concluded that British subjects had wrought damage in less mysterious, far more material, ways:

> ***'their [First Nations'] claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded. The land has been taken from them without the assertion of any other title than superior force'.***

But Aboriginal people resisted colonisation and its effects. Aboriginal people never surrendered or ceded sovereignty.

Aboriginal reaction to the arrival of the First Fleet was varied: cautious, curious, friendly and hostile. But when the full implications of the arrival of the British became apparent, the reaction hardened into serious resistance.

The British assumed ownership over larger and larger tracts of land and vital water resources. It was an invasion with permanent intent, with soldiers enforcing de facto control. The legal justification for First Nations' dispossession arrived with the invaders, travelling with them in the King's instructions and books of British Law. There was no treating for use of land, no seeking to negotiate terms of co-existence and common occupation. There was no reciprocity or respect. Consent was never a consideration.

The Northern Territory

The colonial frontier, cutting into Aboriginal traditional country, arrived relatively late in the Northern Territory, almost a century after Arthur Phillip's First Fleet. There remain Elders, parents or grandparents in Northern Territory society today who remember first contact.

The last Pintupi family, from the Western Desert whose traditional country straddles the Northern Territory and Western Australia borders, made first contact with Europeans in 1984. After that the rest of the Pintupi people were rounded up and relocated to Haasts Bluff, Hermannsburg and Papunya near Alice Springs by the 1960s. The Commonwealth Government cleared their traditional country of people to enable British Blue Streak missile testing.

Australian history is littered with similar stories and it's important to acknowledge not only the recent past, but the injustice present at the founding of our nation.

Unnamed Arrernte Warrior, 1896

Ntyarlke inherited the post of Ngkarte, ceremonial leader of the Arrernte Alice Springs estate from his father, who had previously inherited it from his father. In 1896 W.B. Spencer and F.J. Gillen, anthropologists, calculated that 'sovereignty of the Alice Springs estate, in an Arrernte sense' had remained in at least one family through patrilineal descent since c. 1780. Ntyarlke was a young man when the first whitefellas turned up.

In 1860, the European explorer John McDouall Stuart entered Central Australia, climbed a prominent landmark later known as Central Mount Stuart, and planted the British flag:

"We then gave three hearty cheers for the flag, the emblem of civil and religious liberty, and may it be a sign to the natives that the dawn of liberty, civilisation, and Christianity is about to break upon them".

Stuart recommended settlement on Arrernte range country: *"as fine a pastoral hill-country as a man would wish to possess; grass to the top of the hills, and abundance of water through the whole of the ranges".* He also suggested that the Overland Telegraph Line follow his route into the Centre.

In 1871 the 'dawn' indeed broke on the Arrernte people. Instead of Stuart's nine men and small mob of horses - travelling hard and fast without need of much water and a relatively small amount of grass for the horses – suddenly, there were about sixty men with 45 horse wagons, 51 bullock drays, 15 express wagons, about 495 horses, 630 bullocks, and 2,000 sheep, together with Afghan cameleers in charge of 100 camels. In addition to taking vastly more water and grass for themselves and their stock, the men totally cleared vegetation and boulders along a route ten metres wide, cut down thousands of tall straight trees, and begin wiring up 'the Singing String' in a north-south line through Arrernte country. By 1872 the Overland Telegraph stretched coast to coast from Port Augusta, through what was christened Alice Springs, to Darwin.[9]

In the north of the Northern Territory, the colonial frontier arrived tentatively in the form of two early attempts at settlement. The first was Fort Dundas on Melville Island (1824–1829) north of Darwin and the second was Fort Wellington in Raffles Bay (1827– 1829) on the Coburg Peninsula. Both represented the British claim to the whole of the Australian continent as a sign of possession to other European powers in the region at the time. These settlements were also established because of British commercial and strategic interests in the Indian Ocean and the southeast Asian archipelago. After the failure of these colonies came the attempted settlement at Port Essington, also on the Coburg Peninsula, established in 1838 which lasted until 1849.

Fifty years after the arrival of the First Fleet in southeast Australia, the HMS *Alligator* and HMS *Britomart* arrived at

[9] Kimber R. G., History Report, Alice Springs Arrernte Native Title Claim, filed by CLC, April 1997,Federal Court of Australia

World's End
Unknown: ._NMA MA53812808-Port-Essington-1400w-1400-200.jpg

Port Essington on 27th October 1838. The Muran clan of the Arrarrkbi people welcomed the newcomers who arrived in the wake of other adventurers to the land of the Muran. For centuries, Maccasans had traded along this coast sailing on the annual monsoon winds, making landfall and camping while harvesting and processing trepang, a species of marine sea cucumber that was a delicacy item the Macassans traded to China. These annual visits meant the Muran grew accustomed to the Macassan visitors, so when the Europeans arrived they helped unload the British ships, helped the Europeans find suitable water, and brought the European fresh marine protein, fish species now called 'trevally', 'snapper', 'coral trout' and 'barramundi'. An overwhelmingly congenial relationship developed[10].

The settlement soon took on the appearance of a small English village, with a Government House, makeshift hospital and a powder store built by a garrison of forty Royal Marines and sailors. A few civilians were Marines' wives and children who also lived there. Governor Bremer reported[11] to his superiors on the beauty of the location, that the harbour could anchor the entire British Navy, there was fertile soil, plentiful fresh water, plentiful wild game, fish and amicable Natives.

This initial period of positive outlook was followed by eleven years of no trade, cyclones, shipwrecks, white ants, green ants, sand- flies, mosquitoes, crop failure, malnourishment, scurvy, exhaustion, malaria, loneliness, monotony and depression. The Muran people continued to help the Europeans though, providing food including turtle, shellfish and the hearts of cabbage tree palms as food. By the late 1840s, Captain John MacArthur of the Royal Marines reckoned the dead would soon outnumber the living. He signed his dispatches, 'Port Essington, World's End'.[12] The British abandoned the settlement in 1849, leaving evidence of dozens of graves. Every child who arrived or was born in the settlement died.

Aboriginal women cried and cut themselves with flints as the British departed on HMS Meander.

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[10] https://www.abc.net.au/radionational/programs/the-history-listen/port-essington,-worlds-end/11606992 Allen. J, Port Essington, The historical archaeology of a north Australian nineteenth century military outpost, Studies in Australasian Historical Archaeology Vol. 1, University of Sydney Press, 2008
[11] ibid
[12] ibid

On deck, the sailors performed kangaroo dances they had learnt from watching and joining corroborees. It was a singular frontier example of intercultural positive contact. With one exception, no blood was shed. Initial British mistrust and condescension were replaced by the close observation of Aboriginal culture, admiration of harvesting, hunting, fishing and navigation skills and the learning of the Iwaidja language. There was mutual respect and friendship. Don Christopherson, a descendant Elder of the Muran people, recently described it as an encounter of 'great humanity'.

Away from Port Essington, the frontier dynamics between First Nations in the Northern Territory and British colonists (and later, Australian citizens) followed, for the most part, the same pattern as in the southern states. First encounters often swiftly and disastrously became misunderstandings with dire consequences. Strangers took and dominated the best land and fresh water, prospected for gold, tin and copper and had sex with, or raped, Aboriginal women. The strangers brought with them different and devastating diseases and had different laws that were detrimental to Aboriginal lifeways. Small encampments were replaced by expansive towns and resultant incursions further and further inland triggered hostile Aboriginal resistance and killings on both sides as each fought for the right to occupy land. Killings and reprisal killings and spearing slaughter of introduced cattle eventually led to outright massacres by Europeans. Other methods of killing involved intentional poisoning of flour rations, decimation of clans by introduced diseases, deaths by substance addictions and starvation. Abuse and exploitation of Aboriginal labour also led to campaigns of mutual hostility. On the frontier there was resistance on both sides but the immorality of European dispossession of Aboriginal people was clear.

Yet there were also distinct differences between events on the frontier in southern Australia and those on the Northern Territory frontier. The natural protection afforded by the remoteness and size of the Territory, the relatively small non-Indigenous population, and the evolution of a legislative approach to the 'Aboriginal problem', benefitted the First Nations of the Northern Territory to a degree in terms of mitigating some impacts of colonisation.

With the invasion of the 'Top End' of the Northern Territory in 1869 by George W Goyder and within a short time of the establishment of early Darwin, successive waves of Europeans from southern Australia, migrants from international countries and emigrating Chinese from mainland China inevitably outnumbered the Larrakia People upon whose land Darwin is built. With colonisation in the Darwin region came guns and rifles, horses and horsemen, chains and shackles, diseases and opium, and intentional poisonings. In addition, the impacts of white sugar, tea, tobacco, coarse and processed flour and alcohol, the health of Aboriginal people was decimated. The entire horizon of Aboriginal life – family, kinship, caring for country, knowledge, language, spirituality and culture that sustained and gave meaning and coherence to their existence for millennia underwent massive social transformations with devastating consequences that is still felt today by the descendants.

The primary fact… is that the aborigines regard the land as theirs, and that the intrusion of the white man is a declaration of war, and the result is simply "the survival of the fittest."

I am well aware that there are many odious things done by whites, but I believe I express the opinion of nine-tenths of those who have taken their lives in their hands and gone into the back blocks when I say that occupation of the country for pastoral purposes and peaceable relations with the native tribes are hopelessly irreconcilable. There is a straight issue presented for the philanthropist, the statesman, and the capitalist to consider. Does the land inalienably belong to the aborigines, who have from time immemorial occupied it and exercised tribal rights over it?

Legislation on the subject of aborigines is no doubt absolutely necessary unless the State intends to assist in exterminating them as soon as possible.[13]

Extermination was never the policy of British or Australian Governments. But they certainly anticipated the gradual *'withering away'* of First Nations, with the idea remaining current well into the twentieth century; along with the notion of *'smoothing the pillow of a dying race'*. But bureaucrats' attention shifted to what they considered the real problem, the growing number of 'half- castes'.

The Northern Territory Aborigines Act 1910 (SA) placed Aboriginal people under the near absolute control of the Chief Protector of Aboriginals, who held power *'to confine any Aboriginal or half-caste child'* to a reserve or Aboriginal institution. This paternalistic control over First Nations' lives, marriage, employment and possessions was extended by the Commonwealth *Northern Territory Aboriginals Ordinance 1911 Act*. After 1918, a new Ordinance placed further restrictions on relationships between Aboriginal women and non-Aboriginal men in an attempt to curb the growing 'half-caste' population. It also made all police 'Protectors'.

The determination of First Nations' degree of Aboriginality was at the discretion of the Chief Protector and so began the brutal policy era that is now described as *The Stolen Generations*. 'Protectors' took Aboriginal children deemed 'half-castes', without the consent of their parents and families, and put them in institutions, such as the 'Bungalow' and Jay Creek institutions in Central Australia; the Kahlin Compound and the Retta Dixon Home in Darwin; and the Bathurst Island, Croker Island and Groote Eylandt Missions, off the coast of the Top End. Critical parts of early Commonwealth Ordinances continued in force until they were repealed and subsumed under the general *Welfare Ordinance 1953*, which introduced the Register of Wards, known derisively as the 'Stud Book'. This was removed with the introduction of *The Social Welfare Ordinance 1964*.

An examination of legislation of the Commonwealth and the several States reveals a dichotomy based on 'blood' by which those having Aboriginal or other 'coloured' blood or strains of blood were singled out for special legislative treatment. Aborigines and 'half- castes', in particular, were subject to increasing refinement as legislative subjects in the several jurisdictions. A bewildering array of legal definitions led to inconsistent legal treatment and arbitrary, unpredictable, and capricious administrative treatment…

[In] 700 separate pieces of legislation dealing specifically with Aborigines or Aboriginal matters – or other seemingly non-Aboriginal matters – no less than 67 identifiable classifications, descriptions, or definitions have been used from the time of European settlement to the present.[14]

Aboriginal labour, skill and knowledge underwrote the foundation, growth, and wealth of the Northern Territory pastoral industry. In 1929, the Queensland Chief Protector of Aborigines, J.W. Bleakley, was commissioned by the Commonwealth Government to inquire into, *"The aboriginals and half-castes of Central Australia and North Australia"*. Bleakley reported that: *"One fact is universally admitted, that the pastoral industry in the Territory is absolutely dependent upon the blacks for the labour, domestic and field, necessary to successfully carry on. If they were removed, most of the holdings, especially the smaller ones, would have to be abandoned"*

By the 1960s, the majority of the 2500 Aboriginal pastoral workers were classified as wards and forced to labour under the *Wards Employment Ordinance 1953*. If Aboriginal workers received any wages at all, they were paid no more than £3.3.3 per week under the *Cattle Station Industry (Northern Territory) Award 1951*. When the Equal Wages Case for Aboriginal cattle station workers was won in 1965, fair pay was due by December 1968 – so these pastoral workers were turned off their land to live like refugees in reserves and camps on the outskirts of towns. It was brutal in its

[13] J.L. Parsons, Government Resident, 1889 Report on the Northern Territory, Colony of South Australia
[14] The Legal Classification of Race in Australia, John McCorquodale

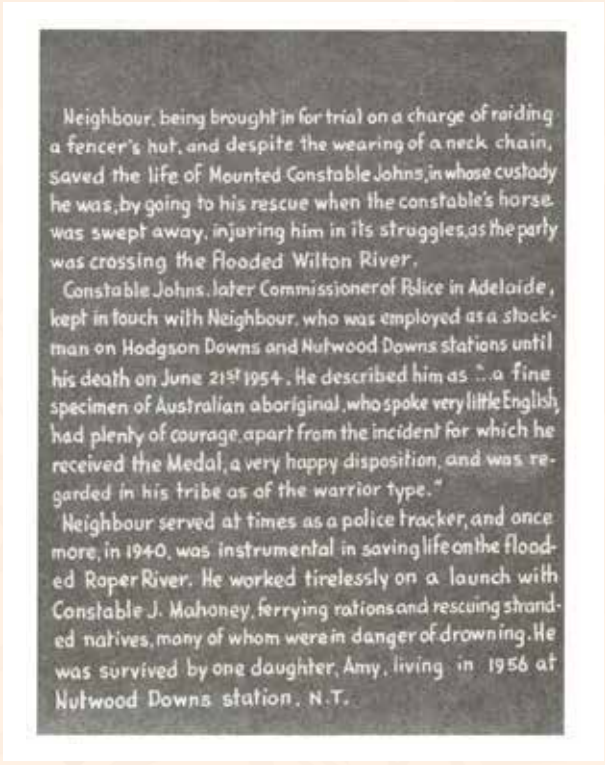
lack of recognition of the extent of the European dependence on Aboriginal labour to the economic viability of cattle stations in the Northern Territory, and utterly corrosive to the richness of Aboriginal family life, which embodies one of the most complex human social organisations, based on kinship and reciprocity, ever documented. What replaced these worker's wages was 'sit-down money', a form of passive welfare payment.

In recalling the past, we should not forget that there was always another view of the First Nation peoples of this country. The Port Essington story already told is just one example. Even on the rough country of the Northern Territory frontier, there was considerable coexistence, cooperation, respect and friendship. There had been various personal alliances between Aboriginal and non-Aboriginal people, and a degree of frontier coexistence and cooperation for mutual advantage. It was later regimes of segregation and assimilation that eroded earlier relationships between Aboriginal and non-Aboriginal people, but threads of deep connection have always endured. The better part of our shared history also needs more telling.

From the 1960s, there was a gradual recognition of the land rights demands and human rights of Australia's First Nations. In the struggle and pursuit for recognition, Northern Territory First Nations have been consistently in the vanguard[15].

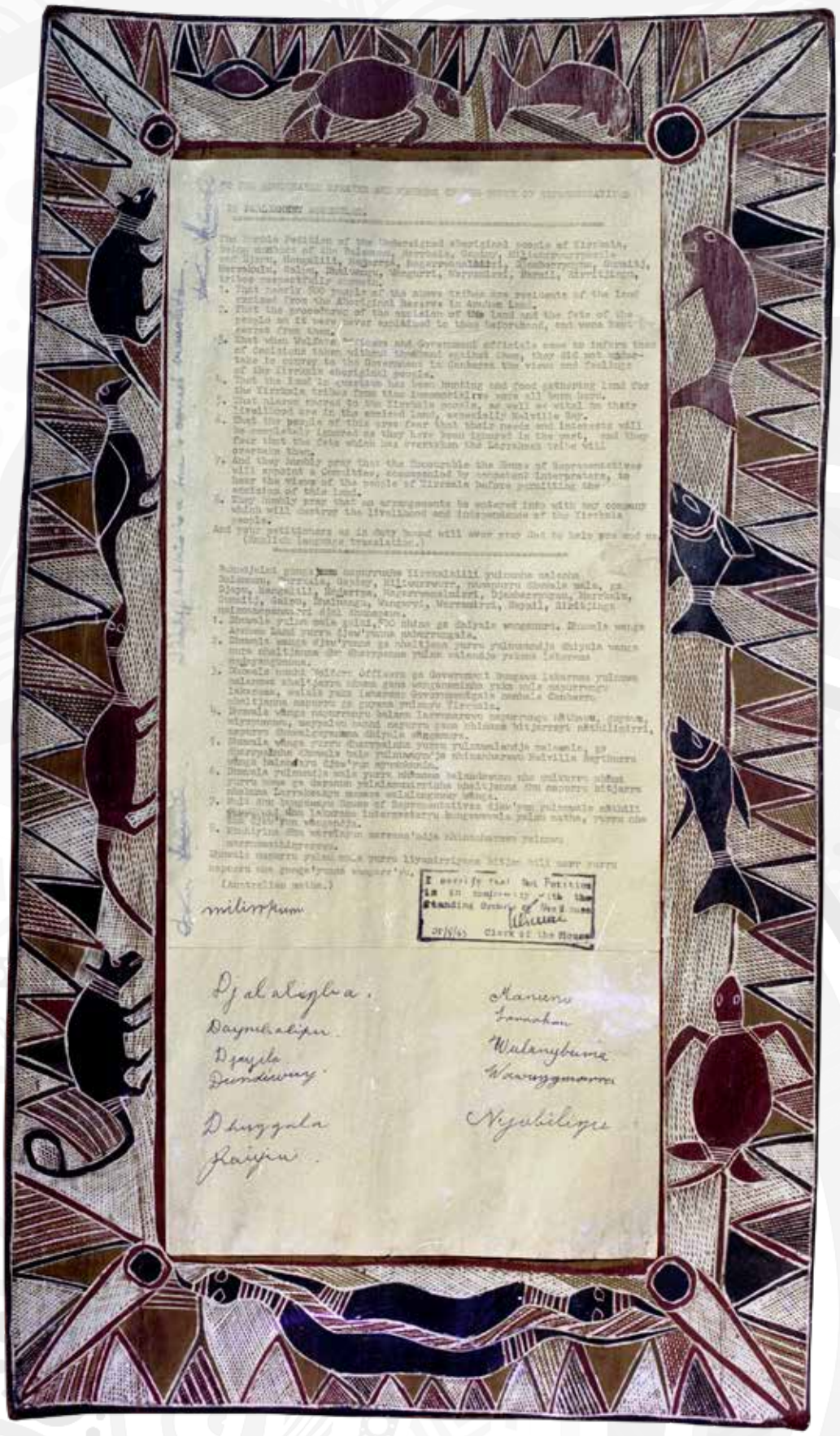
While this was progress though, decision making about Aboriginal people's lives remained in the control of non-Aboriginal politicians. This suggested a lack of will to grant Aboriginal independence and autonomy in decision-making. Instead Aboriginal self-governance and rights to self-determination remained eroded. The Aboriginal use of country was not considered as essential as was its use by non-Aboriginals. After colonisation Aboriginal rights consistently ran second place to money and commerce. In 1963, the *Report from the Commonwealth of Australia*

1934-1935, Removal of quadroon and octoroon children from the N.T. - Offers of accommodation [newspaper photograph of half caste Aboriginal children] Image courtesy of the National Archives of Australia. NAA: A1, 1934/6800



In 1912 Ayaiga, a clansman of the Alawa language group of the Arnhem region, known to the whites as 'Neighbour', receives the highest civilian medal for bravery, the Albert Medal, for saving the life of Mounted Police Constable Johns.

[15] Appendix 8.5 – Legal Constitutional Timeline



YIRRKALA BARK PETITION
AIATSIS, 1976, The Yirrkala bark petition, image. Courtesy of AIATSIS, item AIAS.049.CN-N00004_07

House of Representatives Select Committee on the Grievances of Yirrkala Aborigines, Arnhem Land Reserve, 1963, remained adamant that:

It was not intended that the lands included in the reserve should be handed over absolutely to the Aborigines, and that, if a payable gold or mineral field were discovered in a reserve, such field should be worked and the area withdrawn from the reserve[16].

The Commonwealth Government excised Aboriginal land for bauxite mining in northwest Arnhem Land, handing it to Nabalco Pty Ltd and did so without natural justice. Subsequently, the 1963 Yirrkala Bark Petition asserted:

That the procedures of the excision of this land and the fate of the people on it were never explained to them beforehand, and were kept secret from them.

That when Welfare Officers and Government officials came to inform them of decisions taken without them and against them, they did not undertake to convey to the Government in Canberra the views and feelings of the Yirrkala aboriginal people...

That the people of this area fear that their needs and interests will be completely ignored as they have been ignored in the past, and they fear that the fate which has overtaken the Larrakeah tribe will overtake them.[17]

Sustained activism and advocacy by Aboriginal people ultimately led to the Commonwealth government implementing the *Aboriginal Land Rights (Northern Territory) Act 1976* (C'th) which delivered a statutory form of traditional ownership based on primary spiritual responsibility for particular land and sacred sites, together with procedural rights relating to resource development[18]. This Act was a very substantial advance for Aboriginal rights, but it remained a statutory gift of government: an expression of beneficial policy based on anthropological evidence.

It was not until 1992, in Mabo [No 2], that the High Court of Australia first recognised First Nations' right to land flowing directly from their culture, their law and sovereignty. In the words of the Chief Justice Kiefel in 2020:

Native title is not regarded as a creation of the common law, although Mabo [No 2] might be seen as correcting the prior refusal of the common law to recognise it ... It has its origins in the traditional laws and customs of indigenous peoples.[19]

The sharp edge of *terra nullius* arises from a single social source: one group's judgment of another group of people. The perceived lack of Aboriginal cultivation of land – using sedentary agriculture recognisable to Europeans – was taken as a clear sign of the inferior nature of First Nations. Further, whether justified by a belief in the Providence of God, or, later, Darwinian evolutionary theory, Aboriginal people were considered so low in the scale of human existence that they were held to have no property rights. They became legal ghosts, dependent on the patronage or otherwise, of strangers in their land.

It has been a long and tortuous path for Aboriginal people from the First Fleet to the Full Court of the High Court of Australia's recognition of native title. But the correction achieved in *Mabo [No 2]* was not merely legal – it broke the yoke

[16] Report from the Commonwealth of Australia House of Representatives Select Committee on the Grievances of Yirrkala Aborigines, Arnhem Land Reserve, 1963,
[17] Yirrkala Bark Petition
[18] Op cit. ALRA 1976
[19] Love v Commonwealth of Australia, Thoms v Commonwealth of Australia [2020] HCA, 11 February 2020

of Australia's colonial history and aligned Australia with a broader sense of justice. The more comprehensive, essential, point of the decision was not about old or new or complex law and legal doctrine. It was about justice based on equality: which is the central principle of treaty[20]. But *Mabo [No 2]* has not provided the settlement many anticipated.

In a Treaty Issues Discussion Paper in 2001, Commissioner Dodson wrote:

> ***In Australia, it was not until the Mabo decision that the government recognised the property rights of Aboriginal and Torres Starit Islanders. The British, with the exception of Australia, recognised these rights in all its other colonies.***

BUT

> ***The Mabo decision has not delivered a just settlement of the historical grievances of Aboriginal and Torres Strait Islanders. These claims are not only defined in terms of meeting the physical needs of Indigenous peoples, but they also have, for Aboriginal and Torre Strait Islander peoples a moral dimension. The moral component will never be met by better informed government policies or programmes of service delivery which focus on health, housing, education etc. The so called practical reconciliation.[21]***

So, while the High Court could correct Australian common law, it could not fix the impacts of over 200 years of highly damaging, and racist, settler Australian/coloniser belief that Aboriginal peoples were inferior to them.

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[20] Op cit. Mabo [No 2]

[21] Op.cit M Dodson, Treaty Issues Discussion Paper presented to ATSIC 2001 – unpublished.

Truth Telling

The tenth "Principle Guiding the Treaty Consultation Process" in the Barunga Agreement (Appendix 8.1) says:

"The Treaty should aim to achieve successful co-existence between all Territorians that starts with 'truth-telling' which involves hearing about, acknowledging and understanding the consequences of the Northern Territory's history."

The need for truth-telling has therefore already been agreed in the Barunga Agreement (Appendix 8.1).

Purposes of Truth-Telling

The central objectives of truth-telling are to:

- Help reset the relationship between all Territorians;
- Enable Aboriginal people, particularly Elders, to tell their stories;
- Facilitate healing; and
- Record Aboriginal oral history for preservation and research.

There are many government records and histories of the Northern Territory written from a non-Indigenous perspective. Indigenous history is primarily oral, visual, enacted in dance, music and art – such as the Tiwi people's dance documenting the bombarding of their islands and the bombing of Darwin in World War II. And it is the legacy of Aboriginal trauma and loss that needs to be acknowledged by others by listening to the stories of Aboriginal people and hearing them.

Truth-telling is fundamental to dealing with unfinished business, and we have already shared some of the uncomfortable truths that are not disputed (or that shouldn't be). These 'uncomfortable truths' though, illustrate how facing up to our past can both contribute to healing and yield positive outcomes.

Another uncomfortable truth follows.

Coniston Massacre

The last officially recorded massacre in Australia, known as the Coniston Massacre, occurred in 1928, three hours north-west of Alice Springs. The precise number of Aboriginal dead is difficult to ascertain from the original records by agents of the massacre who proposed 31, but estimates range from 17 to 200. The Central Land Council estimates there were "100 murder victims"[22]. The massacre involved the sustained and purposeful hunting and killing of Warlpiri, Anmatyerre and Kaytetye people by a party of police and civilians led by Constable George Murray in reprisal for the death of local dingo trapper Fred Brooks at Yurrkuru (Brooks Soak). Accounts from 1928 say Brooks was killed for breaching Warlpiri marriage law, which is a punishable offence. Two Warlpiri men, Arkikra and Padygar, were arrested for his murder[23]. They were acquitted after a criminal trial. A government inquiry exonerated the leaders of the massacre, finding they acted in self-defence. It is difficult to imagine how, after actively seeking separate family groups over August, September and November 1928, all deaths could have uniformly resulted from self-defence. The official inquiry found *"not a scintilla" of evidence existed to suggest punitive motivation by whites'*. That was the injustice of the time. **These facts cannot be changed, but our response to them today remains open.**

In 2018, the ninetieth memorial anniversary of the massacres was commemorated in the Northern Territory. A witness of the massacre, Mr Dinny Jampijinpa Nolan, now an elderly man, said,

> ***They kept shooting until they ran out of bullets. We heard gunshots and ran to the nearby valleys and hills. We climbed the hills to save our lives. Everyone was running for safety. Every one of them ran away, even my father and us mob. We all scattered. We were all together on the top of the hill, frightened.***[24]

[22] Central Land Council Media Release August 2018 - https://www.clc.org.au/media-releases/article/coniston-massacre-families-gather-to-tell-the-truth
[23] https://www.commonground.org.au/learn/coniston- massacre.
[24] Time to Tell the Truth, Central land Council Video August 2018

Teddy Long, a Traditional Owner for Yurrkurru, said, *"the trouble started from here…not only our family. This is our land too we belong to this land, for some of us…along with my (Warringi) grandson, there are few of us (Jupurrurlas) who are still alive today, we belong to this area. This is our country. Our old people stayed at that soakage (Mawungka). And with the families, they were sitting there, and my father and his step brother, Mr Leo, they got shot there. And all the way from there, family (Jakamarra) from here, they have travelled on to Yinjilyipi Kurlangu Kurra to the hills site all night, because they were sorry. Also, my father ran away because he was afraid, his name was Long Jack, and Mr Leo. They came to a place called Dingohole."*

Barb Shaw, Central Land Council Executive Member stated that *"many Warlpiri, Anmatjerre, Kaytetye families among us today have very painful memories of what had happened across this region after the murder of dingo trapper, Fred Brooks. Stories of the revenge party led by Constable George Murray, have been passed down through many generations . All Australians need to know about this".*

Likewise, Sammy Butcher said *"we just gotta be honest about ourselves, you know. Because killing times happened all around…Australia. We need to learn more about all the killing times and the schools need to be learning more. It's not about British Empire, God Save the Queen, it's us, Australians together knowing the rights and the wrongs."*

Chief Minister, the Hon Michael Gunner MLA said,

> ***I'm sorry for what happened here ninety years ago and, the truth must be told and the truth must be heard.***

Reece Kershaw, Chief Commissioner of the Northern Territory Police, laid a wreath at the commemoration and stated: *"There is no excuse or justification for what occurred here 90 years ago".*

Liza Dale-Hallett, the great-niece of Mounted Constable George Murray, the policeman who led the killers, said, *"We are here today because we believe in facing our history, Australia's history."*

Hearing the stories of Aboriginal Territorians – the personal experiences of "trauma and loss that needs to be addressed and healed" - will help us shape our future relationship.

The importance of truth telling is not in question. But the best method to enable the process is entirely open for discussion.

Consultations will provide an opportunity to discuss options. It is useful, in this Discussion Paper, to suggest some factors that may guide our conversation.

A proposed framework for Truth Telling can be found in Section 6.

Stolen Generation and Implications for Treaty Recognition

As written in earlier in this Discussion Paper, one of the sad truths in Australian history is that of the Stolen Generations. There are some difficult legacies and intergenerational issues arising from this history and significant consequences from generations of children being taken away that we need to address in as sensitive and caring a manner as possible in our treaty discussions.

As noted, the Northern Territory treaty process was initiated by the Barunga Agreement, 2018 (Appendix 8.1). The agreement is described as: *'A Memorandum of Understanding to provide for the Development of a Framework for Negotiating a Treaty with the First Nations of the Northern Territory of Australia.'*

The Agreement's Principles Guiding the Treaty Consultation Process speaks in similar terms of any potential treaty being with the First Nations of the Territory:

It is envisaged that should a Treaty ultimately be negotiated, it will be the foundation of lasting reconciliation between the First Nations of the Territory and other citizens with the object of achieving a united Northern Territory.

It would appear to be the clear intention of the Barunga Agreement (Appendix 8.1) that the framework for negotiations is to facilitate a treaty, or treaties, between the Northern Territory Government and Territory First Nations. Accordingly, only Aboriginal people, considered in their capacity as members of a First Nation, would qualify to negotiate a treaty.

The implication of this approach is that other Aboriginal people in the Territory, not recognised as members of a First Nation, have no collective standing to enter into a treaty with the Northern Territory Government. Members of the Stolen Generation in the Territory – who have not been able to trace their origins or have not been accepted as members of a First Nation – would appear to be disenfranchised in the Northern Territory treaty process. The situation of the Stolen Generations is another dimension of injustice arising from the policy of forced child removals and separation from family and country and this needs to be addressed in the truth-telling process.

Although, there may be a way forward to achieve potential resolution of this injustice.

The Barunga Agreement (Appendix 8.1) also provides for the establishment of an Independent Treaty Commissioner to assist in the development of a negotiating framework. The first task defined for the Commissioner is not limited to consultations with members of First Nations. It is expressed far more broadly as:

Consultation with all Aboriginal people and their representative bodies in the Northern Territory about their support for a Treaty and on a suitable framework to further Treaty negotiations with the NTG

The inclusiveness of this consultation task is reinforced in the *Treaty Commissioner Act, 2020*. Section 10 (1) (a) states the Commissioner's first statutory function is:

> to gauge support in the Territory for a treaty between the Territory and Aboriginal peoples of the Territory

Under the Act the consultation function is not defined in terms of 'a treaty between the Territory and Territory First Nations.' Section 10(1)(a) speaks in enlarged terms of 'a treaty between the Territory and Aboriginal peoples of the Territory.'

Section 10(2) (a) states the Commissioner's first statutory power is:

> to consult with the Territory Aboriginal Land Councils, the Aboriginal peoples of the Territory and areas adjacent to the Territory and Territorians in general;

The power of the Commissioner is clearly directed to consultations with *'the Aboriginal peoples of the Territory' in execution of the Commissioner's function to gauge support for 'a treaty between the Territory and Aboriginal peoples of the Territory.'*

In these circumstances it appears that in performing his functions and exercising his powers in accord with the Act, the Treaty Commissioner should consult broadly as to the form of a treaty or treaties, what outcomes are achievable for Aboriginal peoples – including the potential for Aboriginal peoples who are not formally members of a Territory First Nation to enter into a treaty. And, to gauge support for their standing to do so within any proposed negotiation framework.

Section 10(1) (g) of the Act expressly tasks the Commissioner:

> to provide advice on matters related to a treaty between the Territory and Aboriginal peoples of the Territory;

The Stolen Generations issue is clearly a 'related matter.'

When the position of Stolen Generations who have not found their people is considered by members of First Nations, we are confident they will respond with understanding and empathy. These are our people whose loss was not their fault, and we know their loss is felt very deeply. They were taken from their families, land, language and culture against their will. Some still remain completely dispossessed.

3.2.2. Better Outcomes Occur where there is First Nation Decision Making and Control

There is no better evidence that the policy approach regarding First Nations Australians needs a significant overhaul than the dismal results again presented in the most recent Closing the Gap Report (2020). More than a decade after the initial targets were released, the 2020 report shows that five of the seven targets are not on track.[25]

There is evidence that better outcomes are achieved by First Nations peoples when they are in control of the decisions that affect their lives. The Northern Territory's Chief Minister, the Hon Michael Gunner MLA in his speech at the Barunga Festival in June 2018, acknowledged the point when he said:

> ***I know Aboriginal people make better decisions about how to develop their people, communities and resources in accordance with culture and custom than any bureaucrat in Darwin or Canberra ever could.***[26]

In light of this recognition, this section provides examples of where Indigenous community control and decision-making has made a positive practical difference. The examples are drawn from Australian experience and international research. In both cases, treaties, or other forms of formalised self-determination enabling genuine community control, have yielded better substantive outcomes for First Nations peoples.

The Purple House in the Northern Territory[27]

Western Desert Nganampa Walytja Palyantjaku Tjutaku Aboriginal Corporation, now known as the Purple House, is an entirely Aboriginal owned and operated organisation providing end-of-stage renal care for Aboriginal people across the Northern Territory suffering from kidney disease. Rates of kidney disease among Aboriginal people are four to five times higher than the rates among other Australians and illness affects people at a younger age. Many patients live remotely, so treatment typically meant travelling long distances and being away from family and country, which causes significant loneliness and cultural dislocation. This, along with early death by kidney disease, has prevented older people from passing on cultural knowledge to their communities and families.

The community decided to do something about it!

In 2000, Papunya Tula artists from Walungurru and Kiwirrikurra developed four extraordinary collaborative paintings which were auctioned at the Art Gallery of New South Wales along with a series of other works. The auction raised over AUD$1 million. That money started the Purple House. It developed a new model of care based around family, country and compassion.

Through 'remote' dialysis for bush communities, Purple House enables patients to be treated on country among family and in their home community. Improvements in dialysis patient outcomes in the Northern Territory have been supported by the growing reach of Purple House programs in recent years. Purple House now runs dialysis clinics in more than 15 remote communities and a mobile

[25] Closing the Gap Report 2020, Australian Government
[26] Contained in a speech given by Chief Minister Gunner at the Barunga Festival June 2018. Text obtained from unpublished speech notes
[27] Information sourced from Purple House web site https://www.purplehouse.org.au

dialysis unit - the Purple Truck - which allows patients to head back home to visit family for festivals, funerals and other cultural business. It offers services in Mparntwe (Alice Springs), Darwin, Katherine, Kalgoorlie, Perth and Adelaide. As well as improving health outcomes for sufferers of kidney disease, it has created broader benefits.

Purple House services have expanded to include advocacy, well-being activities, health promotion, health education and primary health care, aged care, National Disability Insurance Scheme service provision, school nutrition programs, volunteer opportunities and a thriving bush medicine enterprise called Bush Balm.

In 2018, dialysis in very remote areas was added to the Medicare Benefits Schedule, providing a stable funding source for the first time and securing the future of Purple House services in remote Australia.

The Institute for Urban Indigenous Health (IUIH)[28]

The IUIH is a not for profit Aboriginal and Torres Strait Islander Community Controlled Health Organisation which leads the planning, development and delivery of comprehensive health care for the Indigenous population of the South East Queensland region. The IUIH has achieved outstanding success over ten years of operation.

South East Queensland is home to 38 per cent of Queensland's and 11 per cent of Australia's Indigenous peoples. The region has the largest and fastest growing Indigenous population in the nation and the biggest health gap between Indigenous and other Australians.

The IUIH was joint winner of Category A of the 2018 Indigenous Governance Award. In summary, the IGA judging panel noted:

> ***Through strengthened community self-determination, an entrepreneurial business model, and pioneering a brand new regional health 'ecosystem', IUIH has now been able to make the biggest single health impact of any Indigenous organisation in Australia.***[29]

An independent review of IUIH by international management consultants, NOUS, concluded in 2019 that:

"The bottom line is that our review at the 10-year mark is strongly supportive. The IUIH has the right model, the right emphasis on systems and is making the right headway."

Some of the IUIH Network's outstanding achievements over its 10 years of operating include:

- An independent health economic impact study identified a net benefit to society from IUIH System of Care of $1.43 for every $1 invested by IUIH including estimated savings in avoidable hospital admissions. Conservative modelling calculated $100 million in net benefit to the community since IUIH was established.
- An improvement in life expectancy of 0.4 years.
- Women had significant better outcomes on key metrics (e.g. 3 times less likely to have pre-term birth and low birth weights, compared to standard care);
- Significant changes in clinical outcome measures, including movement, blood pressure and weight.
- A 20% increase in young Indigenous men attending clinics, a 12% increase in health assessments and a 7-fold increase in completion of GP mental health plans for this cohort.

Maranguka Justice Reinvestment Project[30]

Maranguka means ***"caring for others and offering help"*** in the Ngemba language.

In 2013, Bourke, in North West NSW, became the first major pilot site in Australia to adapt and implement an Aboriginal led

[28] Sourced from Institute for Urban Indigenous Health Ltd Annual Report 2018-19 unless otherwise cited
[29] https://www.reconciliation.org.au/iga/#iga-past-winners
[30] Sourced from KPMG "Maranguka Justice Reinvestment Project – Impact Assessment" 27 November 2018

place-based model of justice reinvestment. Justice reinvestment demonstrates that sustained outcomes can be achieved through redirecting funding from adult prison and youth detention towards preventative, diversionary and community development initiatives that address the underlying causes of crime.

The Bourke Aboriginal community in and around Bourke drove this project following 20 years of the community's over-representation in the justice system, with the highest rate of juvenile crime and domestic violence in NSW. Previously, the community had very limited decision-making regarding justice issues that directly affected them. The project is now guided by the Bourke Tribal Council, comprised of representatives from the 27 Tribal Groups living in Bourke.

Consultants KPMG conducted an impact assessment in 2017 (compared to 2016), which shows a staggering improvement in the following areas:

- Family Strength: 23% reduction in police recorded incidence of domestic violence and comparable drops in rates of reoffending.
- Youth development: 31% increase in year 12 student retention rates and a 38% reduction in charges across the top 5 juvenile offence categories; and
- Adult empowerment: 14% reduction in bail breaches and a 42% reduction in days spent in custody.

United States of America

The Harvard Project on American Indian Economic Development (the Harvard Project) was founded in 1987. It conducts systematic and comparative studies of social and economic development on American Indian reservations. Its stated aim is to find out what works, where and why. One of the Harvard Project's key research findings over the last 30 years is:

> ***When Native nations make their own decisions about what development approaches to take, they consistently out-perform external decision makers on matters as diverse as governmental form, natural resource management, economic development, health care and social service provision***[31]

[31] All Harvard Project information sourced from https://hpaied.org/

In a separate paper, Cornell and Kalt conclude that:

After 20 years of research and work in Indian Country, we cannot find one single case of sustained economic development in which an entity other than the Native nation is making the major decisions about the development strategy, resource use, or internal organisation...[32]

These are well grounded and persuasive findings about the galvanising effect of genuine self-determination in action. Two specific case studies from the USA follow:

Forestry Industry Study[33]

Research compared the financial results of two adjacent forests in north-west Montana. The Lolo forest is managed by the US Forest Service (US). The Flathead Indian Reservation forest is managed by the Confederated Salish and Kootenai Tribes (CSKT). The two forests share much in common. They border one another, share similar soils, are subject to the same climate and are both comprised of mixed hardwood trees. Additionally, a comparable proportion of each forest is managed for timber production. The forests have similar volumes of standing timber per acre, potential productivity and annual average net growth.

When comparing returns from 1998 to 2005, the CSKT total timber revenues exceeded timber sale costs by more than $16M. Lolo timber revenues exceeded timber sale costs by only $2.5M. Another way to describe the difference is that sales on the CSKT forests averaged $2.04 in gross annual revenue for every dollar spent, whereas the US operation averaged $1.11 in gross annual revenue for every dollar spent. The following table illustrates the differences in financial performance:

	Costs	Revenues	Harvest Volume (MBF)	Net Revenue per MBF
Flathead Reservation (CSKT)	$15.5M	$31.7M	129,523	$125
Lolo National Forest (US)	$24.3M	$26.9M	203,106	$13

The researchers concluded that CSKT performed substantially better than the US because US government forest managers have less incentive than tribal forest managers and there is little connection between their performance and reward. The CSKT have both *"skin in the game"* and are driven by a higher motivation. Their goals are community focused and include *"strengthening tribal sovereignty and self-sufficiency through good forest management, and providing perpetual economic benefits of labour, profit and products to local communities."*

"Since the CSKT rely on timber revenues to support tribal operations, they have a vested interest in continuing the viability of their natural resources. The tribe stands to benefit from responsible forest stewardship –or bear the burden of mismanagement."

An earlier study[34] found that tribal control of forestry resulted in significantly better management and concludes that tribes enjoy a decided motivational advantage over government foresters who

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[32] "Two Approaches To the Development of Native Nations One Works, the Other Doesn't", Stephen Cornell and Joseph P. Kalt, 2007

[33] Information taken from "Two Forests Under the Big Sky: Tribal vs Federal Management", Alison Berry, 2009

[34] Cornell and Kalt, above n 34

received a "flat" salary regardless of how well they manage the forests.

It has also been found[35] that Native nations do a better job of managing their forests because they are their forests. There is also highly suggestive evidence of improved results where Native Nations assume greater control of their law enforcement, health service delivery and housing.

Akiachak[36]

In the 1980s and 1990s, the small Native community of Akiachak, Alaska, set out to regain control of its land and resources as well as education and other services long provided by the federal government. In 1984, the community established the Akiachak Tribal Court to resolve disputes. In 1990, Akiachak became the first city in Alaska to disband itself and be reconstituted as a Native Village government.

Government performance improved. The community levied local taxes to support its self-rule. It assumed responsibility for a wide range of services, including trash collection, police and fire protection, and water, sewerage, and electricity services. The Akiachak Native Village government operates its own jail, health clinic, and dock site. It has improved village infrastructure, particularly housing, roads, and community buildings.

The Native Village manages health care, natural resources, and child welfare programs. It employs more than forty local people in service delivery and other activities. It has built new relationships with other Yup'ik communities in the region and has become a model of what Alaskan Native villages can do to improve community wellbeing - through self-determination.

3.2.3. Better to Negotiate than Litigate

This section explains why treaty negotiations provide a sound alternative to litigation by First Nations who have lost country and the capacity to fulfil spiritual and cultural obligations to their country.

Native title holders are entitled to just terms compensation for rights and interests lost, diminished or destroyed or damaged by Crown acts or acts authorised by the Crown, after the commencement of the *Racial Discrimination Act 1975* (C'th). But the onerous burden lies on the native title holding group to prove in court its continuous connection to country, to strictly establish the precise[37] native title rights and interests lost or impaired. Just terms compensation may be paid in money or transfer of land or the provision of goods and services.

Instead of going to court, a native title claim for compensation relating to the extinguishment or impairment of native title rights could be rolled into wider treaty negotiations with the Northern Territory Government for the provision of reparations for historical loss and damage, considered holistically.

Reparations for the loss of land, damage to culture and excesses, such as massacre, may be negotiated with a great deal of flexibility and responsiveness to the nature and degree of harm suffered. Negotiated reparations are far more flexible in form. It is not a choice of money, or land or goods and services. It might be the return of land, financial compensation, a memorial, a jointly managed nature reserve or Aboriginal language centre. It may consist of any or all these components, depending on the circumstances.

For the native title holders, this wider, more flexible and cumulative form of compensation may be more attractive. Equally it may suit the Northern Territory Government to deal with issues collectively.

Western Australia: South West Native Title Settlement

This approach was taken by the Noongar people in south west, Western Australia.

In 2006, the Federal Court determined that the Noongar people held native title rights to occupy, use and enjoy specified lands and waters in the south west of Western Australia – including Perth.

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[35] Cornell and Kalt, above n 7
[36] ibid
[37] Native Title Act 1993 (C'th) s.51(6)

Hailed as the first decision recognising native title over a capital city, it was subsequently overturned by the Full Federal Court in 2008.[38]

The Noongar leaders realised that it would be difficult to achieve their goals through continued litigation so decided to not appeal that decision to the High Court of Australia. The Noongar leaders knew that for many reasons, 'a win in the courts would provide formal recognition as traditional owners … it would provide little else'.[39]

So, instead, the Noongar decided to pursue a negotiated outcome with the Western Australian government. An agreement was settled and formally recognised in 2015 when the Western Australian Parliament passed *The Noongar* (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016.[40]

The South West Native Title Settlement (the Settlement)[41] is the largest native title settlement in Australian history. The Settlement will affect an estimated 30,000 Noongar People and encompasses approximately 200,000 square kilometres in the South West.

Litigation under Native Title Act 1993 The Timber Creek Case

Concerning the loss or impairment of native title rights and interests, the High Court of Australia has recently defined how to calculate monetary compensation. While multiple factors affect the exact calculation in each case, the methodology was definitively set out in the Timber Creek case.[42]

Monetary compensation is payable for economic loss and cultural loss caused by compensable Crown acts and acts authorised by the Crown and by the effects of those acts. Interest is payable on compensation for economic loss, calculated from the date of the loss.

In 2011 litigants on behalf of the Ngaliwurru and Nungali peoples in Timber Creek commenced action in the Federal Court against the Northern Territory and the Commonwealth for the loss or diminution of native title or other effects of certain government grants of historic pastoral leases, other land titles and public works on their non-exclusive native title in the town of Timber Creek.

In 2014 it was found that, between 1980 and 1996, the Northern Territory was responsible for 53 acts of granting tenures and constructing public works in the town of Timber Creek that impaired or extinguished native title rights and interests held by the Ngaliwurru and Nungali peoples. The amount of compensation awarded for this injury, and basis of its calculation, was appealed to the Full Federal Court, and then to the High Court of Australia. Judgment was delivered in March 2019.

The compensation payable to the native title holders by reason of the extinguishment of their non-exclusive native title rights and interests was found to be:

a. compensation for economic loss in the sum of $320,250;

b. interest on (a) in the sum of $910,100; and

c. compensation for cultural loss in the sum of $1,300,000;

The High Court's order related to 1.27 square kilometres of **non-exclusive** native title rights and interests. In total the compensation bill came to $2,530,350.

Section 51 of the Native Title Act 1993 (the Act) is central to determining compensation. Native title holders are entitled to compensation for *'any loss, diminution, impairment or other effect'* flowing from an act that extinguishes native title rights and interests. Those rights may be physical, economic, cultural and/or spiritual.

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[38] Op.cit George Williams and Harry Hobbs, Treaty, p242. Federation Press
[39] ibid.
[40] The Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Bill 2015
[41] South West Aboriginal Land and Sea Council - http://www.noongar.org.au/settlement-agreement
[42] Northern Territory v Griffiths (Deceased) and Jones on behalf of the Ngaliwurru and Nungali Peoples [2019] HCA 7

The way in which the act affects these rights may vary. The joint majority judgment stated:

Section 51(1) thus recognises that the consequences of a compensable act are not and cannot be uniform. The act and the effect of the act must be considered. The sub-section also recognises not only that each compensable act will be fact specific but that the manner in which the native title rights and interests are affected by the act will vary according to what rights and interests are affected and according also to the native title holders' identity and connection to the affected land. As the trial judge held, s 51(1) does not in its terms require that the consequence directly arise from the compensable act. The court's task of assessment under s 51(1) is to be undertaken in the particular context of the Native Title Act, the particular compensable acts and the evidence as a whole.[43]

The bundle of the Ngaliwurru and Nungali native title rights and interests affected in Timber Creek were essentially usufructuary – hunting and gathering - and ceremonial. They did not include the right to refuse access or completely exclude others from the land or its use for commercial exploitation. The economic value of loss and damage to these rights set at 50 per cent of the freehold value. More extensive native title rights would attract economic compensation closer to full value of the freehold estate. Exclusive native title would warrant full freehold value.[44]

The calculation of cultural loss looks to the spiritual relationship of the native title holders to their country: *'to translate spiritual hurt from compensable acts into compensation'*.[45] Judicial evaluation examines first, the connection to country, then *'the effect, under their laws and customs, when country is harmed'*, and finally the effects of the compensable acts.[46] The evaluation is wholistic.

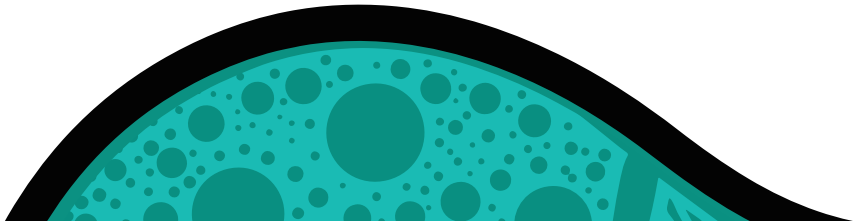
Each act affected native title rights and interests with respect to a particular piece of land. But each act was also to be understood by reference to the whole of the area over which the relevant rights and interests had been claimed. As was explained earlier, each act put a hole in what could be likened to a single large painting – a single and coherent pattern of belief in relation to a far wider area of land. It was as if a series of holes was punched in separate parts of the one painting. The damage done was not to be measured by reference to the hole, or any one hole, but by reference to the entire work. Given those findings, it would be wrong to consider each compensable act in these appeals in isolation.[49]

The Ngaliwurru and Nungali people's connection to country was found to be *'unique, deep and broad'*. It included, among other things, rituals and ceremonies inextricably bound to the lands and waters in and around Timber Creek.[48] The assessment of damages to a spiritual connection is complex – it too could be said to be *'unique, deep and broad'.*

But it is now clear that under s.51 of the Act the effects of the actual compensable acts include dispossession, serious and ongoing hurt to feelings of the claimants, the impeding of access to hunting grounds, damage to significant sites, and impeding the abilities of the claim group to practise traditions and customs, amounting to damage to the claimants' ability to fulfil their duties to country.[49]

... it is necessary to say something about the notion of diminution in connection. As already explained, the connection is spiritual. That is, the connection is something over and above and separate from "enjoyment" in the sense of the ability to engage in activity or use. Spiritual connection identifies and refers to a defining element in a view of life and living. It is not to be equated with loss of enjoyment of life or other notions and expressions found in the law

[43] Ibid par. 46
[44] Ibid par. 106
[45] Ibid 155
[46] Ibid par. 167
[47] Ibid at [219])
[48] Ibid [168] ff
[49] Ibid par. 190 ff



relating to compensation for personal injury. Those expressions do not go near to capturing the breadth and depth of what is spiritual connection with land.[50]

Blue Mud Bay - Sea Country Rights Case under the *Aboriginal Land Rights (NT) Act 1976*

On 30 July 2008, in a landmark case that further defined Aboriginal property rights in the Northern Territory, the High Court of Australia confirmed that Aboriginal Traditional Owners have exclusive access rights to the intertidal zone overlying their land - that is, between the high and low watermark.[51] The case against the findings of the full bench of the Federal Court was largely lost on appeal by the Northern Territory. The Yolngu Traditional Owners of Blue Mud Bay in north east Arnhem Land had their rights to their inter-tidal sea country upheld by the High Court.[52] . The High Court decision, now known as the *Blue Mud Bay* case applies to all Traditional Owners with coastal estates.

This decision provides another example of where a legal right held by First Nations Territorians could be discussed in the context of a treaty negotiation.

The Northern Territory coastline, including mainland and offshore islands, is approximately 7,200km long. Around 84 percent of 6,050km of this coastline is owned by Aboriginal Traditional Owner groups.

Aboriginal land is privately owned; it is not crown land, nor public land. Permission must be obtained in accordance with the *Aboriginal Land Rights Act* before entering these lands. As a result of the *Blue Mud Bay* case, this also includes access to tidal waters over Aboriginal land, and permits are required to access these tidal waters also.

The *Blue Mud Bay* case threw into question the validity of fishing licences issued by the Northern Territory Government granting access to the sea and/or land between the high and low watermarks.

The *Blue Mud Bay* case "did not question that a grant of freehold as *Aboriginal Land under the Aboriginal Land Rights (Northern Territory) Act 1976 extended to the low water mark. And it upheld the view that the NT Government did have the power to grant commercial fishing licences. However the NT Government does not have the right to allow commercial fishers entry to tidal waters over Aboriginal-owned land."*[53]

Since 2007 Aboriginal Traditional Owners have agreed to interim arrangements allowing all recreational and commercial fishers to access tidal waters over Aboriginal Land. They have continued to extend this waiver pursuant to section 5(8) of the *Aboriginal Land Act*.

The current waiver is due to expire on 31 December 2020.[54]

Furthermore, the NLC has issued 'Open Access Agreements' (OAA's) for 'High Incidence' locations within Aboriginal Land Trusts' sea country enabling fishing activities. There are presently five OAA's locations pursuant to agreements reached in 2012-14. The term of these agreements is 20 years.[55]

Fishing (commercial & recreational) and other activities within the inter-tidal zone may become matters forming part of the content of treaties in the treaty-making process between the NTG and First Nations holding Blue Mud Bay type rights.

Advantages of negotiation

Litigation by the Ngaliwurru and Nungali peoples took eight years to reach a conclusion. Blue Mud Bay litigation took a decade. Future litigation on the same point should not run into the same problems of appeals on the same points as were eventually decided by the High Court. Still it will be a lengthy and expensive process.

[50] Ibid par 187
[51] Northern Territory of Australia v Arnhem Land Aboriginal Land Trust (2008) HCA 29
[52] Gawirrin Gumana & Ors v Northern Territory (the Blue Mud Bay case)
[53] Altman, J. Understanding the Blue Mud Bay Decision. 2008 http://www.austlii.edu.au/au/journals/JlIndigP/2013/17.pdf
[54] Northern Land Council website. Sea Country Rights at https://www.nlc.org.au/our-land-sea/sea-country-rights
[55] Ibid.

The measurement of the amount of time consumed by litigation does not adequately indicate the stress of litigation and the potential uncertainty of the final outcome.

The evaluation of compensation payable to the native title holding group ends up in the hands of a judge or judges. It is very heavily reliant on Elders giving evidence in court. As the High Court imaginatively captured in their judgment, the effects of cultural loss and the destruction of significant and ceremonial sites are deeply felt by their custodians. Giving evidence in court and being open to cross-examination causes distress to our old people. It requires reliving and recounting the trauma of cultural loss.

But perhaps the major advantage to native title holders who have a case for compensation under the *Native Title Act 1993* is to escape the artificial legal environment of the Act and its limitation to the award of monetary compensation or the transfer of property or the provision of goods and services.

Treaty negotiations open the way to agree the value and the form or forms of compensation. Native title rights and interests may be combined with other grounds for reparations. Together, collectively, they may support the negotiation of more valuable, cumulative, recompense.

Another aspect of the Timber Creek case should be noted.

Prior to the case, by some, it was *"assumed that compensation for the extinguishment of native title rights and interests would be nominal, with the result that the issue of compensation does not receive a lot of attention in decisions and transactions which affect native title"*[56]. It is now clear that compensation for the loss of non-exclusive native title rights and interests relating to a quite small area of land may be substantial.

The High Court's discussion of the breadth of compensation due to the loss or injury to Aboriginal spiritual connection to their traditional land will be helpful when approaching the assessment of the value of appropriate reparations for any such injury - where native title is not the basis of the claim. The High Court has stated the principles that should guide all future assessments of loss of Aboriginal land, cultural suppression and impairment, and the combined effects of both as a discrete head of damages or reparation.

3.3. Minimum Standards

The role of the principles and minimum standards that might be included in a Northern Territory treaty or treaties is a question for discussion and negotiation with Aboriginal First Nations.

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[56] https://www.lexology.com/library/detail.aspx?g=f531ed0f-84a3-4190-85eb-8c183acd397b

The negotiation framework might provide for a broad Territory-wide treaty between First Nations and the Northern Territory Government, followed by multiple treaties negotiated, subsequently and separately, by individual First Nations.

Alternatively, Northern Territory legislation negotiated with First Nations Territorians could set principles and minimum standards that are automatically applied and included in all treaties agreed to by individual First Nations.

We can talk about which way First Nations would prefer to go.

Two important documents that could be used to provide a baseline of rights and principles in all Northern Territory First Nation treaties are the United Nations Declaration on The Rights of Indigenous Peoples (Appendix 8.2) and the van Boven/Bassiouni Principles (Appendix 8.3). These are examined below.

3.3.1. United Nations Declaration on the Rights of Indigenous Peoples 2007

In 2007, the United Nations General Assembly adopted a resolution containing the Declaration on the Rights of Indigenous Peoples (UN Declaration) (Appendix 8.2). It includes 46 articles covering all aspects of human rights, as they specifically affect Indigenous peoples:

- self-determination
- Identity
- Religion
- Language
- Health
- Education
- Community
- Land and resources.

Its "golden thread" is the right to free, prior and informed consent on matters affecting Indigenous peoples.

The UN Declaration emphasises the rights of Indigenous peoples to live in dignity, to maintain and strengthen Indigenous institutions, cultures and traditions, and to pursue self-determination and economic independence. The resolution endorsing the Declaration was adopted by Australia in 2009. Articles 3 and 4 are particularly relevant to treaties:

"Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."

The rights articulated in the UN Declaration respond to current circumstances and historical legacies common to Indigenous peoples throughout the world. First nations live within states founded on the colonisation of their land and resources and the suppression of their autonomy and cultures.

Internationally, Indigenous peoples have addressed and rectified many of these issues in treaties with nation-states [governments]. The UN Declaration provides a recognised reference point and minimum standard of Indigenous rights in both treaty negotiations and the final terms of agreement.

3.3.2. The van Boven/Bassiouni Principles[57]

In 1989, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities asked Professor Theo van Boven to conduct a study of the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms.

In 1996, he submitted the ***Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human***

[57] Van Boven, T. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 1996, United Nations. Referred to hereafter in this document as the van Boven Principles https://legal.un.org/avl/ha/ga_60-147/ga_60-147.html (Attachment 8.3

Rights Law and Serious Violations of International Humanitarian Law.

An overview of the principles is at clause 2:

"The obligation to respect and to ensure respect for human rights and humanitarian law includes the duty: to prevent violations, to investigate violations, to take appropriate action against the violators, and to afford remedies and reparation to victims. Particular attention must be paid to the prevention of gross violations of human rights and to the duty to prosecute and punish perpetrators of crimes under international law."

Further detail on remedies is found at Clause 4:

> *Every State shall ensure that adequate legal or other appropriate remedies are available to any person claiming that his or her rights have been violated*

Indigenous peoples grappling with the consequences of various forms of State intervention in their lives have a right to a remedy. Reparations forms a category of remedy far wider than compensation:

> *In accordance with international law, States have the duty to adopt special measures, where necessary, to permit expeditious and fully effective reparations. Reparations shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. Reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (van Boven 1996).*

The van Boven Principles have previously been relied on in Australia. In 1997 the Australian Human Rights Commission presented a report to the Commonwealth Government – Bringing Them Home. The report followed a national inquiry into the effects of the forcible removal of Aboriginal and Torres Strait Islander children from their families under Australian laws, policies and practices.

Bringing Them Home explicitly adopted van Boven's interpretation of reparations:

The Inquiry concurs with van Boven that the only appropriate response to victims of gross violations of human rights is one of reparation. In international law and in the practice of other countries the term 'compensation' is generally reserved for forms of reparation paid in cash or in kind. Other terms are used for non-monetary compensation. The term 'reparation' is the comprehensive notion … In light of the clear intent of the terms of reference to redress the history of removals the Inquiry adopts this interpretation.

The recommendations of the Australian Human Rights Commission to the Commonwealth Attorney- General were structured on the van Boven Principles. They were designed to achieve reparation through an interlocking series of measures, far wider than monetary compensation. The measures addressed personal pain and suffering, enduring losses of identity, family connection, language, culture and access to traditional land. They also included support and services to help restore these losses, in so far as that is possible.

In the Northern Territory, it is expected that any treaty will have to address a similar range of issues collectively experienced by First Nations. Flexibility will be key to this process because reparations have no fixed form.

Agreed reparations will, potentially, include monetary compensation for loss of traditional land and/or the restitution of land. Redress for past pain and suffering caused to families and communities by massacres may consist of a variety of measures. As we have seen in relation to the commemoration of the Coniston Massacre, it may consist of a memorial and apologies to descendants of the dead made by the Northern Territory Government and the Northern Territory Police. The Central Land Council's suggestion of dedicating a national park in the area, for the enjoyment of all Territorians, is an example of an inclusive, creative response to a tragedy. Research and programmes to restore,

preserve and teach endangered First Nation languages is a method of responding to cultural loss.

The Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law can serve as a minimum standard to guide negotiations in good faith, and to deliver material and emotional reparations, relevant and proportionate to the original violation.

3.4. Scope and Content

This section is not intended to presume or suggest whether a Territory-wide treaty or individual First Nation treaties or a combination of both should be preferred by First Nations. This section provides information regarding the overall scope and content of any Aboriginal treaty or treaties in the Territory. It hopefully provides food for thought, not a set menu.

Treaties between First Nations and the governments of States or Territories founded on Aboriginal dispossession, have two essential functions: to correct historical injustices and to settle a new relationship for the future. To achieve these purposes a treaty in the Northern Territory should contain several core elements, including:

- Recognition of the standing of First Nations as distinct political communities;
- Recognition of First Nations' right to self-determination, with decision-making and control that amounts to a form of self-government;
- Substantive reparations for material loss and human damage;
- The parties to negotiate with each other in good faith, and to agree to the terms of their future relationship on a basis of equality and mutual political recognition;
- Acknowledgement that the colonisation of the Northern Territory occurred without consent or any regard to the status of First Nations' as free self-governing peoples; and
- Commitment that these outcomes will only be achieved by the inclusion of a clear statement of the equal standing of the parties and defined procedural standards for negotiation. The parties must recognise each other and participate in negotiations based on complete equality.

Other content considerations could include:

3.4.1. Apology

Any First Nations treaty with Government should include a formal comprehensive apology for past wrongs. In the Ngāi Tahu Settlement (NZ) the apology was highly valued by Elders who bore the brunt of historical wrongs. Sincere apology is necessary for healing and relationship building. And it is proof of good faith.

Specific apologies have been made to the Northern Territory Stolen Generations and to descendants of those killed in the Coniston Massacre. But, on the occasion of striking a new relationship for the future, a comprehensive apology for past wrongs is of great significance. Its form should be agreed.

The one-sided exercise of control over First Nations in the past is the very source of the need for apology. The formulation of the scope and terms of apology should model the new relationship with government. It should be participatory.[58]

Treaty negotiations should include the terms of an apology for past wrongs and the agreed text of the apology should be included as an integral part of each treaty.

3.4.2. Substantive Outcomes

Substantive outcomes are the practical results intended by the agreed, enforceable terms of a

[58] Apologising for Serious Wrongdoing: Social, Psychological and legal Considerations, Report of Law Reform Commission of Canada.

treaty. They should conform to treaty principles and minimum standards.

If there was a collective Territory-wide treaty or act of Parliament, the broad areas of these substantive outcomes might be agreed with the Northern Territory Government. Then the precise form and method of achieving specific outcomes could be negotiated by individual First Nations. Local circumstances and aspirations of First Nations would determine substantive outcomes: what best meets local needs and aspirations.

A substantive outcome may be a self-government arrangement exercised directly by a First Nation within their traditional country. It may include authority to set the education curriculum for their children and direct responsibility for the delivery of local teaching services. Or it could be an agreement with the Northern Territory Government for the Education Department to deliver an agreed curriculum for their children. The agreement may provide for the selection and training of future teachers, in cooperation with the Education and other relevant departments.

Outcomes might consist of an agreement to build a new primary school or health clinic; or a high school so that children don't have to leave their community to get a secondary education; or a regional hospital with a specialist renal dialysis and other units that reflect the health profile of the regional population.

Substantive outcomes may be a monetary settlement with First Nations, collectively, or with an individual First Nation. A settlement might be in the form of a cash payment or a trust for particular purposes, such as language maintenance and cultural recovery. It may be a capital payment and loan security to start up or support a business to provide employment on country.

Positive, practical outcomes may relate to self-government, culture, language, education, health, housing, justice and corrections, economic development, business and employment. They should conform with and advance international standards, such as the UN Declaration of the Rights of Indigenous Peoples and the van Boven Principles– but essentially, they are a matter of what is right for each First Nation from their perspective, their particular history and their community goals.

3.4.3. Imagination

How substantive outcomes might be achieved is a matter of the self-determination and imagination of individual First Nations, particularly in areas where loss of country has been very substantial and long-standing and there remains little unoccupied Crown land. The situation of the Arrernte peoples of Alice Springs and the Larrakia peoples of Darwin comes to mind.

To give an idea of how the contents of a treaty with a First Nation whose country is now largely urban might provide a substantive outcome, title to an agreed upon tract of land might be passed to the First Nation that bore the brunt of colonisation. It would be up to the First Nation to decide how they would utilise that land to suit their purposes, which may include joint management with the Northern Territory, for example, it could be developed and provide training and employment opportunities. Side agreements with established Local Government bodies may also be an option.

3.4.4. Native Title

As discussed in detail earlier, where monetary compensation relates to the extinguishment of native title interests in land under section 51 of the *Native Title Act 1993* (C'th) there is now clear guidance regarding the value of the loss. Late in March 2019, the High Court of Australia decided the Timber Creek Case.[59] It provides clear guidance for the calculation of both the economic value and cultural loss relating to non-exclusive native title interests extinguished by the Crown. The extinguishment of exclusive native title is clearly of higher value. The evaluation of cultural loss and the effects on the native title holders is broad and considers the whole effect on spiritual connection and cultural practice.

[59] The Northern Territory of Australia v Griffiths (Deceased) and Jones on behalf of the Ngaliwurru and the Nungali Peoples [2019] High Court of Australia 7

If a First Nation chose to negotiate, rather than litigate, for compensation for the loss of native title interests under section 51 – and those negotiations were included in the negotiation of a treaty there would now be a benchmark of 'market value'. Once again, given the flexibility regarding the contents of a treaty, this loss may be rolled up in a more extensive settlement that takes into account other loss of land, or land needs or other forms of substantive outcomes beneficial to that First Nation.

3.4.5. Review, Implementation and Dispute Resolution.

The scope of any treaty with the Northern Territory Government must contain provisions for the implementation of the agreement. Some matters will be completed immediately on the signing of the treaty. Others, including payments, could be delivered in stages or tranches.

Where there is, say, an agreement to shift governance structures or service delivery, this should be completed in accord with a practical timetable. Provision of progress reviews in the timetable will enable the parties to adjust the speed of implementation and respond to unforeseen circumstances.

Treaties will be reinforced by enactment in legislation and this requirement should form a term of the treaty. Once again, a clear timetable for the passage of the legislation should be agreed to and included in the treaty.

No matter how carefully any complex agreement is written, there will inevitably be differences of interpretation between the parties. Such outcomes are entirely normal. It should not be regarded as a problem, provided the treaty contains explicit terms for dispute resolution.

Chapter 23 of the Tla'amin Agreement in Canada spells out that most issues are expected to be settled by the parties in informal talks.[60] But if no resolution is found it provides for formal talks, mediation or arbitration or court proceedings. Three clear stages are described. None of the stages prevent any party at any stage going straight to court. It provides a well-structured process that is worthy of consideration in the community consultation phase of this Commission.

Appendix 8.6 contains the Table of Contents of the Tla'amin Final Agreement from British Columbia, Canada and provides a real-life example of the structure of a modern treaty. Its details are discussed in section 5.

[60] http://www.tlaaminnation.com/final-agreement/

4. THE LEGAL CONTEXT

The Constitution and laws of Australia have characteristically reflected the denial of Indigenous identity, presence, laws, and rights. Past examples include protection laws associated with policies of dispossession, assimilation and child removals, and laws that denied basic civil and political rights, such as voting, political participation, citizenship and freedom of movement and association.[61]

4.1. Overview

It is important to make clear the fundamental legal issues underlying the treaty process in the Northern Territory. It does not mean that everyone involved needs to understand the fine legal detail, but it does require that the key legal ambitions and limitations are communicated plainly and effectively so parties are able to understand what is, and what is plainly not, achievable.

This section draws on the work of the Northern Territory Treaty Commission and also draws extensively on independent legal opinion provided to the Commission.[62] It highlights that the best way to achieve a treaty with adequate scope and contents, and its protection is through legislation enacted by the Northern Territory Government.

There is a fundamental limitation on the scope of any treaty negotiated with the Northern Territory. It is not a State within Australia's federal system. As a Commonwealth Territory, the powers exercised by the Northern Territory Government are conferred and defined by the Commonwealth under the *Northern Territory (Self Government) Act 1978* (Self Government Act). Northern Territory legislation giving effect to a treaty must be consistent and comply with that Act and all other Commonwealth laws in operation across the Northern Territory. For example including, the *Aboriginal Land Rights Act* and the *Native Title Act*. If the terms of a treaty exceed the powers of the Northern Territory, or are inconsistent with any element of Commonwealth legislation, they will have no legal effect.

The Commonwealth also has complete power over the governance of any Australian Territory under section 122 of the Australian Constitution. The Commonwealth has the legislative power to void any treaty enacted by the Northern Territory and to amend the *Northern Territory (Self-Government) Act*, expressly withdrawing any power to conclude a treaty with First Nations. This fact highlights the role the Commonwealth has in ensuring that any treaty with First Nations in the Northern Territory will have meaningful and lasting legal effect.

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[61] Sarah Joseph & Melissa Castan. Federal Constitutional Law – A contemporary view Third Edition Law Book Co. 2010 p497

[62] Mr. Bret Walker SC Legal Context of a Northern Territory Treaty – Opinion, 2020. Extracts from Mr Walker's Opinion are quoted extensively in this section

4.2. The Northern Territory – a short legal history

For upwards of 65,000 years the First Nations peoples of Australia held exclusive sovereignty over the continent and its islands now known as Australia. Since 1788 the imposed law, supported by the force of arms of the colonisers, has dominated the nature of the relationship between First Nations Peoples and what is now the Australian Nation-State. This relationship has been determined by only one side – the British invaders. The imposed legal relationship has largely been, for the last 232 years, one of exclusion and discrimination. A treaty or treaties in the Northern Territory sits against this backdrop.

From the time of British colonisation, the area of land now known as the Northern Territory was part of the colony of New South Wales. Following several unsuccessful attempts to establish a British presence in the north between 1824 and 1863, the land was ceded in 1863 to the colony of South Australia and became its 'Northern Territory'.

Arthur Phillip's Proclamation of the Colony of New South Wales in January 1788 covered the area from the eastern coast of Australia to the 135th meridian,[63] which passes close by Millingimbi in Arnhem Land. His Proclamation was the first step in the assertion by the British Crown of sovereignty over the land which is now the Northern Territory. The second step was the establishment by Captain Bremer, in 1824, of a military settlement at Fort Dundas on Melville Island.[64] He took possession of the coastline as far west as the 129th meridian, which is the present boundary. The third step was taken in 1828 when the inland boundary of New South Wales was also extended to the 129th meridian by Governor Darling of New South Wales[65]. A misstep occurred on 17 February 1846. The Colony of North Australia was created by an Order-in-Council issued under the Australian Constitutions Act 1842[66]. The new colony comprised that part of New South Wales north of the present South Australia and Northern Territory border and included what was later to become the Colony of Queensland. Sir Charles Fitzroy was appointed Governor. The putative government was never established in fact and on 28 December 1847 the Order-in Council was revoked.

To facilitate a more thorough understanding of the legal history, a timeline of major constitutional and statehood milestones is provided at Attachment 8.5.

When Australia federated in 1901, the Northern Territory remained under the legal control of South Australia. This continued until 1911 when it was surrendered to the Commonwealth under Section 111 of the Australian Constitution.[67]

This meant that from 1911, unlike the Australian States, the Northern Territory did not have legal independence from The Commonwealth. It wasn't until 1978, through the Self Government Act, that the Territory achieved limited self-government. Even then, (per section 122 of the Constitution) the Commonwealth assumes ultimate control over the legal affairs in the Northern Territory. It can make laws specifically for the Northern Territory and any NT legislation inconsistent with Commonwealth Acts has no effect. This creates unique challenges and opportunities for establishing a treaty or treaties in the Northern Territory.

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[63] See useful discussion on Australian Boundaries in the UQ Law Journal 1065 and at: http://www.austlii.edu.au/au/journals/UQLJ/1965/1.pdf

[64] Glenville Pike, F.R.G.A., Life Member, Royal Historical Society of Queensland. See at: https://core.ac.uk/download/pdf/15094789.pdf

[65] Seat: https://www.foundingdocs.gov.au/item-did-41.html See relevant legislation at: http://classic.austlii.edu.au/cgi-bin/download.cgi/cgi-bin/download.cgi/download/au/legis/qld/consol_act/aca1842312.pdf

[66] See relevant legislation at: http://classic.austlii.edu.au/cgi-bin/download.cgi/cgi-bin/download.cgi/download/au/legis/qld/consol_act/aca1842312.pdf

[67] Section 111 of the Constitution states that, "The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth."

The constitutional history of the Northern Territory can be usefully divided into four broad periods:

1824 to 1863	Part of the area that will become the Northern Territory is included in the Colony of New South Wales; unsuccessful attempts at colonial settlement are made from the 1820s to the 1840s
1863 to 1911	Government of the Northern Territory by South Australia as part of the province/state
1911 to 1978	Government of the Northern Territory by the Commonwealth following the surrender of the Territory to the Commonwealth by South Australia with limited local involvement following the establishment of the Northern Territory Legislative Council (1947) and Legislative Assembly (1974)
1978 to present	Self-government of the Northern Territory with some reserved areas of Commonwealth authority and the continued ability of the Commonwealth to legislate for the Territory under s. 122 of the Constitution.[68]

4.3. Key Legal Issues

One of the great challenges facing willing treaty partners in the Northern Territory will be the legal and constitutional issues confining the process. The terms of a treaty or treaties may relate to the transfer of land and rights over resources, matters about cultural heritage and language and financial compensation. They may confer some degree of self-government.[69] It is therefore important to examine whether the Northern Territory Government, as a Territory of the Commonwealth, can freely enter into legal arrangements regarding such issues. This crucial, and other key, legal issues are set out and dealt with below.

4.4. The Northern Territory Legislative Assembly can give legal effect to a treaty with Northern Territory First Nations

The Northern Territory Legislative Assembly has capacity to pass legislation giving legal effect to a treaty with Northern Territory First Nations. Under section 6 of the Self-Government Act, the Assembly has the power to make laws for "the peace, order and good governance of the Territory". Provided any Territory legislation seeking to give legal effect to a treaty observes the limits imposed by the Constitution in relation to consistency with Commonwealth laws, the Northern Territory Legislative Assembly has ample power to provide for the negotiation and observance, including the enforcement of a treaty or treaties between the Northern Territory and its First Nations.

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[68] A key issue requiring consideration is liability for past wrongs. If we are to have a truth telling process and apply the van Boven principles particularly concern recompense and reparations who pays? NSW, SA, the Commonwealth & the NTG have all at some stage in its history, to varying degrees, have something to answer for

[69] Section 5 discusses this in the context of British Columbia

4.5. The Constitution and Commonwealth Power

Section 122 of the Constitution gives the Commonwealth power to make laws for the Northern Territory.[70] This power means the Commonwealth can overrule any treaty enacted in legislation by the Northern Territory Legislative Assembly, through the Commonwealth enacting or amending its own legislation. Since Territory self-government this power has been used several times, including to enact the NT Intervention in the *Stronger Futures in the Northern Territory (Consequential and Transition Provisions Act 2012* (C'th) and to overrule the *Rights of the Terminally Ill Act 1995* (NT) (euthanasia law) by amending the Self-Government Act.

There is no constitutional barrier to the Commonwealth playing a positive role through passing a law or laws to support the Northern Territory Treaty process. Although it might be impractical to have the Commonwealth as a party to any treaty or treaties, it could play an important role by, for example, setting (through negotiation with Aboriginal peoples of Australia) national minimum standards for truth-telling and treaty negotiations. In any case, given the above, the support or, at least, acquiescence of the Commonwealth Executive and Parliament would be useful reassurance throughout and after the process of negotiating a treaty or treaties in the NT.

Federal Minister for Indigenous Australians, the Hon Ken Wyatt AM MP's comments in his televised speech at the National Press Club on 10 July are very helpful in this regard:

> ***With respect to treaty, it is important that states and territory jurisdictions take the lead.***
>
> ***"Treaty models are evolving with work undertaken by the Victorian and NT government which address the aspirations of Indigenous Australians in those jurisdictions and it is important that it resides and sits there."***[71]

4.6 Compliance and Consistency with Commonwealth Legislation

Any Northern Territory legislation giving effect to a treaty or treaties must comply with the Constitution and the present or future laws of the Commonwealth. Terms of any treaty that are inconsistent with Commonwealth legislation will be invalid. There are various Commonwealth laws operating in the Northern Territory which deal with issues that could reasonably come within the scope of a treaty or treaties and so should be considered in this context. Generally, the Aboriginal Land Rights Act, the Native Title Act and the Self-Government Act may impose constraints on the subject-matter of a treaty, such as financial compensation, ownership, access to and management of land, water, inter-tidal and marine areas, minerals, petroleum and other natural resources. The Native Title Act may have implications for the representation of Aboriginal people in the negotiation, execution and enforcement of any treaty.

4.7. Aboriginal Land Rights Act

The Northern Territory Government does not have power (except in some inconsequential matters) over Aboriginal Land under the Aboriginal Land Rights Act. The Northern Territory Government is therefore potentially limited in its capacity to provide to First Nations, through any treaty, broad powers to control land in the Northern Territory. For example, a treaty or treaties reached with Aboriginal First Nations could not include subsurface mineral rights relating to Aboriginal Land

[70] Section 122 of the Constitution states that, "The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth ....".

[71] Minister Ken Wyatt, comments included in his speech to the National Press Club on 10 July 2019 see also: https://www.smh.com.au/national/walk-with-me-australia-ken-wyatt-s-historic-pledge-for-indigenous-recognition-20190710-p525rx.html

under the Aboriginal Land Rights Act. Additionally, it is not that clear if self-government powers could be agreed to on Aboriginal Land. These outcomes could be possible on Aboriginal-owned land that is not Aboriginal Land under the Aboriginal Land Rights Act.

The treaty-making exercise between the Northern Territory Government and Aboriginal First Nations of the NT has to be consistent with the powers and functions of the NT Land Councils pursuant to relevant provisions of the Aboriginal Land Rights Act. Section 23 is particularly relevant because it outlines key functions of Land Councils in relation to Aboriginal people and the management of Aboriginal Land.

These functions include ascertaining and expressing the wishes and opinions of Indigenous people living in its area in relation to the management of their land and appropriate legislation concerning that land. Section 23 outlines that a Land Council's functions extend also to negotiations for the acquisition and use of relevant land and assisting traditional owners to carry out commercial activities. These are examples of certain functions that the Land Councils are required to perform that bear directly on any future treaty-making process involving the rights and interests of traditional owners under the Aboriginal Land Rights Act. These functions need to be considered in the negotiation of the scope and content, as well as the rights and responsibilities contained in any treaty in the Territory that is given legal effect through Northern Territory legislation.

4.8. The Native Title Act

It is unlikely that Northern Territory legislation related to the treaty process would include provisions inconsistent with the Native Title Act. The preambular explanations contained in the Native Title Act strongly endorse the grant of real agency to First Nations, such as to justify not only the recognition of native title rights and interests but also to potentially support the negotiation and conclusion of treaties recognising and asserting "native title". It is therefore more likely that the Native Title Act would support treaty-making in the Northern Territory as a means of settling, recognising and asserting Native Title.

4.9. Northern Territory Laws

A treaty given legal effect by Northern Territory legislation could include terms that are inconsistent with pre-existing Northern Territory laws. An example of this could be the *Local Government Act 2008* (NT) (Local Government Act). Section 7 of that Act states that the Territory is divided into local government areas, having regard to "the nature … of population" as well as the "appropriateness … of each area as a separate unit of local government administration". It also states that the local government council for each area is to "be responsible for the government and management of the area at the local level". It is possible that a treaty or treaties would seek to establish some form of First Nations self-governance and that doing so would bring terms of the treaty into conflict with the Local Government Act.

This type of inconsistency could be resolved by ensuring that legislation enacted to give legal effect to a treaty or treaties expressly dealt with any inconsistencies in pre-existing Northern Territory laws. It would therefore be advisable at the outset to have the Northern Territory Legislative Assembly enact supportive legislation which could resolve differences between pre-existing laws and outcomes achieved in a treaty.

4.10. International Law

The Northern Territory does not have the legal capacity to enter into a treaty recognised under international law. Under international law, only Nation-States acting through national governments have the legal capacity to enter into treaties, which, are agreements concluded between Nation-States. International law does not concern itself with the internal relations within any one Nation-State and so is not concerned with agreements formed by governments in State or Territory

jurisdictions within Australia. In Australia, the Commonwealth enjoys exclusive and undivided international sovereignty and is the only actor with sufficient legal capacity to enter into treaties under international law.

4.11. Legal Risks

Nothing is risk-free. The surest way to entrench a treaty would be through the Commonwealth amending the Constitution at a referendum (via section 128 of the Constitution). This is historically extremely rare and would require Commonwealth carriage of the treaty issue. It is extremely unlikely that a Northern Territory treaty would be constitutionally entrenched. Commonwealth legislative support is the next best option. That too appears unlikely at the present time. Without Commonwealth legislative support, the highest (and most likely) protection of a Northern Territory treaty is Northern Territory legislation. As discussed above, this would be subject to the Commonwealth voiding any Territory law by Commonwealth enactment under section 122 of the Constitution. Even without Commonwealth involvement, it is a basic principle of parliamentary government that all legislation is amenable to future legislative repeal or amendment. A future government in the Northern Territory could repeal or amend any legislation giving effect to a treaty or treaties.

The best way to ensure the longevity and enforceability of any treaty rests in good faith and in convincing all parties and relevant observers that a treaty or treaties in the Northern Territory is positive and beneficial to the future of all Territorians. The more impressed Territory and Commonwealth officers are with the treaty process and its ultimate conclusion, the less likely they are to revisit or abandon the compact. The longer a treaty has lasted, and the more impressive its contribution to enriching the lives of people in the Northern Territory, the better prospect it will have of obtaining future social and political resistance to its abrogation or diminution.

4.12. A Series of Treaties

Given the unique and diverse First Nations voices across the Territory it's likely that treaties will require a substantively local focus. There are no doubt matters common to all First Nations that could be addressed through a Territory wide treaty mechanism or Territory legislation. There are also matters of local, regional or specific First Nations' concern. These are sensitive and critical matters and will need to be properly discussed between First Nations to decide if a common approach to negotiations is possible. Ultimately this process might create a series of treaties, with common issues dealt with by an overarching Territory wide agreement that is legislated, and local issues dealt with by local agreements. There is no legal or constitutional obstacle to such an approach.

4.13. How the Aboriginal Party to a treaty is Constituted and the Enforcement of Treaties

The issue of defining an Aboriginal First Nation as the party to a treaty is related both to the rights of Aboriginal groups to determine their membership, and to the question of Stolen Generations and people who do not hold First Nation identity. Ultimately this may depend on how parties are described in legislation or how they choose to describe themselves in negotiation. There are existing descriptions under legislation that could be utilised, for example under the Aboriginal Land Rights Act and the Native Title Act. Whatever the arrangement it's important to ensure that minorities are given a fair hearing in contributing to these decisions. In relation to the authority to negotiate, that is dependent on agreed group decision-making processes. Formal authority to negotiate, and to decide other related issues could be confirmed in legislation before any treaty-making commences.

On the issue of enforcement, the First Nation representative governance body should hold the power to authorise proceedings against the Northern Territory for breach of the treaty. In relation to internal matters, agreed grievance mechanisms can be established for first nation members, or groups of members, who have a complaint or complaints.

4.14 . Key Negotiation Principle

Any treaty in the Northern Territory should not be considered as a 'full and final' settlement of all historical wrongs perpetrated against First Nations in the Northern Territory. To make this clear it's important that language used in any treaty in the Northern Territory is not used in an extreme way and that the terms of a treaty do not preclude changes in the future by way of what one party may regard as improved terms. Notions of 'full and final' settlements may be acceptable in commercial law settings but could deliver enormous injustices to future generations in the First Nations' treaty making exercise. British Columbia expressly abandoned this approach in 2019:

> ***Treaties, agreements and other constructive arrangements are the preferred methods of achieving the reconciliation of Crown title and the inherent titles of Participating Indigenous Nations, and the reconciliation of pre-existing Indigenous sovereignty with assumed Crown sovereignty. They will: ....be capable of evolving over time and not require full and final settlement...***[72]

In Aotearoa, relativity clauses in earlier settlements revisit the financial terms later on.

[72] British Columbia Treaty Commission Annual Report 2019, p15, published on http://www.bctreaty.ca/sites/default/files/BCTC%20Annual%20Report%202019%20Final.pdf

4.15. Inter-First Nations Treaties

There is no reason in law to stop first nations from making treaties between themselves and *"... it will be valuable to ensure the engagement of the Northern Territory in the observance of the agreement between the first nations in question"*. In fact, agreement between neighbouring First Nations on matters such as borders, and citizenship should be secured before meaningful treaty negotiations can commence.

4.16. First Nations Traditional Estates and Cross-border Issues

The traditional estates of many First Nations in the Northern Territory stretch across legal borders into neighbouring States. This creates some jurisdictional issues. Any treaty settled between the Northern Territory Government and First Nations would lack legal force in neighbouring states unless those states reached agreement and passed laws giving effect to the terms of the treaty. Attempting to reach a cross-border settlement could weaken the scope and content as well as threaten the ultimate settlement of a treaty in the Northern Territory. This is because increasing the number of parties to an agreement reduces the prospect of reaching agreement. Among federal entities especially, agreement making can be fraught, particularly in relation to issues of enforcement. Because of this, it might be impractical to seek to extend treaty coverage outside the legal boundaries of the Northern Territory.

5. NATIONAL AND INTERNATIONAL BEST PRACTICE

This section examines treaty and self-determination developments in other jurisdictions by providing detail of the frameworks operating and being developed in Victoria, British Columbia (Canada), Aotearoa (NZ) and Scandinavia.

Within Australia, Victoria is the Australian jurisdiction most advanced in a Treaty development process. However, Victoria is still at a very early stage of developing its negotiating system and realistically, it will be a number of years before you would expect to see the first Treaty negotiation commencing.

Overseas, British Columbia is leading the way in modern treaty making but there is also much we can learn from the settlement process operating in Aotearoa (NZ). Scandinavian developments for the Saami appear to be more aligned to the Uluru Statement from the Heart's "Voice" concept rather than treaties.

5.1. Victoria, Australia

Following a decision to pursue a treaty process in 2016, the Victorian Government convened several consultations and forums across the state, culminating in the formation of the Victorian Treaty Advancement Commission (VTAC) in January 2018. While VTAC had several roles, its key role was to establish an Aboriginal Representative Body, now known as the First People's Assembly of Victoria (FPAV). Jill Gallagher AO, a Gunditjmara woman from western Victoria, was appointed as the Victorian Treaty Advancement Commissioner and fulfilled the role during the Commission's duration. The FPAV met for the first time in November 2019. The VTAC was then dissolved and it handed the baton to the FPAV to continue the process.

Victoria's treaty process[73] was formalised with the passing of the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (the Act) in June 2018. The Act requires the FPAV and the Victorian State Government to work together to establish four elements to support future treaty negotiations: Treaty Authority; Treaty Negotiation Framework; Self Determination Fund; and Ethics Council. The Victorian process is described in Diagram 1

To reinforce its independence from Government, the FPAV is a company limited by guarantee. FPAV was initially designed to comprise 33 seats – 21 determined through a popular voting process, and 12 reserved for formally recognised Traditional Owner groups. However, two seats reserved for Traditional Owner Groups were declined, reducing FPAV to its current 31 seats[74]. The Act allows the number of recognised Traditional Owner groups on the FPAV to increase if more are established.

The VTAC facilitated the creation of an Aboriginal electoral roll to elect the 21 elected FPAV members and voting occurred between 16 September 2019 and 20 October 2019. Aboriginal people 16 and over were eligible to enroll in the election and votes could be cast either online, by post or in person at polling booths.

Low enrolment levels compounded by low voter turnout led to only 7% of eligible Aboriginal Victorians casting votes. This has led many to question the FPAVs mandate. Reasons cited for the low enrolment and voter turnout include[75]:

- A general distrust of Government by many Aboriginal Victorians;
- A feeling that the process was rushed and dictated by the Government's timeframes and agenda;
- A sense that the methodology adopted for the election process was a western imposed model that was inconsistent with cultural protocols;
- Disappointment with recent Government decisions, including removal of sacred trees

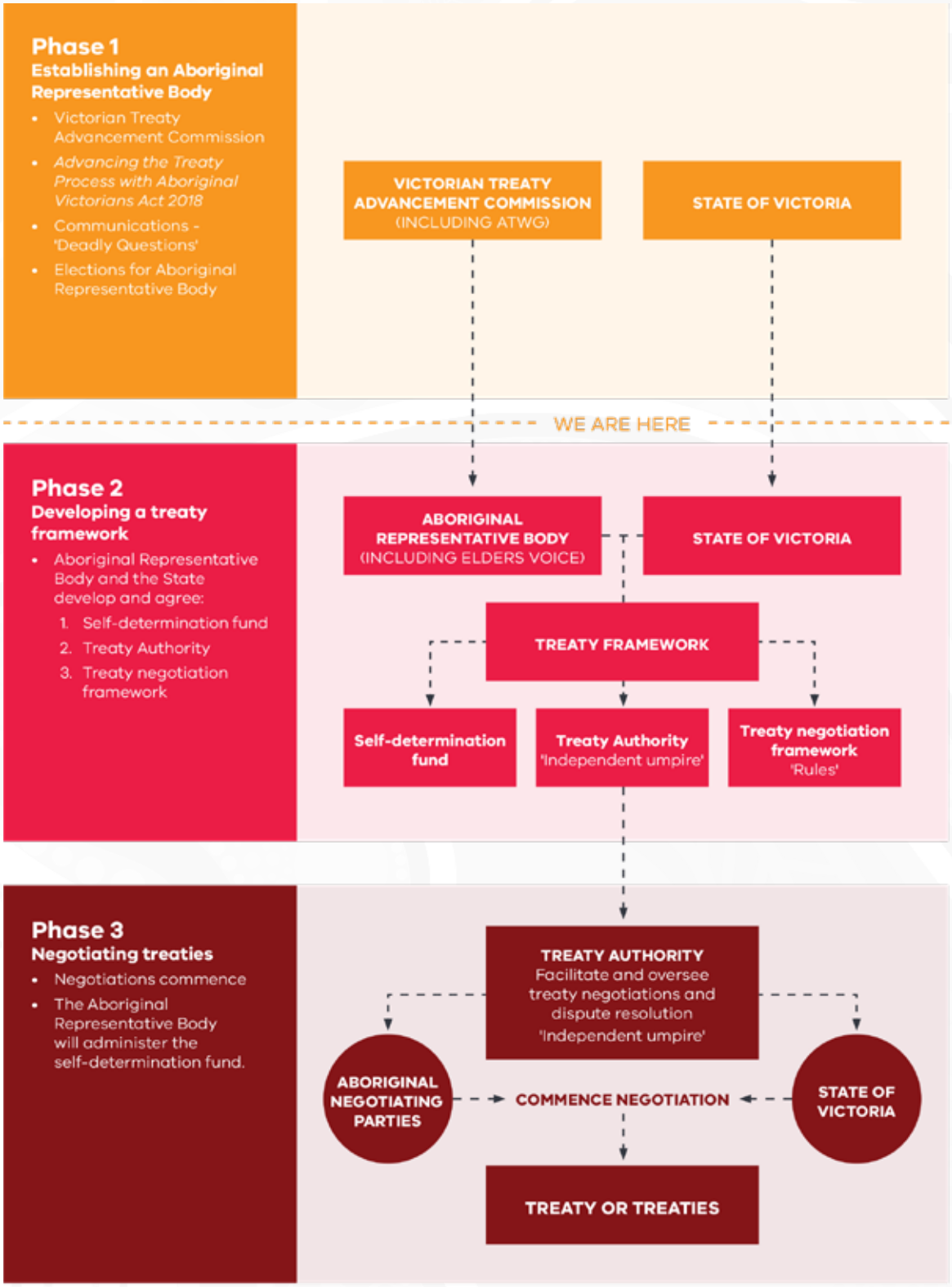
[73] Sourced from www.vic.gov.au/aboriginalvictoria/treaty

[74] There is inconsistency in reporting on the number of PFAV members. 31 is the number reported by FPAV in a Fact Sheet on its web site https://www.firstpeoplesvic.org/download/factsheet-about-the-first-peoples-assembly/

[75] Based on the yet unpublished work of Sarah Maddison and Dale Wandin, "So much at stake: Forging a treaty with authority and respect", 2018 Australian Book Review, as well as general free to air news reports.

Diagram 1

Victorian Process



Note: there may be many different Aboriginal negotiating parties which work within the rules of the treaty negotiating framework, representing entities such as clans or nations.

and land sales, that did not appear to be aligned with the positive Treaty agenda and therefore undermined the Government's credibility;

- Disappointment with the final composition of the FPAV, the voting process and notwithstanding the inclusion of Traditional Owner groups, a lack of Traditional Owner inclusion on the FPAV; and
- A sense that the Victorian government "put the cart before the horse" by legislating a process before the FPAV's creation; thus, compromising its message that Treaty will be an Aboriginal led process.

The First Peoples' Assembly of Victoria met for the first time on 10/11 November 2019 and have considerable challenges ahead.

5.2. British Columbia, Canada

5.2.1. Background

In 1992, a modern treaty-making process was agreed between the First Nations Summit, the Canadian Government and British Columbia. It provides a negotiation framework for the three parties - First Nations, Canada and British Columbia to work towards their agreed goals of reconciliation and a new relationship of mutual trust, respect and understanding, founded on certainty of the relationship.

5.2.2. British Columbia Treaty Commission (BCTC)[76]

The BCTC was established in 1992 by agreement between the Canadian and British Columbia (BC) governments and the First Nations Summit. It is the independent body responsible for facilitating treaty negotiations between First Nations in BC and the governments of Canada and BC.

It is important to note that the BCTC does NOT negotiate Treaties. Its purpose is to oversee the "made-in-BC" treaty process that was developed by the BCTC.

Treaties negotiated through the made-in-BC treaty process are tripartite, constitutionally protected, government-to-government agreements between the governments of Canada, British Columbia and a First Nation. BC treaties (Final Agreements) are legislated. The BCTC comprises five (5) Commissioners, one of whom is the Chief Commissioner. The Chief Commissioner is appointed on a three-year term by agreement of the Principals (the three governments). The First Nations Summit elects two Commissioners and the federal and provincial governments appoint one each. Commissioners do not represent the Principals that appoint them, but instead, act independently. Decisions require the support of one appointee of each of the Principals.

There are currently 11 staff supporting the Commissioners. Operating funding for the BCTC in 2018/19 was CAD$3.05M and the Canadian Government provides 60% of the BCTC's operating funding while the BC Government provides the remaining 40%.

Although each Treaty negotiation is unique, comprehensive Treaties in BC must, as a minimum, address:

- First Nations government structures and related financial arrangements;
- Jurisdiction and ownership of lands, waters and resources;
- Cash settlements;
- Processes for amendment and resolving disputes; and now
- Implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

However, under the made-in-BC process, each First Nation, Canada or BC may introduce any issue at the negotiation table that it views as significant to the new relationship.

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[76] All of the descriptive material about the BC process has been sourced from the BCTC web site http://www.bctreaty.ca/ including their 2019 Annual Report published on that site

The BCTC has three main roles that work toward achievement of their goals:

- Facilitating Treaty negotiations, including assisting the parties to find solutions and resolve disputes;
- Allocating negotiation support funding to enable First Nations to participate in negotiations. The Canadian Government provides around 90% of the support funding and the BC Government provides the balance; and
- Educating the public and providing information about treaty negotiations.

Significant reforms to the BCTC process have occurred over the last two years. In particular:

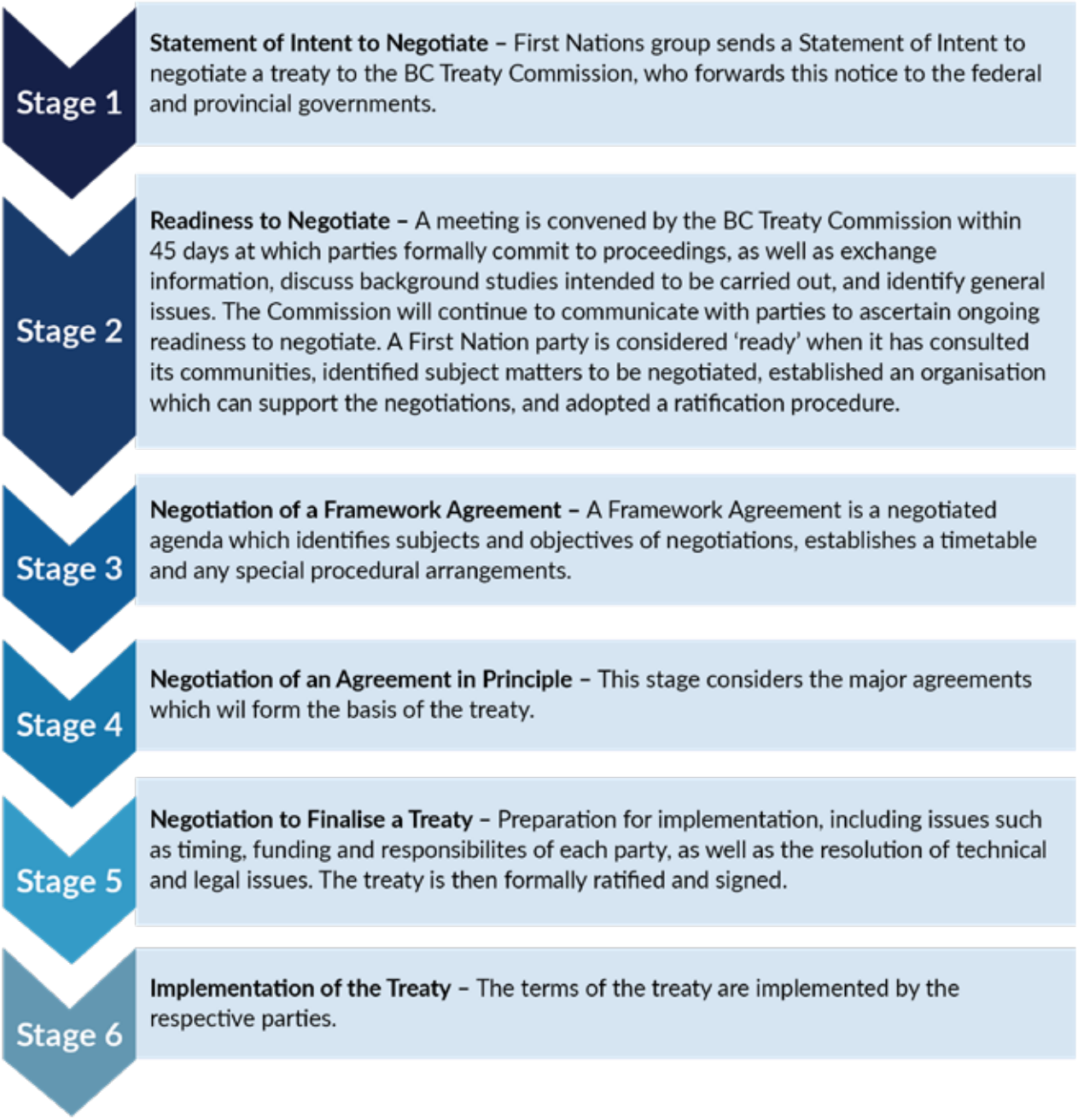
- The three Governments have agreed that the extinguishment or surrender of rights has no place in modern Crown and Indigenous relations, treaties, or other agreements. BC's new approach to negotiating is grounded in the recognition of rights. As a result, Treaties and agreements: will now be capable of evolving; will not seek to achieve full and final settlement; and will be drafted to be adaptable, renewable and changeable over time;
- Formerly, funds provided to a First Nation government to negotiate Treaties were loans that were required to be repaid out of any settlement funds negotiated. The Canadian Government has now ceased this practice, eliminated all existing debts and is reimbursing payments by First Nations made to date; and
- After being introduced into the BC Parliament the previous year, the *Declaration on the Rights of Indigenous Peoples Act (the Act)* received Royal Assent on 28 November 2019. The Act establishes processes to ensure that BC laws are consistent with the rights incorporated in the United Nations Declaration on the Rights of Indigenous Peoples. BC treaties must now provide for implementation of the UN Declaration, including the rights to redress and free, prior and informed consent.

These are significant reforms that place the made-in-BC treaty process at the forefront of worldwide treaty making between First Nations and their colonisers.

5.2.3. Made in British Columbia (BC): The Six Stages

Made-in-BC is a six-stage treaty negotiation process that is designed to advance negotiations and facilitate fair and sustainable treaties between the parties. The six stages involve extremely detailed policies, procedures, processes and templates underpinning each stage.

Diagram 2
Made-in-BC Negotiation Process



Source: Ms Alice Petrie, Parliamentary Library of Victoria

5.2.4. BC Treaty Example: The Tla'amin Final Agreement (Treaty)

The Province of British Columbia is located on the west coast of Canada, between the Pacific Ocean and the Rocky Mountains. With a population of 5.1 million, it is the third most populous Canadian province. Broadly, its European colonisation history is similar to the Northern Territory.

The first British occupation was a military settlement, Fort Victoria, built in 1843 on Vancouver Island. Consequently, the First Nations peoples were devastated by introduced diseases. The British attitude of the time was that they could make better use of the land than the First Nations peoples. To make way for colonist's uptake of land, the First Nations peoples of British Columbia were dispossessed, forcibly removed and made to live on reserves. By 1930, the First Nations peoples of British Columbia had been confined to approximately 1500 reserves. Before then, *The Indian Act 1876* had introduced the Indian Residential School system that had been designed to eradicate Aboriginal autonomy of language and culture and replace Indigenous identity with Christian values. Although contemporary British Columbia has its own distinctive history, in many ways the history of the First Nations peoples after European colonisation is akin to the experience of the Stolen Generations in Australia.

The Tla'amin First Nation was formerly known as the Sliammon Indian Band. This First Nation's traditional territory ranges from the north of British Columbia's Sunshine Coast down to both sides of the Strait of Georgia, an area over 400 square kilometres. The Tla'amin community now has approximately 1,000 members with the majority living in the main village site at Sliammon. The demographic is predominantly young and rapidly growing: over 60% of community members are under 40.

The Final Agreement between this First Nation and the other two governments came into effect twenty-two years after the Tla'amin lodged its Statement of Intent to negotiate. This demonstrates treaty making is a long game.

Key elements of the Final Agreement (the Treaty):

Land

The settlement package granted to the Tla'amin under the treaty consists of approximately 8,323 hectares of land. It also includes approximately 1,917 hectares of former reserves and 6,405 hectares of former provincial Crown Land. In total the land package represents around 2.6% of the Tla'amin's traditional territory.

Under the agreement all highways remain Crown land. Reasonable public access is authorised in designated areas on Tla'amin lands, as is access for certain law enforcement, emergency response and public utility installation activities.

Significantly, clause 67 of Chapter 3 of the agreement states: *'The Tla'amin Nation owns Sub-surface Resources on or under Tla'amin Lands.'* This allows the Tla'amin Nation opportunity to negotiate new models of economic self-determination.

Financial Settlement

The treaty provides the Tla'amin Nation with CAD $33.9M to be disbursed in annual payments of $3.8M over ten years. A resource revenue sharing arrangement provides further payment of CAD $738,895 per year over 50 years. Under the agreement several other funds are also established: CAD $7.9M for Economic Development; CAD $285,585 for Fishing Vessels and CAD $1.4M to increase Tla'amin participation in the British Canadian commercial fishing industry.

Service Delivery

Under a Service Delivery Agreement annual grants from the governments of Canada and British Columbia support the delivery of agreed Tla'amin Nation programmes and services to citizens and residents, in addition to funding supporting treaty implementation activities.

The agreement is renegotiated every five years. The current agreement includes:

- One-off federal funding of approximately CAD$5M;
- Federal funding of approximately CAD$9M per year for the first five years; and
- British Columbia funding of approximately CAD$446,000 per year for the first five years.

Tla'amin citizens will continue to be able to access mainstream British Columbian programmes and services provided by the governments of Canada or British Columbia that are not included in the scope of the agreement.

Self-Government

The Tla'amin Treaty precisely defines the self-government powers of the Tla'amin Nation and how they intersect with the wider government powers of Canada and British Columbia. A specific chapter in the Treaty deals with the membership of the Tla'amin First Nation and citizenship issues in detail.

In broad terms, the Tla'amin First Nation holds power to decide on the exercise of its Treaty rights and self-government procedures. The heads of its law-making and regulatory powers include Tla'amin land, resources, health, education, language and culture, cultural heritage, land management and public works. Significant sections of the Treaty are devoted to access to, and the management of, natural resources.

Residents on treaty settlement lands, known as Tla'amin Lands, who are not Tla'amin Citizens, may participate in the decision-making processes of a Tla'amin public institution, such as a school or health board, if the activities of that institution directly and significantly affect them.

Federal and provincial laws apply on Tla'amin lands. Where the Tla'amin has coinciding law-making authority, the Treaty sets out which law prevails in the event of any conflict.

In exclusively internal matters, Tla'amin laws have priority over federal and provincial laws. These matters include Tla'amin citizenship; language; culture and cultural heritage sites and; the governance of Tla'amin lands and assets.

Taxation

The treaty gives the Tla'amin government certain taxation powers. The powers are not exclusive and operate concurrently with the taxation authority of the Canadian and British Columbian governments. While taxes are yet to be imposed by the Tla'amin Nation, in other First

Nations Treaties, Canada has vacated some of its tax room – that is, has agreed not impose a portion of its taxes – to allow the First Nation to impose sales or personal income taxes, harmonised with the taxes vacated by the government.

Under an agreement with the government of British Columbia, and separate to the Treaty, the Tla'amin government will collect real property taxes applicable to Tla'amin citizens and non- members living on Tla'amin lands. The Tla'amin government is responsible for providing local services to all residents on Tla'amin lands and must apply property taxes equally to all residents whether citizens or not.

Dispute Resolution

Dispute resolution procedures are included in the agreement. In most cases the treaty parties expect simple informal talks will resolve disagreements. If that is not possible, there are three clear stages of resolution. The first, is formal discussions; the second involves, structured efforts at dispute resolution assisted by a neutral party without power to resolve the dispute, other than through the parties' agreement; and thirdly, formal arbitration or court proceedings, where a resolution is decided by an arbitrator or court. The separate stages of dispute resolution procedures do not prevent any party from opting for arbitration or going straight to court at any time.

BC Summary

The made-in-BC process commenced over 30 years ago and has evolved over that time. There are many elements of the BCTC framework that should be considered for inclusion in any treaty negotiating framework proposed in the NT. One of the key lessons we can take from the BCTC experience is that comprehensive modern treaties are a "long game" and that progress can be slow. The Tla'amin Final Agreement took 22 years from start to finish. As of mid-April 2020, of 66 First Nations to participate in the BCTC process, only seven had reached Stage 6 implementation.

5.3. AOTEAROA (New Zealand)

5.3.1. Background

The Treaty of Waitangi is roughly one page long; contains only three articles; and there were English and Maori versions of the Treaty that differ.

Since the Treaty was signed in 1840, Maori have made many complaints to the Crown that the terms of the Treaty were not being upheld. The *Treaty of Waitangi Act 1975* (the Act) established the Waitangi Tribunal and provided a legal process by which Maori Treaty claims can be investigated. In fulfilling this role, the Waitangi Tribunal has exclusive authority to determine the meaning and effect of the Treaty and can decide on issues raised by the differences between the Māori and English texts of the Treaty.

Maori have lodged more than 2,500 claims with the Tribunal and over 80 settlements have now been reached, many covering multiple claims.[77]

The Treaty of Waitangi is not considered part of New Zealand domestic law, except where it is specifically referred to in legislation. However, settlement agreements are legislated. Apart from orders for the resumption of state owned enterprise land, the Waitangi Tribunal's recommendations are not binding on the Crown.

5.3.2. Aotearoa Crown Negotiating Principles

Good Faith: The negotiating process is to be conducted in good faith, based on mutual trust and co-operation towards a common goal.

Restoration of Relationship: The strengthening of the relationship between the Crown and Māori is an integral part of the settlement process and will be reflected in any settlement. The settlement of historical grievances also needs to be understood within the context of wider government policies that are aimed at restoring and developing the Treaty relationship.

Just Redress: Redress should relate fundamentally to the nature and extent of breaches suffered, with

[77] Sourced from https://waitangitribunal.govt.nz/about-waitangi-tribunal/

existing settlements being used as benchmarks for future settlements where appropriate. The relativity clauses in the Waikato-Tainui and Ngāi Tahu settlements will continue to be honoured, but such clauses will not be included in future settlements. The reason for this is that each claim is treated on its merits and does not have to be fitted under a predetermined fiscal cap.

Fairness Between Claims: There needs to be consistency in the treatment of claimant groups. In particular, 'like should be treated as like' so that similar claims receive a similar level of financial and commercial redress. This fairness is essential to ensure settlements are durable.

Transparency: First, it is important that claimant groups have sufficient information to enable them to understand the basis on which claims are settled. Secondly, there is a need to promote greater public understanding of the Treaty and the settlement process.

Government-Negotiated: The treaty settlement process is necessarily one of negotiation between claimant groups and the government. They are the only two parties who can, by agreement, achieve durable, fair and final settlements. The government's negotiation with claimant groups ensures delivery of the agreed settlement and minimises costs to all parties.

5.3.3. Aotearoa Settlement Process

All claims need to be registered with the Waitangi Tribunal before the Tribunal can begin an inquiry or the Crown can start negotiating with a claimant group. However, once a claim is registered, a claimant group can seek negotiations with the Crown straight away or may choose instead to have their claims heard by the Tribunal before entering negotiations.[78]

Te Arawhiti (the Office for Maori Crown Relations)[79] is now the New Zealand Government Agency responsible for settlement agreement negotiation and implementation. Te Arawhiti commenced on 1 January 2019 and subsumed some existing entities, including the Office of Treaty Settlement. Te Arawhiti's purpose is to support the Crown to act fairly as a Treaty partner. Two of Te Arawhiti's key operational responsibilities are:

- Completing treaty settlements with willing and able groups; and
- Ensuring the Crown meets its Treaty settlement commitments.

Importantly, though, two of Te Arawhiti's other responsibilities clearly demonstrate the New Zealand government's commitment to a true partnership – an approach that greatly enhances the prospects of successful implementation and reduces the prospects of disputes:

- Ensuring public sector capability is strengthened; and
- Ensuring the engagement of public sector agencies with Māori is meaningful.

There are three key stages in a treaty settlement. Each settlement needs to provide:

- An apology by the Crown and a historical account;
- Financial redress;
- Commercial redress; and
- Cultural redress (for example, the return of lands of special significance, arrangements to provide a role for Māori in the governance of resources and place name changes).

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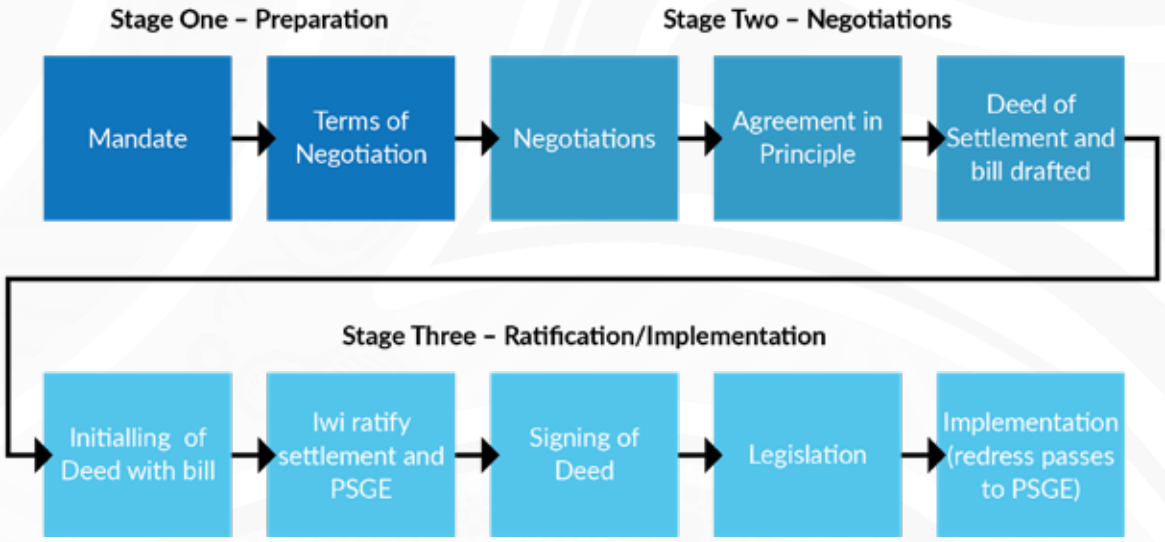
[78] Healing the Past, Building a Future: A guide to Treaty of Waitangi Claims ad Negotiations with the Crown published by the former Office of treaty Settlements in June 2018

[79] Information in relation to Te Arawhiti sourced from http://www.tearawhiti.govt.nz/

The negotiation process is quite similar to British Columbia's:

Diagram 3
Aotearoa (New Zealand) Negotiations Process



Stage 1: Pre-negotiation[80]

In this stage, the claimant group chooses representatives to act on its behalf. Once chosen, the representatives' initial task is to draft a "Deed of Mandate" document in order to receive formal mandate to act from the Minister.

Once representatives receive a formal mandate from the Minister, the next step is to negotiate a "Terms of Negotiation" document with the Crown. This document describes what the claimant group and the Crown want to achieve. Two kinds of Terms of Negotiation documents are available; "streamlined", which takes two to three weeks to negotiate and "full", which can take up to three months to complete.

Stage 2: Negotiation

The outcome of the Negotiation Stage is a final Deed of Settlement between the claimants and the Crown. The first milestone in this stage occurs when an Agreement in Principle (AIP) has been completed. The AIP becomes a public document once executed.

A Deed of Settlement (DOS) is then drafted by the appointed negotiators and the Crown. The DOS contains all of the details of the settlement and represents a full, final and comprehensive settlement of the claim.

Additionally, a Post Settlement Governance Entity (PSGE) must be created to manage the settlement assets. The DOS cannot be finalised until the claimant group has voted on and approved both the DOS and the proposed PSGE. If passed, the Deed of Settlement will be formally executed by both parties.

Stage 3: Ratification/Implementation

The executed Deed of Settlement is then legislated, and a Settlement Act is passed. The Crown and the claimant group work together to make sure everything agreed in the Deed of Settlement happens.

[80] All information in relation to the Aotearoa settlement process sourced from https://www.govt.nz/organisations/te-kahui-whakatau-treaty-settlements/

Aotearoa's settlement agreements do not completely satisfy our proposed definition of modern Treaties as they do not result in self-government. However, they do improve and set requirements for joint management and joint decision making in many arenas. The fact that settlement agreements: arise from the original Treaty; provide clear social, cultural and economic benefits to Maori; are legislated; and are an outcome of an effective dispute resolution process, which provide sound reasons for us to consider their applicability to the NT.

5.3.4. Ngāi Tahu Settlement

The Ngai Tahu Settlement is a practical example of a treaty negotiated under Aotearoa's three stage process:

The Ngāi Tahu are the principal Māori *iwi* (nation) on the South Island of Aotearoa. Ngāi Tahu *takiwa* – territory is the largest in Aotearoa and extends from Te Parinui o Whiti (White Bluffs, southeast of Blenheim), Mount Mahanga and Kahurangi Point in the north, down to Rakiura (Stewart Island) in the south. The Ngāi Tahu population is in the order of 65,000 with roughly 49% living on country and 51% living off-country, including about 1200 overseas.

As early as 1849, the Ngāi Tahu complained about Crown dealings following *Te Tiriti o Waitangi*. Over the next 150 years, the Ngāi Tahu protested the Crown's broken promises, including Crown ownership of *pounamu* (greenstone, a resource of great spiritual value to Maori) and the Crown's failure to provide schools and hospitals. The *iwi* also protested over the low prices paid for land (a fraction of a penny per acre), unclear boundaries of the purchased lands, the loss of mahinga kai (traditional food and other natural resources and the places where they are found), and the leasing to settlers in perpetuity of reserved lands without *iwi* consent. In 1986, the Ngāi Tahu lodged claims with the Waitangi Tribunal. This was the first large claim that the Tribunal heard under its modern power to investigate grievances going back to 1840, the date the *Te Tiriti o Waitangi* was signed. It is one of the most significant claims considered by the Tribunal.

The agreement was given the effect of law in the *Ngāi Tahu Settlement Act 1998* – **12 years after the initial claim was lodged.** The terms include:

An unreserved apology from the Crown

The Ngāi Tahu regarded an apology as the first step towards healing. To some, especially Ngāi Tahu Elders, the comprehensive and detailed apology was the most important part of the settlement.

Cultural Redress

- Ownership and control of various land resources and lands significant to the *iwi*, including commercial property, forest and farm assets, high-country stations and the beds of certain rivers and lakes;
- *Mana Whakahono a Rohe*: enhanced authority and standing of Ngāi Tahu and other *iwi* authorities to discuss and agree with local authorities regarding resource management and decision-making processes under the *Resource Management Act* 1991;
- *Pounamu*: the New Zealand Crown agreed to return ownership of the natural resource *pounamu* (greenstone), effected through the *Ngāi Tahu (Pounamu Vesting) Act 1997*.
- *Mahinga Kai*: includes management of customary fisheries and *taonga* (high cultural value) species management; and
- Coastal areas: guaranteed Ngāi Tahu access to future Crown allocations of coastal space.

Economic and Financial Redress

- Untied payment of NZ$170M (plus interest of $25M);
- Deferred Selection Process: the Ngāi Tahu *iwi* could buy, at its own discretion, certain Crown assets to a total value of NZ$250M, within twelve months of assent to the settlement legislation;
- Right of First Refusal: the settlement included a permanent right of first refusal to a defined

range of assets, the Ngāi Tahu have the first opportunity to buy Crown assets, if or when, the Crown decides to sell them; and

- Relativity Clause: the relativity clause is designed to equalise Crown settlement payments, made at different times, between Maori claimants. It was agreed that when total Treaty settlement payments throughout Aotearoa reached NZ$1 billion, the first two tribes to finalise Treaty Settlements, the Ngāi Tahu and Tainui-Waikato, would become entitled to extra payments, proportional to those made in later settlements. To date, over NZ$250M has been paid to the Ngāi Tahu in relativity payments since their original settlement in 1998.

The Ngāi Tahu settlement has allowed the *iwi* to establish a sound platform for its economic independence, with interests in fishing, tourism, property and a diversified equity portfolio. The Ngāi Tahu Annual Report 2018/19 shows an audited Underlying Profit for the year of NZ$94.1M. Total value of the group, shareholder's equity, is NZ$1.61 billion.

5.4. Saami in Sweden, Finland and Norway[81]

While there are no treaties with the Saami in Sweden, Finland or Norway, there are other positive developments worth noting. While details differ across the three countries, all have Saami Parliaments (whose roles are more in line with our concept of democratically elected "Voices" as described in the Uluru Statement from the Heart) and all mention the Saami to various degrees in their Constitutions.

The Finnish Constitution recognises the status of Saami as an Indigenous people, their rights to language and culture, and provides linguistic and cultural self-governance to Sami people over their native region. A Saami Parliament was established in Finland in 1996 following the formation of the Sami Delegation in 1973. Through their Parliament, the Saami are ensured cultural autonomy within their homeland in matters concerning language and culture on which the Saami Parliament may present policy proposals and issue policy statements to the Finnish Government. Finnish authorities are required to consult with the Saami Parliament on a wide range of matters including community planning, natural resource management, applications for mineral extraction licences, education and language and cultural issues. However, if consultations fail, the Saami Parliament does not have veto powers.

In Sweden, the Saami people are recognised in the Constitution, and a Saami Parliament was established in 1992. The Saami Parliament is largely an agency of the Swedish national government and its functions are mainly administrative, helping to administer Swedish legislation and policy.

While certain Saami rights (culture, language and way of life) are now recognised in Norway's Constitution, the Saami as a people are not. The Saami Parliament, established in 1987, promotes political initiatives and manages legislation and policies regarding Saami affairs. However, it has limited decision making ability. The Norwegian Parliament is required to consult with the Saami people on policy and legislation that directly affects the Saami people. Consistent with Finland and Sweden, the Saami Parliament does not have veto powers but in Norway, views expressed by the Saami Parliament on any proposal before the national parliament must be stated during debate. A NOK 70M fund was established by the Norwegian government in 2000 as compensation for former assimilation policies. The Saami Parliament allocates grants for cultural and linguistic activities from the interest generated from these funds.

The Saami also have some protection for their human rights language, culture and heritage under the European Union Treaty.[82]

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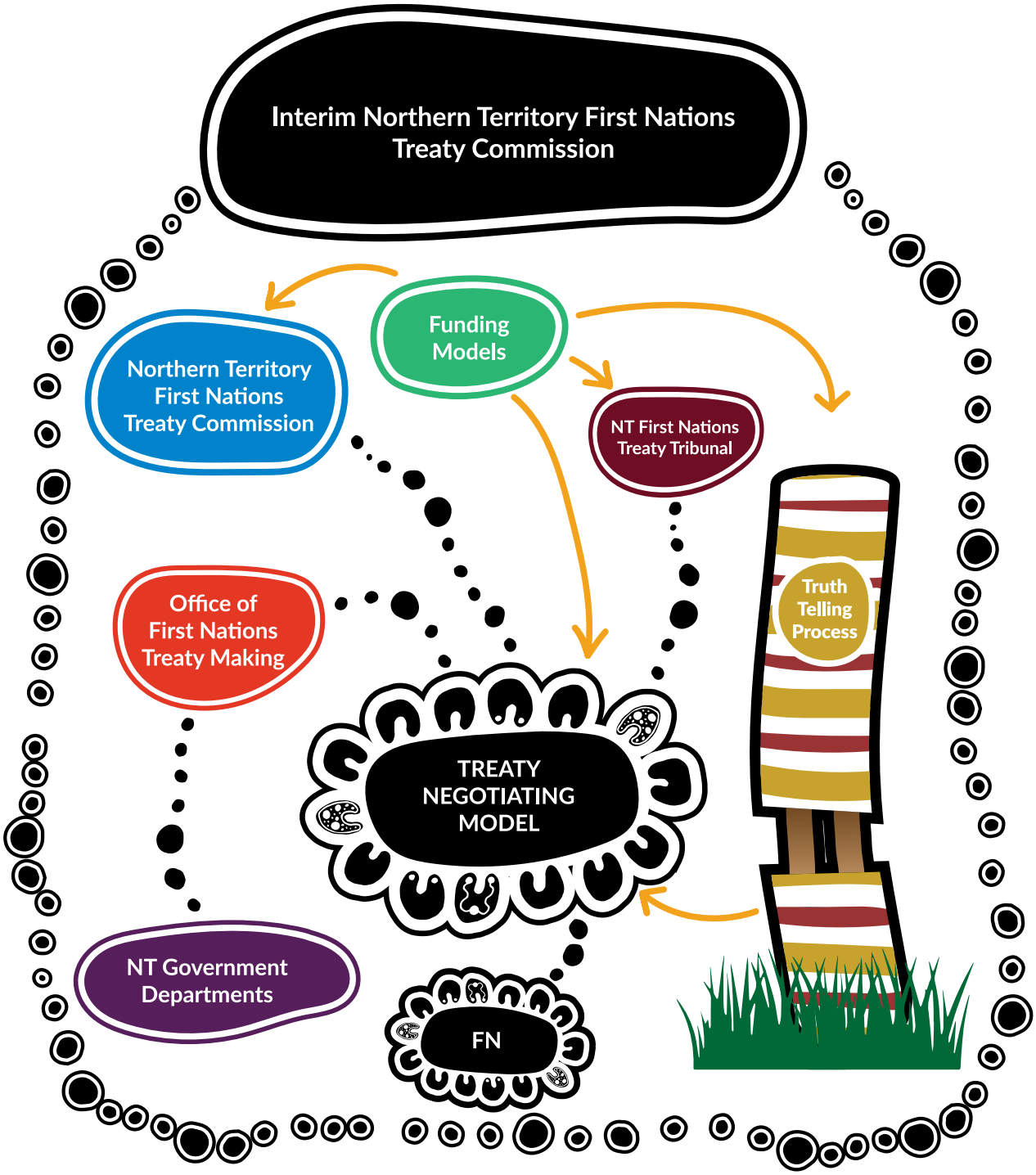
[81] All of the below sourced from "Treaties and Self Determination: Case studies from international jurisdictions" Treaty Series, Research Note No8, June 2018, Alice Petrie, Department of Parliamentary Services, Victoria.

[82] Consolidated Version of the Treaty on European Union Article 2

6. PROPOSALS FOR THE NORTHERN TERRITORY

Diagram 4
NT Treaty Framework



6.1. Proposed Framework

This section and section 6.2 propose a Framework and a Model for treaty-making in the NT that will be detailed and discussed in community consultations. The framework deals with the structure and institutions that need to be established for treaty-making whereas the model describes a process for the negotiations. The suggested Framework and Model apply learnings from BC, Aotearoa and Victoria adapted for the NT context. The proposed Framework is described in Diagram 4:

Descriptions of the framework's key component follow.

6.1.1. The Interim Northern Territory First Nations Treaty Commission – two-year limit

The first step in implementing a framework is to establish its key components. Consistent with the core values encapsulated in modern treaty-making, it is suggested that a time-limited Interim Northern Territory First Nations Treaty Commission (Interim Commission) be formed in order to create the framework's components. The Interim Commission's role will cease once legislation establishing the framework is passed and the Northern Territory First Nations Treaty Commission (NTFNTC) commences.

An interim commission with a clear majority of Aboriginal Commissioners may comrpise:

- Northern Territory Government nominated representatives;
- Aboriginal Land Council (ALC) nominated representatives;
- Aboriginal Peak Organisations (NT) Representatives;
- Community Representatives;
- Aboriginal head of the Interim Commission; and
- Deputy/Alternate Chair to be one of the Aboriginal Land Council representatives.

The Interim Commission needs to be supported by a sufficiently resourced secretariat/administrative arm. The Interim Commission's proposed roles include:

1. To oversee and provide advice on the following:

- The development of Northern Territory Treaty Legislation including, but not limited to: overall schema, minimum standards, principles, dispute resolution, minimum content, creation of The Treaty Commission and the Treaty Tribunal and the various funds;
- The development and implementation of a Truth-Telling process – which should be developed and implemented prior to other deliverables;
- Establishment of a Treaty-making fund;
- Establishment of a Self-Determination fund;
- Establishment of the permanent Northern Territory First Nations Treaty Commission; and
- Creation of the Northern Territory First Nations Treaty Tribunal

2. To develop and implement phase 1 of a Northern Territory wide education and awareness program which may or may not be done in conjunction with a Northern Territory wide truth telling process.
3. To consult widely across the Northern Territory as elements of the framework are being developed, and
4. To host a Treaty Convention involving a minimum of 200 First Nation citizens across the Northern Territory no later than June 2024 to ratify the proposed Northern Territory treaty legislation prior to its introduction to the Northern Territory Parliament.

ONGOING STRUCTURE

6.1.2. Northern Territory First Nations Treaty Commission (Treaty Commission)

The proposed Treaty Commission has been modelled on the British Columbia Treaty Commission and is independent of government. The Treaty Commission is intended to facilitate negotiations between the treaty-making parties, namely, the Northern Territory Government and Aboriginal First Nations who negotiate as 'government to government.' To preserve the integrity of the treaty making process as well as retain the trust of First Nations, it is important that the independence of the Treaty Commission from government is legislated, preserved and respected. For these same reasons, it is important that the body facilitating negotiations is not the same as the body conducting the negotiations.

The Treaty Commission will report directly to the Northern Territory Government Minister responsible for Treaty Progress. It will solely be headed by Northern Territory First Nations Commissioners as well as administrative staff and will be appropriately funded by the Northern Territory Government.

The Treaty Commission may:

- Develop the negotiation framework in detail including all processes, systems, procedures, templates and other electronic and non-electronic resources;
- Develop and implement ongoing education and awareness programmes building on the phase 1 program delivered by the Interim Commission;
- Manage grants to First Nations for:
    - Capacity building for First Nations to enable them to be treaty ready;
    - Costs of running a treaty negotiation on an equality of standing basis; and
    - A mediation process between First Nations where there are disputes
- Develop a process for treaties between First Nations and support that process;
- Develop legislation to be enacted once treaties are signed; and
- Maintain the momentum of treaty-making and facilitate effective project management once negotiations commence.

It is not proposed that the Treaty Commission would have a role in treaty implementation or dispute resolution once a treaty is legislated.

6.1.3. Northern Territory First Nations Treaty Tribunal (Treaty Tribunal)

All agreements contain dispute resolution clauses and treaties need not be an exception. Most treaty issues are expected to be settled by the parties in informal talks. But if no resolution is found, the Treaty Tribunal will be an independent tribunal with powers and functions to:

- Conciliate and arbitrate disputes either during or post-implementation;
- Make findings of fact; and
- Make recommendations for dispute resolution

It is proposed that the Treaty Tribunal may:

- Comprise Aboriginal and Non-Aboriginal membership;
- Have a maximum of five members with an Aboriginal majority;
- Have an Aboriginal person as the Chair. The Chair will be chosen by agreement between the Northern Territory Government, the Land Councils and the peak organisations; and
- Have at least one other member who must have legal qualifications and relevant experience.

The remaining four members could be chosen as follows:

- The Northern Territory Government to choose one member;
- The Northern Territory Aboriginal Land Councils to choose two members; and
- The peak Northern Territory Aboriginal organisation to choose one member

The NT Treaty Tribunal will commence operations once the implementation of the first local treaty begins and will sit as needed.

6.1.4. Office for First Nation Treaties (Treaty Office)

The Treaty Office will be a new Northern Territory Government authority modelled on New Zealand's Te Arawhiti (Office of Maori Crown Relations). Its role will be very different to that of the Treaty Commission and it is important that its role is conducted very separately to it.

Its primary task will be to coordinate all government responses to treaty-making from the Northern Territory Government and ensure good faith establishment, implementation and compliance once treaties are settled. The work of the Treaty Office will include identifying existing legislation that may be inconsistent with the treaty path and taking steps to resolve those inconsistencies. For example, there may be inconsistencies between a proposed model of self-government and the *Local Government Act (NT)*.

The Treaty Office's primary functions could include:

- Lead government treaty negotiations under direction of the Minister responsible for treaty negotiations;
- Ensure the government meets its Treaty commitments in good faith and in a timely manner;
- Negotiate funding with other governments;
- Develop engagement, co-design and partnering principles that ensure Northern Territory Government agencies operate appropriately;
- Ensure public sector capability to work with First Nations in a respectful and culturally competent manner is strengthened; and
- Ensure the engagement of public sector agencies with First Nations is meaningful.

To prevent actual and perceived conflict of interest, the NT Treaty Office will report to a different Minister to that of the Minister for the NT Treaty Commission.

6.1.5. Funding

The following funding will be required to implement the proposed framework and model:

- A treaty making fund to finance the treaty-making process (including grants to First Nations to run the negotiation process and mediate disputes between First Nations where necessary). Accumulations should start in the first financial year after recommendations in the Treaty Commissioner's Final Report are endorsed;
- A Future Fund or Self-Determination Fund for capacity building and to meet the cash component of settlements. Accumulations should start in the first financial year after recommendations in the Treaty Commissioner's Final Report are endorsed;
- Operations of the Interim Commission;
- Operations of the Treaty Commission;
- Operations of the Treaty Tribunal;
- Operations of the Treaty Office for First Nations Treaty Making; and
- Transfer of service delivery budgets post treaty.

6.1.6. Truth Telling Process

Timing

Because so many of the stories important to be recorded reach back in time, Aboriginal Elders will tell them. Some of our Elders are very old, many hold in their memories unique experiences of the past. The process of truth telling must begin as soon as possible. It is urgent.

Treaty negotiations will not begin, at best, for a number of years. **Truth telling must start well before that.**

Setting

There is another reason to separate the two processes. It is to be hoped that treaty negotiations will not only be conducted in good faith, but in a spirit of cooperation. But it would be naïve to think that there will not be disagreements. Some disagreements may well relate to what are

proportionate reparations for past events. Questions of fact may be in dispute. This is not the kind of setting for Aboriginal people, particularly Elders, to tell their stories and recall memories of their childhood.

Fact-finding, and the testing of historical fact, in treaty negotiations should be separate to the truth telling process. The recounting of personal histories as truth-telling that may be highly emotionally charged should be done in an empathetic and culturally comfortable setting. They should be told in the language in which the teller is most at home. The telling should be supported by a trained facilitator and counsellors. And the lines should not be blurred. By its very nature, integrity in truth telling is its foundation. It is not a negotiation and should not be caught up in a negotiation process.

Northern Territory Truth Telling Institute

A neutral institutional setting would best serve the purposes of truth-telling. It should be in a place where all Territorians feel able to come and that they trust. To manage costs, it would be useful if it was a specialist arm of an existing institution. A Northern Territory Truth Telling Institute would be required to fulfil its role over three-years.

Options include:

- the Land Councils – which already have significant historical repositories;
- the Library of the Supreme Court of the Northern Territory;
- the Northern Territory Library;
- NT Archives; or
- Charles Darwin University.

The functions of the Truth Telling Institute could consist of:

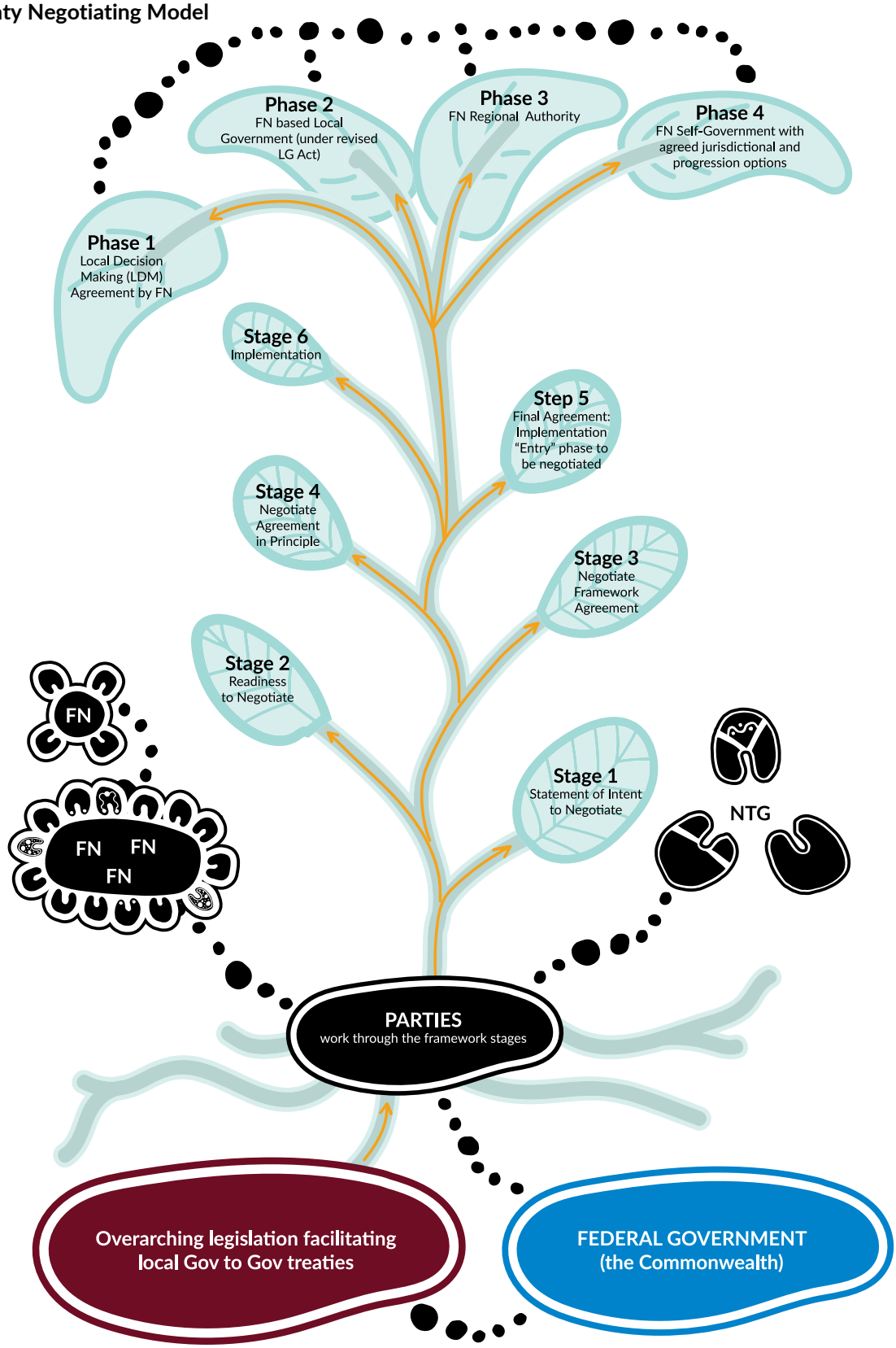
- Recording, cataloguing and creating and keeping records;
- Provision of access while protecting privacy and agreed terms of use;
- Research and liaison with other cultural and research bodies; and
- Produce Annual Reports and then a final report.

There may be other services or functions performed by the institution which would help defray establishment and running costs, provided they are consistent with the truth telling process.

6.2. Proposed Northern Territory First Nations Treaty Negotiating Model

As discussed in the introduction to section 6.1, the proposed model describes a process by which treaties can be negotiated. Diagram 5 depicts the proposed negotiating model and its elements are then described in more detail.

Diagram 5
NT Treaty Negotiating Model



These are the key elements of the Model:

6.2.1. Parties

As noted in the previous section 6.1, a Treaty Commission is intended to facilitate negotiations between the treaty-making parties, namely, the Northern Territory Government and Aboriginal First Nations who negotiate 'government to government,' as distinct polities. At this stage it is assumed that the Commonwealth will not be a party to Northern Territory treaties.

Key issues to be addressed by the First Nation government prior to beginning negotiations include:

- Creating a formal governing body;
- Ensuring that its land tenure is secure and there are no disputes;
- Ensuring that its land borders are not disputed; and
- Settling a process for determining citizenship; noting that it will be up to each First Nation to determine its own method of conferring citizenship and different First Nations may select different methods.

Side treaties or other agreements between First Nations that deal with some or all the above issues may also be made.

6.2.2. Negotiation Process

There is no need to reinvent the wheel when contemplating a negotiating process. The British Columbian six stage process is endorsed as a comprehensive, simple to understand and proven process that can be adapted to the NT.

Stage 1: Statement of Intent (SOI) to Negotiate Submitted by the First Nation

The SOI would need to:

- Identify the First Nation's governing body for treaty purposes;
- Identify the people that the governing body represents;
- Show that the governing body has a mandate from those people to enter the process;
- Describe the geographic area of the First Nation's distinct traditional territory; and
- Identify any boundary or other issues with other First Nations.

The NT Treaty Commission will determine when the First Nation is able to proceed to Stage 2 and will provide financial and other assistance to the FN for activities including capacity building, legal costs and meeting costs.

Stage 2: Readiness to Negotiate

A checklist of matters that need to be demonstrated by both the Northern Territory Government and the First Nation will be developed and assessed by the NT Treaty Commission, which will determine when negotiations can progress to Stage 3. It is critical there will be an understanding there is equality of standing between the parties in the negotiating process. Equally critical, is that the Northern Territory public service has the capability to deliver a treaty settlement in the spirit of the relationship and agreed negotiating principles.

Stage 3: Negotiation of a Framework Agreement

The framework agreement is, in effect, the "table of contents" of the Treaty. Section 2.4 of this Discussion Paper deals with the potential scope and contents of treaties in some detail. During this stage, the parties need to agree on the subjects of negotiation. While there are likely to be some compulsory inclusions in all treaties, nothing should be off the table.

Stage 4: Negotiation of an Agreement in Principle

Substantive treaty negotiations begin in this stage and the parties need to discuss the elements outlined in their Framework Agreement in detail. The goal in this process is to reach agreement on each of the topics that will form the basis of

the Treaty. The Agreement in Principle also lays the groundwork for implementation of the Treaty.

Stage 5: Negotiation to Finalise a Treaty

The parties attempt to resolve all technical and legal issues in this stage so that the Final Agreement can be ratified and signed by the parties. Other key considerations in this stage need to be timing, funding and the responsibilities of each party.

This stage concludes when First Nation's citizens vote on and approve the Final Agreement and the First Nation's Constitution. A successful vote should require more than a simple majority. For example, in British Columbia, 50% plus one of all those on the list of eligible voters must vote to ratify both the Final Agreement and the Constitution. This is a higher standard than ratification by a majority vote who vote on the day and is designed to enhance the mandate.

Stage 6: Implementation of the Treaty

As each treaty will be unique, its implementation will also be unique and have differing timeframes and milestones.

Four post treaty entry phases, with each successive phase representing a more advanced level of self-determination will be available and can be selected by the first Nation. However, there will be no compulsion for the First Nation to progress either to the end phase or any other phase. The four entry phases are:

Phase 1: Legally Enforcable Local Decision Making (LDM) Agreements with a First Nation

LDM Agreements are effectively service delivery agreements and vary in scope and breadth. The LDM framework has a staged progression:

	LEVEL	DESCRIPTION
1	INFORM	Government led, no formal mechanisms
2	CONSULT	Government led – public feedback mechanisms at various times
3	INVOLVE	Government led – formal advisory mechanisms
4	COLLABERATE	Community led – Government funded, co designed and monitored
5	EMPOWER	Aboriginal controlled organisations delivering services

To be consistent with the underlying philosophies of treaties described earlier in this Discussion Paper, it is envisaged that the minimum entry point in a treaty implementation will be Level 4. Consideration of an overarching LDM Agreement that provides a cohesive service delivery plan for the First Nation and avoids the pitfalls of "silo" thinking should be considered in this phase.

Different services, e.g. Education, Housing or Health, may have different level LDM agreements at any point in time and it will be up to the First Nation to determine its own aspiration for each service should it choose this treaty entry phase.

This entry phase does not deliver a form of self-government but may be a good starting point for developing First Nations; especially if existing LDM agreements are relatively new.

Phase 2: Local Government Body

The First Nation will assume all local government responsibility for their nation's land holding area as well as having the choice to continue all LDM agreements in place. Additional LDMs can also be negotiated. Amendments to the *Local Government Act NT* may be required to facilitate this phase.

Phase 3: Regional Authority (RA)

In addition to the First Nation assuming all local government responsibilities, under a RA the First Nation also delivers all key Northern Territory government services on its country. However, outside of local government regulations, there is no ability for the First Nation to make laws in this phase.

Phase 4: First Nations Self-Government

This option provides full self-government along the lines occurring in British Columbia. The terms of the self-government arrangement are detailed in each BC treaty, but include law making and tax raising powers and service delivery arrangements.

6.2.3. Federal Government

Section 4 in this Discussion Paper discusses the legal context of treaties in the Northern Territory (NT) and describes the control that the Commonwealth can exercise over the NT:

The Commonwealth also has complete power over the governance of any Australian Territory under section 122 of the Commonwealth of Australia Constitution Act 1900 (C'th) (the Constitution). The Commonwealth has the legislative power to void any treaty enacted by the Northern Territory and to amend the Northern Territory (Self-Government) Act, expressly withdrawing any power to conclude a treaty with First Nations. This fact highlights the role the Commonwealth has in ensuring that any treaty with First Nations in the Northern Territory will have meaningful and lasting legal effect.

Due to this potential to override the NT, the role of the Commonwealth must be considered as part of any NT model and options to minimise the risk of the Commonwealth exercising its powers to override NT treaties need to be considered. Options to protect the NT's position include:

- Constitutional inclusion;
- The Commonwealth becoming a party to treaties; creating a tripartite process like in British Columbia, Canada;
- Passing legislation that supports NT treaties;
- Documented federal policy position supporting NT treaties; or
- Statements by the Executive congratulating, applauding, or supporting NT progress.

The Commonwealth will also have a funding role.

7. Conclusion

Section 1 introduced the Discussion Paper and Section 2 comprises a detachable Executive Summary.

Section 3 Details provides factual information about what treaties are; why treaties are needed in the Northern Territory; what could go into treaties what minimum standards and principles should apply.

Section 4 details the complex legal context of treaties in the NT. Most of the complexities surround the fact that the NT is a Territory and not a state and that federal legislation has a huge influence on what happens in the NT.

Section 5 goes into the detail of the status of treaty-making development nationally and internationally.

Armed with this knowledge, Section 6 proposes a treaty-making framework and model that may work in the NT.

The Executive Summary at the beginning of this Discussion Paper will be translated into oral recordings in plain English as well as the major First Nations Languages including ES and WS Kriol and will be placed on the Commission's web site.

This information should provide the basis for the Commission to conduct productive and informed community consultations over the next 18 months. Those consultations will primarily be on country and will be assisted by interpreters sourced through the Aboriginal Interpreter Service.

The suggestions and other feedback from the consultations will influence how the Commission's Final Report to the Chief Minister in early 2022 looks. That Final Report will:

- Detail the outcomes of consultations;
- Make recommendations on next steps; and
- Propose a negotiation framework for Treaty to proceed in the Northern Territory.

Whilst the Commission will try to talk to as many Aboriginal people in the Territory as possible over the next 18 months, we will not be able to get everywhere or talk to everyone. We are therefore encouraging written, oral and audio-visual responses to the Discussion Paper. We ask that all submissions are constructive and respectful. Submissions need to be provided by 30 June 2021 and can be submitted:

By Email: to admin@treatynt.com.au or

By post to: NT Treaty Commission
GPO Box 2096 Darwin NT 0801

Additional information can also be obtained from our web site: www.treatynt.com.au

7.1. Acknowledgement

We thank all those Aboriginal people and their organisations who have met with the Commission since we began this story and we are honoured that they have shared their stories with us.

The compilation of documents such as this Discussion Paper is rarely the work of a single researcher and author. This paper is a group effort and I wish to acknowledge and thank the team at the Treaty Commission for their valuable contributions to this document. I therefore express my deep appreciation to: Ms Ursula Raymond, Deputy Commissioner, editor, researcher and writer; Mr Steve Rossingh, Treaty Commission Director, editor, researcher and writer; Mr David Allen, consultant, researcher and writer; Ms. Saskia Roberts[83], research officer and writer; and Mr Thomas Snowdon(Volunteer) researcher and writer, and Dr Kellie Pollard,[84] Editor . Thanks also to Mr Cian McCue of Moogie Down Productions for graphic design. Finally, and extremely importantly, Ms Sandra DeSantis, our Executive support officer, who with professional aplomb and efficiency kept the administrative and logistical cogs a churning.

[83] Special thanks to Professor Brian Schmidt, Vice-Chancellor, Australian National University, for appointing and resourcing Ms Roberts' position as my research officer in my role as Emeritus Professor at the ANU College of Law.

[84] Special thanks to Professor Reuben Bolt, OPVCIL, Charles Darwin University, for appointing and resourcing Dr Kelly Pollard editor.

8. Appendices

8.1. The Barunga Statement, A Memorandum of Understanding 2018

THE BARUNGA AGREEMENT

A MEMORANDUM OF UNDERSTANDING TO PROVIDE FOR THE DEVELOPMENT OF A FRAMEWORK FOR NEGOTIATING A TREATY WITH THE FIRST NATIONS OF THE NORTHERN TERRITORY OF AUSTRALIA

BETWEEN

THE NORTHERN LAND COUNCIL (NLC), THE CENTRAL LAND COUNCIL (CLC), THE ANINDILYAKWA LAND COUNCIL (ALC) AND THE TIWI LAND COUNCIL (TLC)

(THE ABORIGINAL LAND COUNCILS)

and

THE NORTHERN TERRITORY GOVERNMENT

(THE NTG)

The Aboriginal Land Councils are independent statutory authorities established under the *Aboriginal Land Rights (Northern Territory) Act 1976* to express the wishes and protect the interests of traditional owners throughout the Northern Territory. The members of the Land Councils are elected by Aboriginal people living in their areas. The NLC and CLC are also Native Title Representative Bodies recognised under the *Native Title Act 1993* to promote the interests of native title holders across the Territory ('Traditional owners' include native title holders).

The NTG is the democratic, representative and executive arm of the Northern Territory. Its functions and powers derive from the *Northern Territory Self Government Act 1978*, which established the Northern Territory of Australia as a body politic under the Crown.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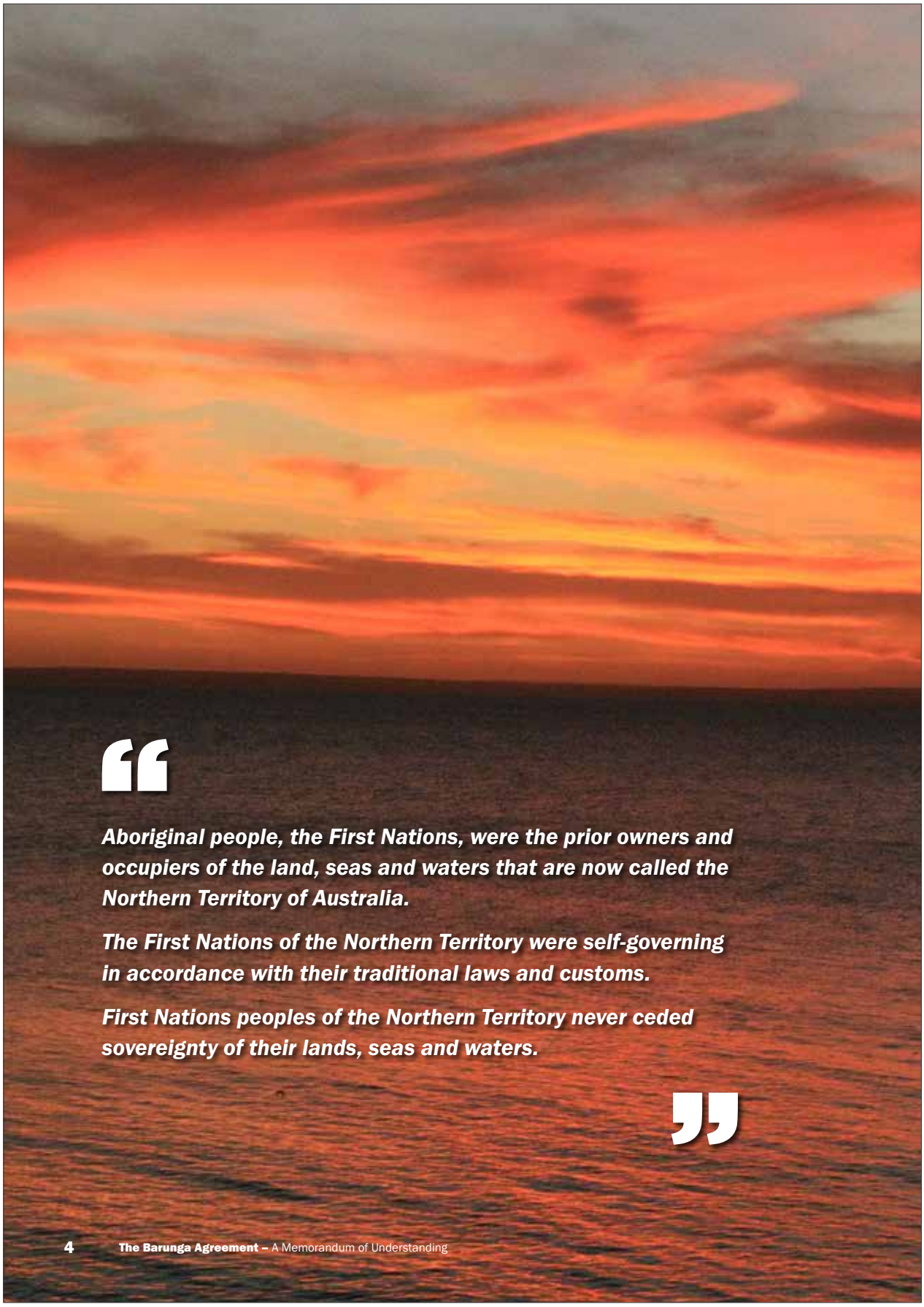
“
Aboriginal people, the First Nations, were the prior owners and occupiers of the land, seas and waters that are now called the Northern Territory of Australia.
The First Nations of the Northern Territory were self-governing in accordance with their traditional laws and customs.
First Nations peoples of the Northern Territory never ceded sovereignty of their lands, seas and waters.
”

Background to the Memorandum of Understanding:

This Memorandum of Understanding (MOU) represents the first significant step in advancing a Treaty in the Northern Territory since the call for a national Treaty in the historic Barunga Statement by the Northern and Central Land Councils.

The Barunga Statement was presented to former Prime Minister, RJ Hawke AC, by Mr Galarrwuy Yunupingu AM and Mr Wenten Rubuntja at the annual Barunga Cultural and Sporting Festival on 12 June 1988.

The text of the Barunga Statement is as follows:

We, the Indigenous owners and occupiers of Australia, call on the Australian Government and people to recognise our rights:

- *to self-determination and self-management, including the freedom to pursue our own economic, social, religious and cultural development;*
- *to permanent control and enjoyment of our ancestral lands;*
- *to compensation for the loss of use of our lands, there having been no extinction of original title;*
- *to protection of and control of access to our sacred sites, sacred objects, artefacts, designs, knowledge and works of art;*
- *to the return of the remains of our ancestors for burial in accordance with our traditions;*
- *to respect for and promotion of our Aboriginal identity, including the cultural, linguistic, religious and historical aspects, and including the right to be educated in our own languages and in our own culture and history;*
- *in accordance with the universal declaration of human rights, the international covenant on economic, social and cultural rights, the international covenant on civil and political rights, and the international convention on the elimination of all forms of racial discrimination, rights to life, liberty, security of person, food, clothing, housing, medical care, education and employment opportunities, necessary social services and other basic rights.*
- *We call on the Commonwealth to pass laws providing:*
- *A national elected Aboriginal and Islander organisation to oversee Aboriginal and Islander affairs;*
- *A national system of land rights;*
- *A police and justice system which recognises our customary laws and frees us from discrimination and any activity which may threaten our identity or security, interfere with our freedom of expression or association, or otherwise prevent our full enjoyment and exercise of universally recognised human rights and fundamental freedoms.*

We call on the Australian Government to support Aborigines in the development of an international declaration of principles for indigenous rights, leading to an international covenant.

And we call on the Commonwealth Parliament to negotiate with us a Treaty recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedom.

The call for the Commonwealth Parliament to negotiate a national Treaty has yet to be realised. However, thirty years later, the Aboriginal Land Councils remain fully committed to the goals and aspirations articulated in the Barunga Statement.

The NTG, for the first time in its history, is also committed to commencing discussions on developing a Treaty (or Treaties) in the Northern Territory with Aboriginal Territorians. It has established an Aboriginal Affairs Sub-Committee of the Northern Territory Cabinet to advance a number of Aboriginal Affairs priorities including a Treaty.

The Aboriginal Land Councils wrote to the Chief Minister of the Northern Territory on 2 March 2018 proposing to reach an MOU with the NTG outlining a consultation process for a Treaty with Aboriginal people that is led by Aboriginal people.

At an historic meeting between the Aboriginal Land Councils and the NTG on 23 March 2018 in Alice Springs it was agreed to establish a Treaty Working Group to develop the MOU.

It is intended that this MOU provides the opportunity, building on the significance of the 30th anniversary of the Barunga Statement, to facilitate consultation with all Aboriginal people in the Northern Territory to allow for a framework to be agreed for negotiating a Treaty.

Subject to the *Northern Territory (Self-Government) Act 1978*, the Legislative Assembly has power, with the assent of the Administrator or the Governor General to make laws for the peace, order and good government of the Territory.

It is acknowledged that there is a range of Aboriginal interests in the Northern Territory and that all Aboriginal people and their representative bodies must have the opportunity to engage fully in the process agreed to in this MOU.

It is further acknowledged that non-Aboriginal Territorians need to be brought along with this process.

It is understood that the use of the word Treaty in this MOU also includes the plural "Treaties" should the proposed framework include provision for negotiating multiple treaties.

IT IS AGREED BY THE NORTHERN LAND COUNCIL, THE CENTRAL LAND COUNCIL, THE ANINDILYAKWA LAND COUNCIL AND THE TIWI LAND COUNCIL and THE NORTHERN TERRITORY GOVERNMENT as follows:

Principles Guiding the Treaty Consultation Process

1. It is envisaged that should a Treaty ultimately be negotiated, it will be the foundation of lasting reconciliation between the First Nations of the Territory and other citizens with the object of achieving a united Northern Territory.
2. All Aboriginal people of the Northern Territory need to be heard and the consultation process agreed to in this MOU needs to be inclusive, accessible and transparent to all.
3. Traditional owners, as the original owners and occupiers of the Northern Territory, and represented by the Aboriginal Land Councils, are integral to consultation concerning a Treaty.
4. All Territorians should ultimately benefit from any Treaty that is agreed in the Northern Territory.
5. The NTG must not exclude from discussions any legitimate issue raised by the Parties or other Aboriginal people for inclusion in a Treaty while the consultation process agreed to in this MOU is underway.
6. It is agreed that:
    a) Aboriginal people, the First Nations, were the prior owners and occupiers of the land, seas and waters that are now called the Northern Territory of Australia.
    b) The First Nations of the Northern Territory were self-governing in accordance with their traditional laws and customs; and that
    c) First Nations peoples of the Northern Territory never ceded sovereignty of their lands, seas and waters.
7. It is also agreed 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 a legacy of trauma, and loss that needs to be addressed and healed.
8. The Treaty must provide for substantive outcomes and honour the Articles of the United Nations Declaration on the Rights of Indigenous Peoples.


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8 **The Barunga Agreement –** A Memorandum of Understanding

9. Recognising that a Treaty is of much wider significance than a normal agreement between the State and Indigenous peoples, it is also recognised that Treaty making involves the acceptance of responsibilities and obligations by all parties;

10. The Treaty should aim to achieve successful co-existence between all Territorians that starts with 'truth telling' which involves hearing about, acknowledging and understanding the consequences of the Northern Territory's history.

Objectives of the Memorandum of Understanding:

The objective of this MOU is to agree about and to implement a consultation process to be led by an independent Treaty Commissioner, which will inform the development of an agreed framework to negotiate a Northern Territory Treaty.

This framework may focus on, but not be limited to, the following areas:

- Agreement as to what a Treaty is and its potential contents;
- What a Northern Territory Treaty will seek to achieve;
- Whether there should be one or multiple treaties;
- What outcomes are possible under a Treaty for Aboriginal people that encompass recognition as First Nations, rights, obligations and opportunities; and
- What the best process is for negotiating a Treaty.

The key objective of any Treaty in the Northern Territory must be to achieve real change and substantive, long term, benefits for Aboriginal people. A Treaty needs to address structural barriers to the wellbeing of Aboriginal people in the Northern Territory and provide for economic, social and cultural benefits.

Appointment of an Independent Treaty Commissioner

The NTG will appoint an independent Aboriginal person as Treaty Commissioner. The appointment, role and functions of the Treaty Commissioner will be enacted in legislation, the contents of which shall be agreed by the parties.

In the interim the Chief Minister shall appoint the Treaty Commissioner to consult, inquire, report and make recommendations in accordance with Terms of Reference agreed by the parties. The Terms of Reference shall outline, in accordance with this MOU, the role, responsibilities, outputs, reporting requirements, term of appointment and qualifications of the Treaty Commissioner.

The role and functions are to include:

1. Consultation with all Aboriginal people and their representative bodies in the Northern Territory about their support for a Treaty and on a suitable framework to further Treaty negotiations with the NTG;

2. Providing a public report to the Chief Minister on the outcomes of the consultation process and a proposed framework for Treaty negotiations; and

3. Facilitating conversations for a possible Treaty framework process between the NTG, Aboriginal Land Councils and other Aboriginal representative bodies, and community groups.

The Treaty Commissioner will be independent of the NTG and Aboriginal Land Councils. The reasonable costs of a Treaty Commissioner to perform the roles and functions and achieve the objectives listed in this agreement, will be paid for by the NTG.

Consultation Process

The Treaty Commissioner will devise and implement an Aboriginal-led consultation program after discussions with the Treaty Working Group. That program will have two stages and include:

- In the first stage (to take no more than 12 months), advising and sharing information and ideas about different experiences nationally and internationally and models of what a Treaty could be with Aboriginal Territorians;
- Explanations of the legal context of a Northern Territory Treaty;
- Initial consultations to determine the level of interest in a Treaty amongst Aboriginal Territorians and the provision of an interim report by the Treaty Commissioner to the Chief Minister to be tabled in the Legislative Assembly;
- At the start of the second stage, release of a public Discussion Paper to help facilitate informed discussions among Aboriginal people that are focussed on reaching a consensus on particular positions with respect to a Treaty;
- Translating the Discussion Paper into the major Aboriginal languages in the Northern Territory (including audio translations) by the Northern Territory Aboriginal Interpreter Service;
- Multiple methods for Aboriginal Territorians to give feedback;
- Consultations will follow a structured and principled process utilising an identical agenda for consistency across locations;
- Land councils will provide advice to the Treaty Commissioner on locations for regional and remote consultations taking into account small, medium and large communities and homelands; and
- A final report on outcomes of consultations about a possible Treaty and proposing a framework for a Treaty to proceed. The report is to be provided to the Chief Minister within 18 months of the conclusion of the first stage, tabled in the Northern Territory Legislative Assembly and shall be publicly released by the Chief Minister within 21 days of its receipt.

Coordination and Support

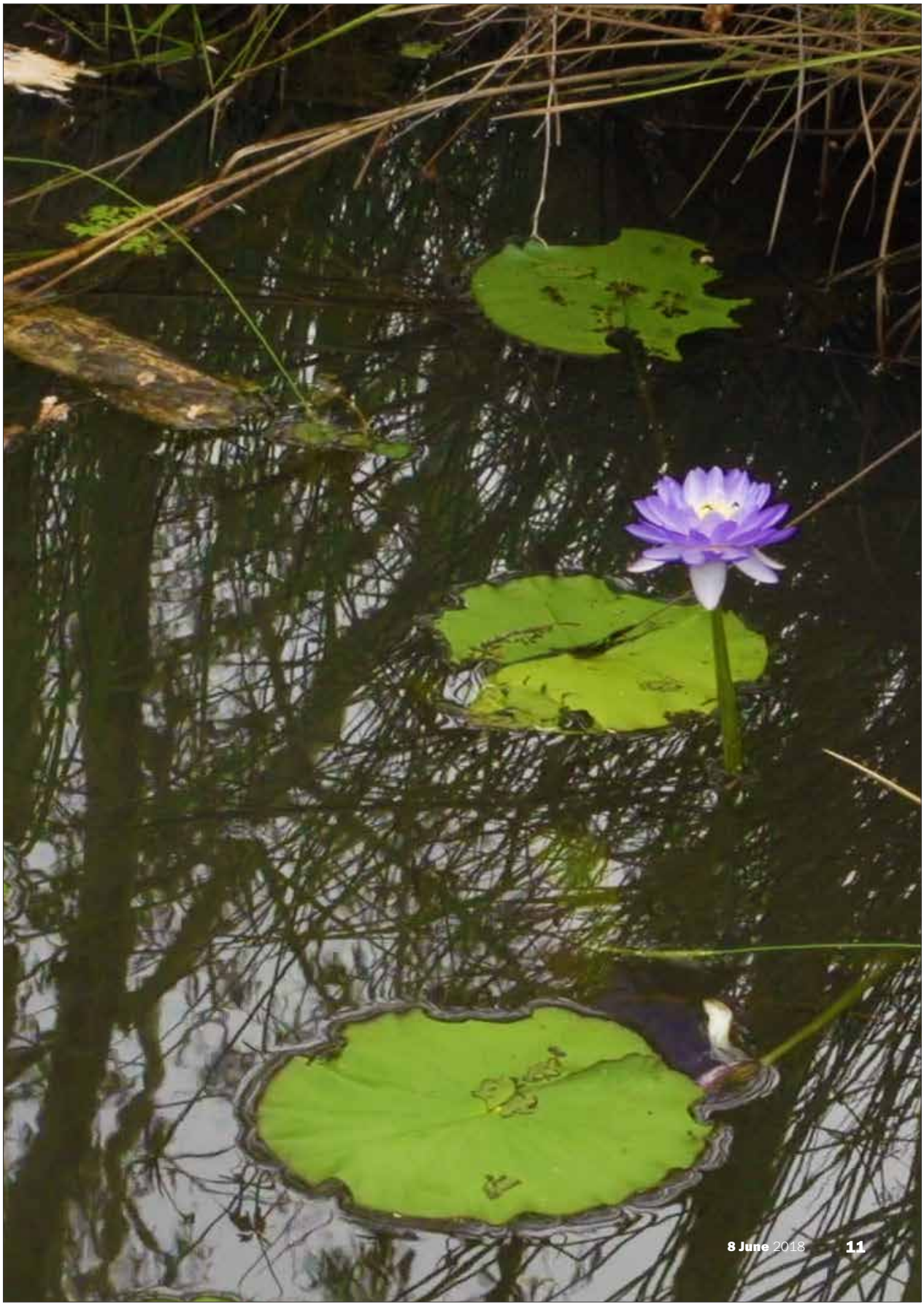
The NTG and the Land Councils will cooperate to support the consultation process to be undertaken by the Treaty Commissioner in regional and remote locations.

The Parties will work together with the Treaty Commissioner to establish consultation protocols for Treaty matters. This will include ensuring the ongoing cooperation of all Parties in consultations across the Northern Territory and the provision of consistent information. Respective parties will also keep the Treaty Commissioner informed of any discussions concerning a Treaty to enable all Aboriginal voices to be heard by the Commissioner.

Treaty Working Group

The Northern Territory Treaty Working Group membership will continue to comprise senior representatives of the NTG and Aboriginal Land Councils. However, by agreement, after the signing of the MOU, its membership will be reviewed and opened up to other Aboriginal representative bodies and community groups in the Northern Territory to also participate.

After the appointment of the Treaty Commissioner the continuation and terms of reference for the Treaty Working Group will be further reviewed.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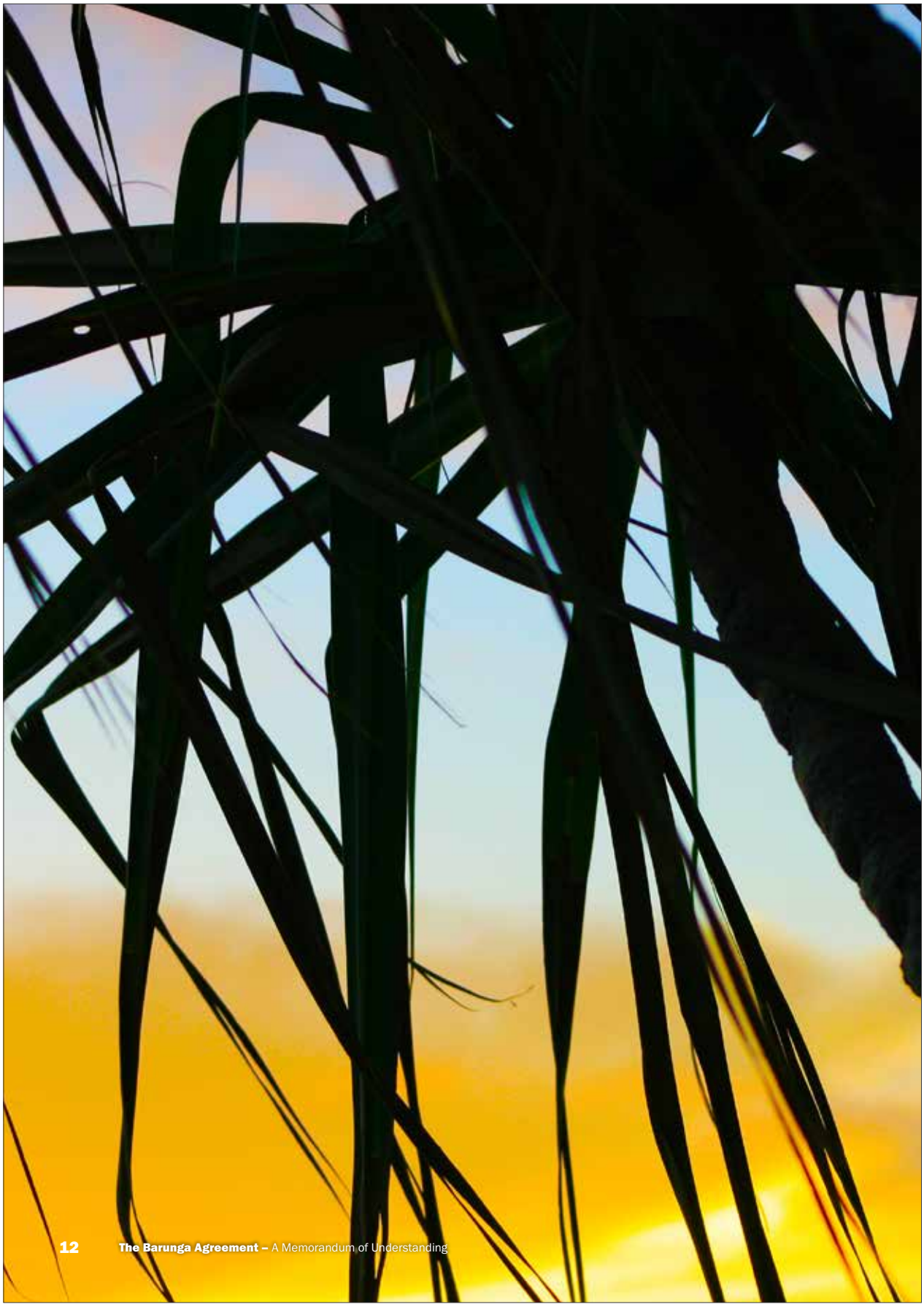

Related Matters

Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples

At the time this MOU is being signed, the Commonwealth Parliament has established a Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples 2018.

This follows a constitutional convention on 23-26 May 2017 that brought together over 250 Aboriginal and Torres Strait Islander leaders at the foot of Uluru in the Northern Territory on the lands of the Aṉangu people. The majority resolved, in the 'Uluru Statement from the Heart', to call for the establishment of a 'First Nations Voice' in the Australian Constitution and a 'Makarrata Commission' to supervise a process of 'agreement-making' and 'truth-telling' between governments and Aboriginal and Torres Strait Islander peoples.

The NTG and Aboriginal Land Councils agree to contribute to the deliberations of the Joint Select Committee and hope that it will be possible to achieve constitutional recognition that also includes a Commonwealth Treaty making process.

Negotiating a Northern Territory Treaty does not remove the need for a Treaty at a national level, accompanied by 'truth telling' or a voice to the Parliament.

A Northern Territory Treaty cannot address all the consequences of the British taking control of the land, seas and waters of the Northern Territory and its legacy of injustice. A Federal Treaty process is a crucial next step in our journey as a nation.

Status of the Memorandum of Understanding

The Parties do not intend any of the provisions of this Agreement to be legally enforceable. However, that does not lessen the commitment of the Parties to fully implementing the Agreement in a transparent, consultative and accountable manner.

To facilitate this, it is agreed by the Parties that the Agreement will be published immediately on the websites of the Parties once it is signed and tabled in the Legislative Assembly as soon as possible and that quarterly updates will be made publicly available by the Treaty Commissioner.

Timeframe, Modification and Termination

The term of this MOU is for a period of three years, starting on 8 June 2018, unless otherwise extended or terminated.

Any modification or extension of this Memorandum must be in writing and signed by all parties.

It is not intended that any party will seek to withdraw from this Memorandum. However, should they contemplate doing so, it is agreed that this should be a last resort because one or more parties are unable to resolve their concerns and only after consulting with all other parties and doing their utmost to settle differences in the interests of all Territorians.

EXECUTED AS A MEMORANDUM on this eighth (8th) day of June 2018 at Barunga, Northern Territory.

The Honourable Michael Gunner MLA Chief Minister of the Northern Territory
for and on behalf of the Northern Territory of Australia

Chair of Northern Land Council

Chair of Anindilyakwa Land Council

Chair of Central Land Council

Chair of Tiwi Land Council


8 June 2018
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NORTHERN
LAND COUNCIL
Our Land, Our Sea, Our Life

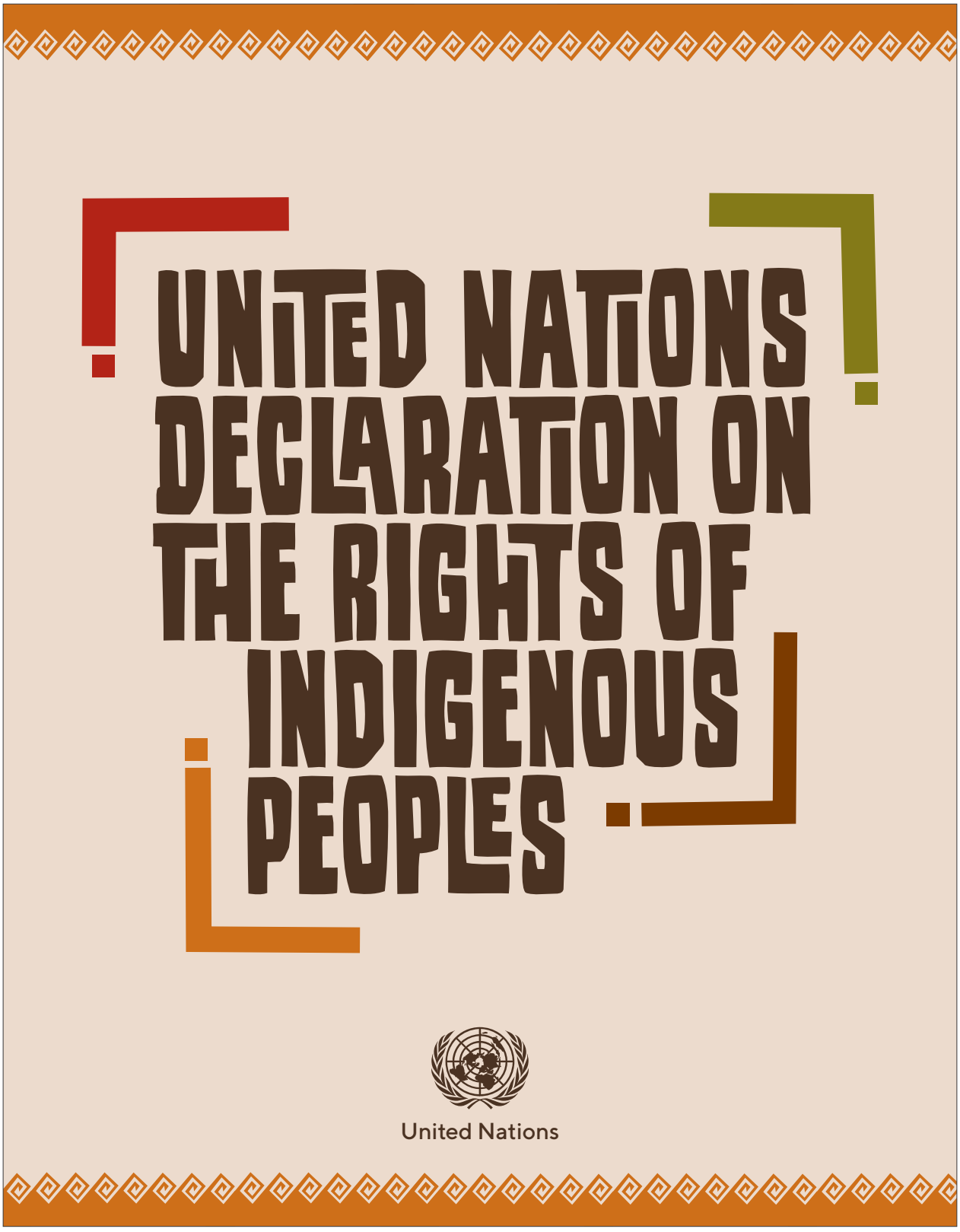

CENTRAL
LAND
COUNCIL


TIWI
LAND
COUNCIL


Anindilyakwa
Land
Council


NORTHERN
TERRITORY
GOVERNMENT

8.2. United Nations Declaration on the Rights of Indigenous Peoples 2007



UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

United Nations

Resolution adopted by the General Assembly on 13 September 2007

[without reference to a Main Committee (A/61/L.67 and Add.1)]

61/295. United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006[1], by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

1 See Official Records of the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53), part one, chap. II, sect. A.

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

107th plenary meeting
13 September 2007

Annex

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples

affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights[2] and the International Covenant on Civil and Political Rights,[2] as well as the Vienna Declaration and Programme of Action,[3] affirm the fundamental importance of the right to self-determination of all peoples, by

2 See resolution 2200 A (XXI), annex.

3 A/CONF.157/24 (Part I), chap. III.

virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all

human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights[4] and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

4 Resolution 217 A (III).

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

   (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

   (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

   (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

   (d) Any form of forced assimilation or integration;

   (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future genera-

tions their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including

those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous

cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect

their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take

the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the

right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and

appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and re-

spect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective

remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

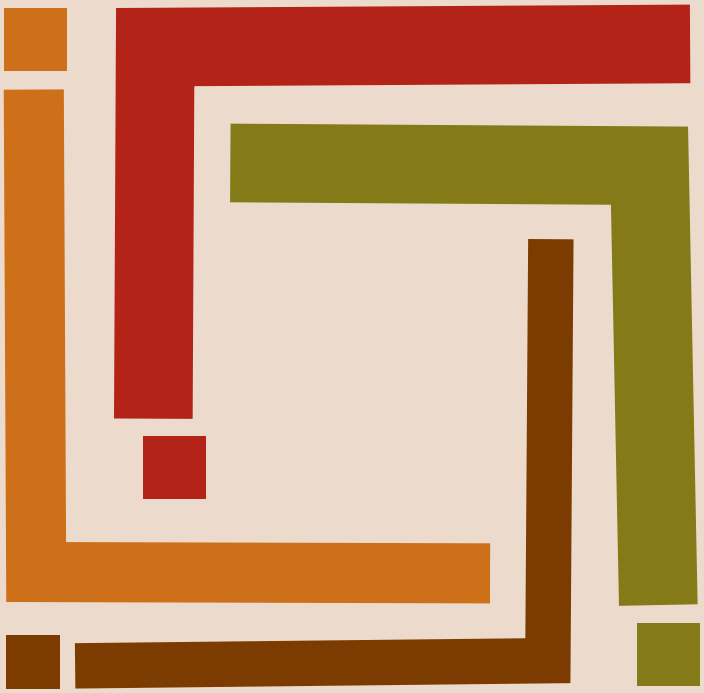
Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismem-

ber or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.



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8.3. The "van Boven" Principles

BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND HUMANITARIAN LAW

The duty to respect and to ensure respect for human rights and humanitarian law

1. Under international law every State has the duty to respect and to ensure respect for human rights and humanitarian law.

Scope of the obligation to respect and to ensure respect for human rights and humanitarian law

2. The obligation to respect and to ensure respect for human rights and humanitarian law includes the duty: to prevent violations, to investigate violations, to take appropriate action against the violators, and to afford remedies and reparation to victims. Particular attention must be paid to the prevention of gross violations of human rights and to the duty to prosecute and punish perpetrators of crimes under international law.

Applicable norms

3. The human rights and humanitarian norms which every State has the duty to respect and to ensure respect for, are defined by international law and must be incorporated and in any event made effective in national law. In the event international and national norms differ, the State shall ensure that the norm providing the higher degree of protection shall be applicable.

Right to a remedy

4. Every State shall ensure that adequate legal or other appropriate remedies are available to any person claiming that his or her rights have been violated. The right to a remedy against violations of human rights and humanitarian norms includes the right of access to national and international procedures for their protection.
5. The legal system of every State shall provide for prompt and effective disciplinary, administrative, civil and criminal procedures so as to ensure readily accessible and adequate redress, and protection from intimidation and retaliation.

Every State shall provide for universal jurisdiction over gross violations of human rights and humanitarian law which constitute crimes under international law.

Reparation

6. Reparation may be claimed individually and where appropriate collectively, by the direct victims, the immediate family, dependants or other persons or groups of persons connected with the direct victims.
7. In accordance with international law, States have the duty to adopt special measures, where necessary, to permit expeditious and fully effective reparations. Reparation shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. Reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.
8. Every State shall make known, through public and private mechanisms, both at home and where necessary abroad, the available procedures for reparations.

9. Statutes of limitations shall not apply in respect of periods during which no effective remedies exist for violations of human rights and humanitarian law. Civil claims relating to reparations for gross violations of human rights and humanitarian law shall not be subject to statutes of limitations.

10. Every State shall make readily available to competent authorities all information in its possession relevant to the determination of claims for reparation.

11. Decisions relating to reparations for victims of violations of human rights and humanitarian law shall be implemented in a diligent and prompt manner.

Forms of reparation

Reparations may take any one or more of the forms mentioned below, which are not exhaustive, viz:

12. **Restitution** shall be provided to re-establish the situation that existed prior to the violations of human rights and humanitarian law. Restitution requires, **inter alia**, restoration of liberty, family life, citizenship, return to one's place of residence, employment of property.

13. **Compensation** shall be provided for any economically assessable damage resulting from violations of human rights and humanitarian law, such as:

(a) Physical or mental harm, including pain, suffering and emotional distress;

(b) Lost opportunities including education;

(c) Material damages and loss of earnings, including loss of earning potential;

(d) Harm to reputation or dignity;

(e) Costs required for legal or expert assistance.

14. **Rehabilitation** shall be provided and will include medical and psychological care as well as legal and social services.

15. **Satisfaction and guarantees of non-repetition shall be provided, including, as necessary:**

(a) Cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth;

(c) An official declaration or a judicial decision restoring the dignity, reputation and legal rights of the victim and/or of persons connected with the victim;

(d) Apology, including public acknowledgement of the facts and acceptance of responsibility;

(e) Judicial or administrative sanctions against persons responsible for the violations;

(f) Commemorations and paying tribute to the victims;

(g) Inclusion in human rights training and in history textbooks of an accurate account of the violations committed in the field of human rights and humanitarian law;

(h) Preventing the recurrence of violations by such means as:

(i) Ensuring effective civilian control of military and security forces;

(ii) Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces;

(iii) Strengthening the independence of the judiciary;

(iv) Protecting the legal profession and human rights defenders;

(v) Improving, on a priority basis, human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials.

8.4. Historical Timeline

Select Northern Terrritory Timeline

Note: This timeline does not represent the entire history of the Northern Territory. It is designed to highlight important instances of Aboriginal dispossession, as well as major developments in Aboriginal protest movements. The death tolls, and sometimes the dates, of massacres are approximate; massacres were supposed to be secret, so there exists little evidence related to them. It is almost certain that many more took place in the Northern Territory.

1623: The Dutch ship *Arnhem*, commanded by Willem van Colster, sighted what would become known as Arnhem Land, as part of a surveying expedition.

1636: The Dutch ships *Cleen Amsterdam* and *Wesel*, commanded by Pieter Pieterszoon, sailed by Arnhem Land and along Melville Island, noting signs of inhabitation.

1644: Abel Janszoon Tasman's expedition from Cape York to Carnarvon marked the end of the Dutch East India Company's interest in Australia for several decades.

1650: Earliest estimated date at which Macassan voyages to Arnhem Land began. Throughout the eighteenth and nineteenth century, hundreds of Macassan sailors from Sulawesi (now part of Indonesia) arrived in Arnhem Land in December each year, departing in April. These fishermen traded with China, supplying up to one-third of that country's sea cucumber, which they gathered and cured on the shores of Arnhem Land. The Macassans also traded with the Yolngu people. Due to these interactions, words like *rupiah* ('money') and *balanda* ('whitefella', from 'Hollander') became part of the Yolngu language; similarly, the Yolngu began using metal in weapons, axes and other objects. The South Australian Government restricted Macassan visits in the early twentieth century, in an attempt to encourage local trade. The last Macassan boat visited in 1906 or 1907.

1705: Martin van Delft and Pieter Fredericks lead a Dutch expedition to Arnhem Land and Bathurst Island. On the arrival of the fleet, the Tiwi and the Dutch battled with spears and muskets. Later, relations varied as the two sides engaged in trade as well as conflict.

1768: The Admiralty gave James Cook 'Secret Instructions', ahead of his expedition to the Southern Hemisphere to observe the transit of Venus. These instructions advised Cook 'with the Consent of the Natives to take Possession of Convenient Situations in the Country'.

1770: In April, Cook and the crew of the *Endeavour* first sighted what is now known as Australia. First Nations' reactions were varied: some defended themselves; some observed the newcomers silently, or ran away; others initiated contact; still, others ignored the presence of the ship and its crew entirely. The first interaction, however, was violent, with Cook shooting muskets and two Aboriginal men throwing stones and lances in return. On 22 August, at Possession Island in the Torres Strait, Cook wrote in his diary that he 'took posession [*sic*] of the whole Eastern Coast.' It does not seem that Cook sought the 'Consent of the Natives' to do this, thus disregarding his 'Secret Instructions'.

1788: The Colony of New South Wales began. Governor Phillip's instructions asked him to 'open an intercourse with the Natives and to conciliate their affections, enjoining all Our Subjects to live in amity and kindness with them.' The instructions also requested Phillip punish any settlers who 'wantonly destroy them, or give them any unnecessary Interruption in the exercise of their several occupations.'

1802-1803: Matthew Flinders' *Investigator* visited Arnhem Land in December, with Flinders naming several islands, capes and bays. In January 1803 his crew shot dead at least one Aboriginal man during an altercation; they later imprisoned another Aboriginal man in retaliation for the theft of an axe.

Also in 1803, the French Captain Nicholas Baudin briefly sailed along the Western coast of the Territory in *Le Géographe*, naming a handful of other locations.

1817-1820: Phillip Parker King conducted several expeditions along the present-day Northern Territory coast. He charted the strait between Bathurst and Melville Islands, and had several – occasionally volatile – interactions with Aboriginal groups.

1824-1829: Britain established Fort Dundas on Melville Island in 1824, with the last settlers abandoning the settlement in 1829. The only mention of Aboriginal people in Earl Bathurst's instructions labelled them as 'of a ferocious disposition'. There were several conflicts between colonisers and the Tiwi, some of them fatal.

1827-1829: Britain established Fort Wellington at Raffles Bay in 1827. The first recorded massacre in the Northern Territory occurred here – after the wounding of a soldier and reports of stealing, Captain Henry Smyth called for an 'indiscriminate attack'. Settlers killed approximately thirty Iwaidja men, women and children by cannon. The following year, an Aboriginal woman and child were killed, with the woman's other child 'adopted' by a soldier's wife and later taken from the settlement. The appointment of Captain Collet Barker in September 1828 marked the beginning of more peaceful relations; however, the final settlers left after an order from Governor Darling in 1829.

1835: John Batman, on behalf of the Port Phillip Association, concluded a 'treaty' with the Kulin people. The Crown voided the treaty in the same year.

1836: King William IV established the Province of South Australia. The Letters Patent stated that nothing 'shall affect … the rights of any Aboriginal Natives … to the actual occupation or enjoyment in their own Persons or in the Persons of their Descendants of any Lands therein now actually occupied or enjoyed by such Natives.'

1837: The House of Commons Parliamentary Select Committee on Aboriginal Tribes (British Colonies) noted that during Australia's settlement, 'it does not appear that the territorial rights of the natives were considered.' Their report suggested the appointment of Protectors, and treaties 'might be made … defining … what acts should be considered as penal.' However, they cautioned against the regular use of treaties, as 'the safety and welfare of an uncivilised race require that their relations with their more cultivated neighbours should be diminished rather than multiplied.'

1838-1849: Britain established the Port Essington settlement in 1838. While there were several reports of positive relations, there were still instances of tension and violent conflict. During the life of the settlement, many Aboriginal people died due to bronchial disease. Yet when the colonisers left in 1849, there were reports that Aboriginal women grieved their departure.

1844: Leichhardt's expedition to Port Essington began on 1 October. Leichhardt arrived at the settlement on 17 December 1845 after losing several men, including to conflict with an Aboriginal group. He had initially estimated that the journey would take five or six months.

1846: The Aboriginal residents of Flinders Island, Tasmania, wrote a petition to Queen Victoria concerning their treatment. They highlighted that their move to the Island was due to 'an agreement which we have not lost from our minds since and we have made our part of it good.'

1855-1867 (approx.): Multiple settlers undertook expeditions through the Northern Territory. During one, John McDouall Stuart raised a flag in Anmatjere country, writing 'May it be a sign to the natives that the union of liberty, civilisation and Christianity is about to break upon them.'

1863: Britain issued Letters Patent which annexed the Northern Territory to South Australia. The *Northern Territory Act 1863* put 500,000 acres of mostly unsurveyed land up for sale.

1864: Governor Daly appointed Boyle Travers Finniss as the first Government Resident of the Northern

Territory. Finniss set up Escape Cliffs on Cape Hotham, near the mouth of the Adelaide River. The colonisers abandoned Escape Cliffs in 1866. Finniss' surgeon, F. E. Goldsmith, was also the Protector of Aborigines; his instructions asked him to 'endeavour to make them comprehend … that they are British subjects, and that as such, they are amenable to, and protected by our laws.' At one point, conflict broke out after a Djerimunga (Wulna) group stole iron. Finniss ordered his men to 'shoot every bloody native you see'. They killed at least one Aboriginal man; the Djerimunga speared a white man in retaliation.

1869: Surveyor-General George Goyder established the Palmerston (later Darwin) settlement. Goyder refused to retaliate after the Aboriginal killing of one of his draftsmen, noting that 'We were in what to them appeared unauthorised and unwarrantable occupation of their country.'

1872: A massacre at Cox River occurred after an expedition party most likely interrupted a men's ceremony. The party then killed approximately six people.

Hundreds of miners sailed into Darwin to work on the goldfields, but these were not prosperous enough to support all of them. In later years, there were reports of the prostitution of Aboriginal women on the fields.

A second wave of expeditions began, spurred by the completion of the telegraph line.

1874: Barrow Creek massacre. In reprisal for stealing women, Kaititja men killed stationmaster James Laurence Oliver Stapleton and linesman John Franks. Four reprisal parties then killed between eleven and one hundred Aboriginal people; most estimates place the number around ninety.

186 Chinese men from Singapore arrived in Darwin to join the mines, beginning a significant period of Chinese immigration to the Northern Territory.

1875: Massacre at Blue Mud Bay. A gold prospecting party killed more than forty Aboriginal people in retaliation for the death of one of their party and the wounding of at least two others.

Settlers killed at least forty Mangarrayi people in a series of reprisals for the killing of Charles Henry Johnson and the attack on Abram Daer and William Rickards at Roper Bar on 29 June. Daer and Ricards were too weak to bury Johnson, so they left a note explaining what happened. Daer later died from his injuries. One of the reprisal parties also left a note, explaining that they had 'dispersed them [the Mangarrayi] and did their best to avenge Johnson's death.'

1877: Lutheran missionaries established the Northern Territory's first mission at Hermannsburg. It closed in 1982, with the land then handed back to the Arrernte people.

1878: Retaliating against the murder of James Ellis, Mounted Constable W. G. Stretton shot dead seventeen Aboriginal people. A civilian reprisal party also killed an unknown number of people. An inquest jury found that 'the only available retaliation is to give a lesson to the tribe.'

1882: The Australian Jesuit Missionaries established Rapid Creek Mission near Palmerston (present-day Darwin); the mission closed, partially due to its proximity to the Palmerston settlement, in 1891.

1884: At least four massacres occurred in the Northern Territory in this year. At Anna's Reservoir, attackers speared Thomas Coombes, a cook, then set the roof alight. In retaliation, Harry Figg, a stockman, shot four Anmatjere people; others speared Figg in turn. Both Coombes and Figg survived. The official death toll was eight, though others placed it at fifteen.

In the Daly River massacre, several reprisals occurred after the deaths of four men at the Mount Hayward Copper Mine. One of the leaders, Mounted Constable George Montagu, recorded twenty to thirty Aboriginal deaths. However, other estimates reach as high as 150.

At Argument Flat, three carters killed approximately ten Aboriginal people, claiming they acted in self-defence. These killings were possibly part of the reprisals for the Mount Hayward deaths. An official investigation did not lead to further action.

Mounted Constable Erwin Wurmbrand killed three Aboriginal men he was escorting from Hermannsburg to Glen Helen Station. These men were chained at the neck and had been charged with attempted murder. Wurmbrand claimed they had tried to escape, but a missionary's discovery of their corpses still in chains cast serious doubt on this explanation. Wurmbrand's party killed four other Aboriginal men at Mount Sonder.

1885: Approximately one hundred Yolngu people died after the manager of Florida Station gave them poisoned horse meat. An unknown number of Aboriginal people also died at Bradshaw Station, after the manager placed a poisoned bag of flour in the store, anticipating its theft.

1886: The Austrian Jesuit Missionaries established the Queen of the Holy Rosary (Old Uniya) Mission at Daly River. In 1899, after a flooding, they moved to St Joseph's Mission (New Uniya).

1887: A reprisal party avenging the death of 'Big Johnny' Durack ran out of ammunition after killing approximately one hundred Aboriginal people. This massacre was so violent that the area nearby is now named Waterloo.

After several instances of cattle spearing, Wurmbrand travelled with six Aboriginal trackers to Owen Springs. The Manager of Undoolya Station, Alec Ross, described this as having 'a wholesome effect, and cattle-killing came to an end'. Estimated Aboriginal deaths: thirty.

1889: The ruling of the Judicial Committee of the Privy Council stated that Australia was 'practically unoccupied, without settled inhabitants or settled land at the time it was peacefully annexed.'

Jesuits opened the Sacred Heart Mission, on the Daly River. The mission suffered from crop failures and several epidemics; it shut in 1891.

The Government established Mud Island 'Living Hell' Lazaret, a leprosarium that became notorious for its awful conditions. In 1907, Dr W. Ramsey Smith wrote that it was 'unsuitable for any being of the human species.' It shut in 1931.

1890: Mistake Creek massacre: the police were escorting sixty Aboriginal men, suspected of stealing cattle, to the Wyndham jail. They received orders to release them; others had found the perpetrator. Instead, the police shot all sixty men, then burnt their bodies.

1891: Attempts to set up the Frew River Station were marred by violence from both colonisers and Aboriginal people. Estimates suggest that at least twenty Aboriginal people and twenty settlers died.

1892: The massacre of sixty-four sleeping Garrwa people occurred in the Abner Range, in reprisal for the death of stockman Ted Lenehan six years earlier and one hundred kilometres away.

At Willeroo, there was a massacre of an unknown number of Wardaman people in response to the death and robbery of W. S. Scott.

1893: At Malay Bay, Aboriginal people killed six Macassans who had used ceremonial string to make nets. Wandy Wandy was hanged on 25 July 1893 for his role. The Government Resident and Northern Territory Judge, Charles Dashwood, ordered that the gallows remain in place as a warning.

1895: Paddy Cahill, a well-known Northern Territory resident who would later become a Protector of Aborigines, narrowly avoided being killed by a spear. In his words, he responded by shooting 'as quickly as possible, and I can shoot fairly quickly'. He didn't count how many people died, but estimates are around ten.

1896: After the spearings of two teamsters in the previous year, Mounted Constable E. O'Keefe sent two Aboriginal women to lead between fifteen and sixty Pilinara men to the police station. The Constable had promised work building a stockyard, with payment in tobacco and good treatment. Instead, the police shot all the men and burned their bodies.

During the 1890s, at least three other massacres occurred for which we do not have precise dates. The Mirki massacre happened between 1889 and 1896 on Florida Station, and involved the deaths of dozens, if not hundreds, of adults and children in retribution for a cattle-killing. In another incident, settlers shot forty to sixty Gadjerong people, with some survivors later taught to be stockmen. The Bowgan massacres occurred between 1892 and 1897, initially in reprisal for the deaths of a stationhand and a cook. Tom Perry led the retribution, which involved the deaths of at least thirty people and the capture of Peter, an Aboriginal man. Peter would later kill Perry after years of ill-treatment; he received a ten-year jail sentence.

1899: Marking the beginning of the 'Protection' policy era, Dashwood tried and failed to pass legislation involving permits and agreements for Aboriginal workers. This legislation would have allowed Aboriginal people to pursue unpaid wages and included jail time and fines for negligent employers. It also would have prohibited the supply of alcohol to Aboriginal people, forbade sexual relationships between Aboriginal women and their employers, and made the Chief Protector the legal guardian of 'half-caste' and 'other unprotected' Aboriginal children.

The Anglican Northern Territory Native Industrial Mission opened on the South Alligator River; it was closed in 1903.

1902: In either this year or 1903, a massacre took place at Hodgson Downs. In retaliation for cattle and horse killings, settlers killed thirty to forty Alawa men, women and children; the men had been cutting timber for them.

1903: In either this year or 1904, old Charlie Waypuldanya took revenge for the Hodgson Downs massacre, of which he was possibly a survivor. He and his brothers killed eight white men. A group of white stockmen decided not to pursue them, knowing they had ammunition.

The Eastern and African Cold Storage Company began their occupation of a large pastoral lease in eastern Arnhem Land. The Aboriginal population killed much of their cattle. The company employed two teams of ten to fourteen Aboriginal men, led by one white or 'half-caste' man, to shoot Aboriginal people on sight. The company went bankrupt in 1909.

1908: The Church Missionary Society established the Roper River Mission; it closed in 1988. The mission hosted many children who had been forcibly separated from their families. At different times these children were transferred to other facilities – as far away as Sydney – based on policy changes and the threat of war. The mission was initially based at Mirlinbarrwarr but moved to Ngukurr in 1940 after flooding.

1910: South Australia passed *The Northern Territory Aborigines Act 1910*. The Act established the Northern Territory Aboriginals Department and the position of Chief Protector of the Northern Territory, who was the legal guardian of all Aboriginal children. Protectors could remove Aboriginal people to reserves or institutions, from which others were banned from entering. Aboriginal women were not allowed to marry non-Aboriginal men without permission from a Protector. Anyone employing any Aboriginal person or 'female half-caste' had to be in possession of a licence (unavailable to 'any person of the Asiatic race'). Aboriginal workers' pay could be sent directly to a Protector or police officer if deemed necessary.

The Plymouth Brethren Mission opened in Darwin. It closed two years later, after the Government rejected its application for a lease.

1911: The Commonwealth Government took over the control of the Northern Territory and passed the *Aboriginals Ordinance 1911*. Besides some minor changes, the Ordinance affirmed and extended the provisions of the 1910 Act, particularly those concerning the Chief Protector's powers.

A massacre of Yolngu people took place at Gan Gan. In reprisal for the killing of a tracker's relative, police killed approximately thirty men, women and children.

The Sisters of Our Lady of the Sacret Heart opened the Bathurst Island Mission. Here, Father Gsell would

buy the marriage rights of young girls to prevent them from marrying older men and engaging in sex work with Japanese pearlers. The girls' dormitory stayed open during World War II, despite food shortages and the evacuation of the nuns. The Mission closed in 1974.

1913: Walter Baldwin Spencer released his 'Preliminary Report on the Aboriginals of the Northern Territory'. He recommended the creation of reserves and compounds in light of impending further white settlement. He insisted that all Protectors and superintendents of Reserves be married, after decrying the 'serious evil' of the 'prostitution of aboriginal women', due to the lack of white women in the Territory. He advocated for brass identification discs, summary punishment for Aboriginal employees who deserted their work and the creation of an island reformatory. Spencer was also troubled by 'half-castes', calling for them to be removed to reserves: 'even though it may seem cruel to separate the mother and child, it is better to do so.'

Due to the recommendations of Spencer's report and the dictates of the 1911 Ordinance, the Kahlin Compound opened in Darwin. The Compound became known for its strict discipline and poor conditions, with a report in 1923 recommending its immediate closure. However, the Compound did not close until 1939, upon the creation of the Bagot Aboriginal Reserve.

Administrator John Gilruth abolished the post of Chief Protector of Aborigines and, in 1916, of Chief Inspector of Aborigines.

1914: The Bungalow opened in Alice Springs. An iron shed designed to house one Aboriginal woman, Topsy Smith, and her seven children, it became an institution the following year and was quickly overcrowded and squalid. Conditions were still deplorable after a move in 1928, with a visitor reporting that 'a more draughty, ugly, dilapidated place one could hardly imagine.' It moved again in 1932; later that decade, its Superintendent was convicted of sexual assault of several of its female residents. Children began to be removed to different religious institutions in 1939, with the final residents removed to New South Wales and South Australia due to the onset of war in 1942.

1916: Methodists established Goulburn Island Mission; it closed in 1973.

1917: A massacre occurred near Tennant Creek when a droving party shot approximately fifty people at night. The party burned around fifteen of the bodies in a fire.

1918: The *Aboriginals Ordinance 1918* consolidated the *Aborigines Act 1910* and the *Aboriginals Ordinance 1911*. The Ordinance also forbade non-Aboriginal men from having 'carnal knowledge' or entering into relationships with Aboriginal women, as well as the sale of opium and alcohol to Aboriginal people.

A reprisal party killed approximately seven Aboriginal men, in revenge for the spearing of an Auvergne Station employee.

1920: At some point between this year and the end of 1922, a massacre took place on Wave Hill Station. While records for this are minimal, it appears that Paddy Cahill, of Oenpelli Station, shot approximately thirty Aboriginal people in reprisal for cattle killings.

1921: The Church Missionary Society established the Groote Eylandt Mission at Emerald River. The mission was initially for 'half-castes'. In 1933, a Protector received complaints from residents, mentioning the use of stocks, weeks-long solitary confinement and the chaining of young girls to trees. In the same year, the mission shifted focus to the local Aboriginal population and transferred many of its 'half-caste' residents to Roper River Mission. By 1934, half the adult population had suffered or was suffering from leprosy. Although the mission moved to Angurugu in 1943, many 'half-castes' had already been transferred to missions in New South Wales or South Australia due to the war. The mission closed in 1978, after the land became Aboriginal freehold two years earlier.

Elcho Island Mission opened; it shut in 1923, due to oil drilling.

1923: Methodists opened Milingimbi Mission, replacing the Elcho Island Mission. The Japanese bombed this area twice, leading to the death of one Aboriginal person and to most residents moving away. It closed in 1974.

1924: The Darwin Half-Caste Home opened. It was designed to house children, with adults remaining at the neighbouring Kahlin Compound. It was always overcrowded; the 1936-7 Administrator's report noted that eighty children were living in the Home, which was the same size as the Superintendent's house. It closed in 1939.

1925: The Church Missionary Society took over the Oenpelli Reserve – which, until 1920, had been Paddy Cahill's Oenpelli Station – to create the Oenpelli Mission. Leprosy proved a big problem in its early years. The missionaries relocated all 'half-caste' women and children during the war; some of the male residents served in the army. The Mission closed in 1975.

1926: David Unaipon spent this year campaigning for an 'Aboriginal Territory of Centralia'.

The Minister for Home and Territories divided the Northern Territory into North Australia and Central Australia until 1931.

1928: The Coniston Massacre – the last recorded massacre of Indigenous Australians – took place. The killings occurred over several weeks and began in response to the murder of Fred Brooks, a white man who had allegedly stolen an Aboriginal man's wife. Further reprisals took place after a group of Warlpiri attacked Nugget Morton, a co-owner of Broadmeadows Station. An inquiry later decided that the reprisals had been justified, and set the official death toll at 31. However, other estimates range from 62 to 200 deaths.

John William Bleakley, the Queensland Chief Protector, released a report on the Central and North Australia Aboriginal populations. Unlike Dr Cecil Cook, (the Northern Australia Chief Protector), Bleakley favoured missionary organisations over Government institutions. Bleakley was also concerned about employment, medical and education standards, arguing for a 'definite scale of wages' and for payment in goods, not cash. Like Spencer fifteen years earlier, he felt that Protectors should be married, noting 'one good white woman in a district will have more restraining influence than all the Acts and Regulations.' Bleakley was worried about sexual relations between pastoralists and Aboriginal women, writing that 'half-castes' represented 'perhaps the most difficult problem of all to deal with … how to check the breeding of them and how best to deal with those now with us.'

1931: Channel Island Leprosarium replaced Mud Island Lazaret. Channel Island became known for overcrowding; improvements to facilities were regularly delayed due to war and a lack of funding, and many of the buildings were supposed to be temporary. The evacuation of the Leprosarium did not occur until after the bombing of Darwin, with several of its inmates wading to the mainland and hiding in the bush during the attack. In 1949, a Darwin contractor wrote that the inhabitants – many of whom were Aboriginal people 'suspected' of having leprosy, rather than confirmed cases – were living under 'the most primitive and insanitary conditions'. The Leprosarium closed in 1955.

Pine Creek Home opened, to deal with the overcrowding at the Darwin Half-Caste Home. It closed in 1933, then opened again, as a transfer facility, from 1940 to 1941.

1932: The Caledon Bay Crisis began when a Balamumu group killed five Japanese fishermen in Arnhem Land. There is evidence these Japanese men had improperly interacted with Yolngu women.

The identification disc system began, to track Aboriginal movement in towns.

1933: On 1 August at Woodah Island, Dhakiyarr speared Constable Albert McColl. McColl was part of an investigation into the previous year's killings, but had separated from his colleagues; he was with a party of (possibly detained) women, including Dhakiyarr's wife, Djaparri. Dhakiyarr had most likely been involved in the earlier disappearance of two white men, William Fagan and Frank Traynor.

In response to McColl's death, Administrator R. H. Weddell suggested a punitive party and that the Government 'consider [Aboriginal] casualties inevitable'. There was national uproar at this idea, particularly in light of the recent Coniston massacre. Instead, the Government organised a 'peace party' of missionaries to meet with the Yolngu.

1934: The Caledon Bay Crisis continued, as the peace party convinced the murder suspects to travel with them to Darwin. Against the peace party's wishes, the police immediately detained all five men. On 1 August, the Supreme Court sentenced three men, Natjalma, Mau and Ngarkaiya, to twenty years' imprisonment for the murder of one of the Japanese men. On 2 August, the Supreme Court acquitted Dhakiyarr and another man, Mirera, of their involvement in the deaths of Fagan and Traynor. On 3 August, the Supreme Court sentenced Dhakiyarr to death for killing McColl. The High Court quashed Dhakiyarr's conviction on 8 November. Upon release, Dhakiyarr went missing. He was never seen again; an oral tradition posits that McColl's friends killed him.

1935: Anthropologist Donald Thomson arrived in Arnhem Land. He had volunteered to make contact with the Yolngu people to make policy recommendations in light of the Caledon Bay Crisis and to facilitate better relations between the Yolngu and the Government.

The Methodists Overseas Mission opened the Yirrkala Mission, which would close in the 1970s. Catholic missionaries opened the Port Keats Mission, which would move from the Daly River to Wadeye in 1938 and be taken over by the Government in the 1970s; it closed in 1978. Catholics established the Little Flower Mission; it changed locations to become the Arltunga Mission in 1942.

1936: Donald Thomson secured the release of Natjalma, Mau and Ngarkaiya from jail, personally travelling with them back to Arnhem Land.

After the events of the Caledon Bay Crisis and the Coniston massacre, as well as a separate inquiry into the shooting death of an escaped Aboriginal prisoner, the Government established a patrol officer service. The patrol officers were responsible for visiting the stations, missions and reserves and enforcing the 1918 Ordinance. The service was phased out in the early 1970s.

The Northern Territory Half-Caste Association formed and would later successfully advocate for their exemption from the rules of the 1918 Ordinance.

1937: The Government organised the Conference of Commonwealth and State Aboriginal Authorities. The conference concluded that 'the destiny of the natives of aboriginal origin, but not of the full blood, lies in their ultimate absorption by the people of the Commonwealth.' Some attendees, including the Northern Territory representative, Dr Cook, advocated for this policy to be extended to the entire Aboriginal population.

1938: The Bagot Reserve opened in Darwin. It was designed to replace the Kahlin Compound and the Half-Caste Home; it shut in 1979. A fence divided the 'half-caste' and 'full blood' areas.

Fred Gray opened the Umbakumba Settlement on Groote Eylandt. As in some other institutions, Gray bought the marriage rights of the female residents. A policy change, in which the Government provided subsidies to Christian missions only, led to the transfer of the mission to the Christian Missionary Society in 1958.

The Lutheran Mission Block opened in Alice Springs, shutting in 1982.

1939: John McEwen, the Minister Responsible for the Northern Territory, announced his 'New Deal' for Aboriginal people. He advocated for a long-term, assimilationist policy, to 'transform people from a nomadic tribal state to take their place in a civilised community.' Like Bleakley, he believed that Christian missions should be used over government-run institutions, as they could provide 'something of a spiritual nature to replace the ancient beliefs'. McEwen also separated the Native Affairs Branch from the Medical

Service.

In September, after the outbreak of war, some 'half-caste' men were permitted to join military units stationed in the Northern Territory.

1940: The Military Board deemed 'non-European' enlistment 'neither necessary nor desirable' by decree. However, Aboriginal people began to work on army gardens and farms.

The Methodist Overseas Mission opened the Croker Island Mission; many children moved here as part of the mass transfers from government institutions to religious missions. The majority of the resident children moved to establishments in New South Wales during the war, with most returning afterwards. Somerville Cottage Homes replaced the Mission in 1968.

1941: The army asked Donald Thomson to create the Northern Territory Special Reconnaissance Unit. Aboriginal men from Arnhem Land, including the former prisoners Thomson had escorted home, manned the unit. Thomson noted 'it took some time to convince these people that they could really kill Japanese who landed in this territory without … being visited by another punitive expedition.'

The Missionaries of the Sacred Heart established the Garden Point Mission on Melville Island, taking in Catholic, 'half-caste' children from the Kahlin Compound and the Bungalow. From 1937 to 1941, 'incorrigible natives' had been sent here as punishment. Other children who lived here were taken from their families, or were the children of leprosy patients. In 1942, missionaries evacuated forty-one of these children to South Australia after the bombing of Darwin. The mission closed in 1969.

The Government established Haast's Bluff Native Settlement as a rations depot. The following year it became an outpost of the Hermannsburg Mission. After continuing problems with potable water, it moved to Papunya in 1959.

1942: After the bombing of Darwin, the army evacuated Aboriginal people to camps, with a labour force raised near the camp at Mataranka. Those who worked at these camps remember good conditions, including rations, proper wages, accommodation, medical services and basic schooling. While Aboriginal people were able to perform ceremonies and leave the camps relatively freely, the army often placed people from dozens of clans in the same camp, without regard for tradition or enmity.

The Little Flower Mission moved to Arltunga, its relocation caused by its proximity to the Alice Springs army base. It moved again in 1953, then becoming known as Santa Teresa Mission.

The Elcho Island Mission reopened to shelter the Milingimbi Mission residents after the bombing of Darwin. It closed again in the 1970s.

1943: Brigadier Dollery recommended raising an Indigenous force, who would be paid the same amount as white men; this never occurred.

The Tin Boys (a group of Aboriginal miners) held a strike near Maranboy after Native Affairs decided to remove Aboriginal women from their camp.

The Government turned the Areyonga Native Settlement into a rations depot; the Pitjantjatjara people, fleeing the drought, originally established the settlement in the 1920s. Missionaries began to visit. Despite many of the Settlement's residents leaving in the 1970s, the area remained under the control of the Lutheran Church until 1990; the land was then handed back to the community.

1944: The army recruited eighty Aboriginal men from Bathurst and Melville Island to man boats of the 56 Port Craft Company. They were unable to leave their barracks and contact their families until April 1945, when their commander granted them leave from which very few of them returned.

1945: The Government established the Phillip Creek Native Settlement (Manga Manda), to remove Aboriginal people from the Six Mile Ration Depot. Initially run by the Aborigines Inland Mission, the

Settlement segregated 'half-castes' from other Aboriginal children, then sent them away entirely in 1947. Children were accommodated separately from their families and were only allowed contact during the day. In 1951, the authorities imprisoned the Superintendent for sexual assault of the female residents, and the Government took over mission operations the year after. The Acting District Officer, investigating the premises in 1951, wrote that he could 'not find words with which to adequately condemn the past practice of locking the children up in buildings of this character.' The Settlement shut in 1956 after ongoing problems obtaining potable water. The authorities forcibly removed many children from this area to other missions, with one mother covering her child in soot in a desperate – and unsuccessful – attempt to prevent his departure.

1946: The Government established Yuendumu Native Settlement as a rations depot; missionaries from the Australian Baptist Home Mission arrived the following year. The Government handed Yuendumu back to the community in 1978.

1947: The Aborigines Inland Mission established the Retta Dixon Home at Bagot Reserve; a fence separated this area, for 'half-caste' children and mothers, from the rest of the reserve. The residents received punishments for singing traditional songs or attempting to contact others. The authorities forcibly removed several children to the Home, from Darwin, pastoral properties and other institutions. In 1961, the accommodation changed from dormitories to cottages, in an unsuccessful attempt to foster a family atmosphere. The Home shut in 1982. In 2015, the Royal Commission into Institutional Responses to Child Sexual Abuse released a report about the Home.

1948: The Government opened the Hooker Creek Native Settlement. The Australian Baptist Home Mission began visiting in the 1950s and had a permanent presence by 1962. Many Warlpiri were moved here from Yuendumu due to overcrowding. Twice groups walked the 600 kilometres back, only to be forcibly returned by truck. In 1978, the Government handed back the area to the community; it is now known as Lajamanu.

1951: The Government held the Commonwealth-State Conference on Native Welfare. According to Paul Hasluck, the Minister for Territories, this conference 'agreed that assimilation is the objective of native welfare measures. Assimilation means … in the course of time, it is expected that all persons of aboriginal blood or mixed blood in Australia will live like white Australians do.'

1952: The Church Missionary Society opened the Rose River Mission in eastern Arnhem Land. A diving school operated here in the late 1950s, training male residents and men from Umbakumba and Groote Eylandt. The mission closed in 1978 and the area came under the control of the Numbulwar Numburindi Community Council.

1953: The *Welfare Ordinance 1953* replaced the 1918 Ordinance, with the Welfare Branch superseding the Native Affairs Branch. A separate Ordinance – the *Wards Employment Ordinance 1953* – repealed the employment sections of the 1918 Ordinance. The Ordinance referred to 'wards' exclusively – but the Government Secretary noted that this was to 'avoid discrimination. The purpose of this Bill was to help the work of assimilation.' Nobody entitled to the vote could be declared a ward, in effect making only Aboriginal people subject to the Ordinance. The Director of Welfare was the 'guardian of the person and the estate of a ward as if that ward were an infant'. Non-wards were not allowed to live with wards, and non-ward men were not allowed to marry or have sexual relationships with female wards. The Ordinance also introduced the Register of Wards, known to many as the 'Stud Book'. Albert Namatjira and five others were the only Aboriginal people at this time exempt from the Ordinance's provisions.

Catholic missionaries opened the Santa Teresa Mission to replace the Arltunga Mission. Although the mission itself closed in 1977, its school still operates today.

1954: Warrabri replaced the Phillip Creek Native Settlement. Although the Welfare Branch ran Warrabri,

missionaries from Australian Baptist Home Mission began providing services in 1957.The community took control of the area, which became known as Ali Curung, in 1978.

1955: The Catholic Daly River Mission opened, closing in 1977.

East Arm Leprosarium replaced the Channel Island Leprosarium. Conditions here were significantly better. As attitudes to and understandings of leprosy changed, it closed in 1982.

1958: The Church Missionary Society took over Umbakumba Native Settlement, renaming it Umbakumba Mission. The Welfare Branch took over in 1966, then handed the mission to a community council in 1973.

The Alice Springs Police charged Albert Namatjira with supplying alcohol to other Aboriginal people; unlike him, they were not exempt from the *Welfare Ordinance*. After public outcry, he served a reduced sentence of two months at Papunya.

1959: The *Social Services Act 1959* allowed Aboriginal people – unless 'nomadic or primitive' – to receive benefits, such as pensions and the maternity allowance.

The Welfare Branch opened Papunya Native Settlement, due to overcrowding at Haast's Bluff. Papunya was an unusually large settlement, with approximately 700 residents in 1959. The Hermannsburg Mission sent a resident missionary. The Settlement closed in 1978.

1961: Another Native Welfare Conference took place, with its attendees agreeing that 'the policy of assimilation … [means] that all aborigines and part aborigines are expected eventually to attain the same manner of living as other Australians and to live as members of a single Australian community.' Around this year, the Accommodation for Part-Coloured Children in Other States for Education and Training Scheme begun, with several children from Retta Dixon sent to foster families in the southern states.

1962: The Government granted the right to vote in federal elections to all Aboriginal and Torres Strait Islanders, although enrolment remained low and non-compulsory for some time.

1963: Yolngu people sent the Yirrkala Bark Petitions to Parliament. Written in both Yolngu Matha and English, the petitions highlighted concerns about mining leases on Yolngu land. The signatories asked for a Committee to consult with them before the excision of the land, and that 'no arrangements be entered into with any company which will destroy the livelihood and independence of the Yirrkala people.'

1964: The *Social Welfare Ordinance 1964* repealed the Welfare Ordinance. This Ordinance was mostly designed to provide welfare services to Aboriginal Territorians in the same manner as other residents. However, some measures were retained, such as the ability of the Director of Social Welfare and others to prohibit certain people from entering reserves. The *Wards Employment Ordinance 1953*, however, remained.

The North Australian Workers' Union applied to the Arbitration Court for equal pay for Aboriginal stockmen, who were paid about one-fifth of the basic wage. In a much-criticised move, the Union did not call any Aboriginal witnesses to the Conciliation and Arbitration Commission. The Commission's report documented the pastoralist view that 'just as the hunter did no more than was necessary to obtain sufficient food so also the aboriginal employee on the station did no more than was necessary to obtain sufficient rations.' Although the Commission fundamentally agreed with this view – noting that 'two aborigines could be replaced by one white' – they considered it a matter of 'overwhelming industrial justice' to award equal pay. They reached their decision in March 1966, but it did not come into effect until 1 December 1968.

The British Blue Streak missile tests began. There are reports that the authorities moved Pintupi to Papunya due to these tests.

1966: Approximately 200 Gurindji people, led by Vincent Lingiari, walked off Wave Hill Station. They were

striking for better pay and conditions from Lord Vestey, the station's owner; a similar strike had occurred earlier that year, at Newcastle Waters.

1967: A referendum asked whether the Census should include Aboriginal people, and whether the Commonwealth should be allowed to make laws concerning them. The referendum returned a resounding 'yes' vote of 90.77%. Afterwards, the Government created the Commonwealth Office and Council for Aboriginal Affairs.

After their consultations failed, the striking Gurindji people moved their camp to Daguragu (then known as Wattie Creek). The location is closer to their sacred sites and represented their desire not just for better wages, but for the return of their land. They wrote a petition to the Governor-General, expressing their 'earnest desire to regain tenure of our tribal lands … of which we were dispossessed in time past, and for which we received no recompense.'

1968: The *Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968* granted a forty-two year lease to Nabalco to mine on the Gove Peninsula, defying claims made by the Yolngu in the Yirrkala Bark Petitions five years earlier. The Yolngu were given permission to access most of the areas under the lease.

1970: The Government excised the Wave Hill Welfare Settlement from Vestey's station, and installed Baptist missionaries on the site. Many of the protesters did not move to the settlement, instead building houses at Daguragu.

The 1970s also marked the beginning of the Homelands movement, as many Aboriginal people began to move from missions and towns into small communities on their traditional lands.

1971: Yolngu people launched a legal challenge against the Gove bauxite alumina project, resulting in *Milirrpum and Others v. Nabalco Pty Ltd and the Commonwealth of Australia* ('the Gove Land Rights Case'). Justice Blackburn ruled against native title, claiming that this did not exist in Australia and that if it had, it would have been extinguished; even if it had not been extinguished, the claimants had not successfully proven their rights to the land.

1972: In January, the McMahon Government distanced themselves from the policy of assimilation and announced some concessions to the Yolngu and Gurindji protestors, but would not support land rights. The following day, protestors erected a beach umbrella outside Parliament House; this would later become the Aboriginal Tent Embassy.

The Larrakia attempted to present a petition to Princess Margaret during her October visit to Darwin. They had already staged several sit-ins and composed a different petition, which asked the Prime Minister to establish 'a Commission to go around to every tribe and work out a treaty to suit each tribe.' The October petition, which measured three metres long and contained hundreds of signatures from across Australia, stated: 'Today we are REFUGEES. Refugees in the country of our ancestors … The British Crown signed TREATIES with the Maoris in New Zealand and the Indians in North America.' On 16 October, the Larrakia set up a shed across from the Administrator's Residence, with a sign labelling it 'Aboriginal Government House'. They shouted 'we want Margaret!' but the police kept them from delivering the petition. The following day, the protestors still could not break through police lines, and the petition was damaged in the chaos. The Larrakia eventually mailed the petition to Buckingham Palace with a note apologising for its state.

The election of Gough Whitlam led to the introduction of the policy of 'self-determination' and the creation of the Department of Aboriginal Affairs, which took over the responsibilities of the Northern Territory Welfare Branch. The Government also froze applications for mining and exploration on Commonwealth Aboriginal reserves.

1973: The Woodward Commission on Aboriginal Land Rights began. The Government and Lord Vestey

agreed to divide Wave Hill into two leases, with 3236 square kilometres going to the Gurindji.

1975: Gough Whitlam ceremoniously poured sand into Vincent Lingiari's hands as he handed back the land to the Gurindji people. Afterwards, Lingiari stated in language that 'We will be mates, White and Black, you must keep this land safe for yourselves, it does not belong to any different "welfare" man.'

Parliament passed the *Racial Discrimination Act*, as well as Senator Neville Bonner's motion calling for recognition of prior ownership and 'true and due entitlement for dispossession'.

1976: Parliament passed the *Aboriginal Land Rights (Northern Territory) Act 1976*. The Act established the four Land Councils of the Northern Territory and allowed Aboriginal people to claim unalienated Crown land if they could prove a connection to the area.

1977: The Ranger Uranium Inquiry handed down its second and final report. These reports recommended the creation of Kakadu National Park, but also for uranium mining to be allowed in the Alligator Rivers area, subject to environmental controls.

1978: The Northern Territory, now self-governing, extended the Darwin township boundaries to three times the size of Greater London, disrupting the Kenbi Land Claim.

1979: The National Aboriginal Conference submitted a treaty proposal to Prime Minister Fraser, who agreed to discuss it.

Several prominent Australians, including H. C. Coombs and Judith Wright, formed the Aboriginal Treaty Committee.

In *Coe v Commonwealth*, Paul Coe unsuccessfully sued Australia and the United Kingdom, claiming they had illegally disregarded Aboriginal sovereignty through the act of colonisation. Chief Justice Gibbs insinuated that a 'properly raised' claim for native title could proceed successfully.

1983: The Senate Standing Committee on Legal and Constitutional Affairs' report, *Two Hundred Years Later*, rejected the possibility of a Treaty, and considered Aboriginal peoples as without sovereignty separate to that of the Commonwealth.

1984: A group of Pintupi people, who became known as the 'Pintupi Nine', made contact with their relatives near Kiwirrkurra. They had been living a traditional lifestyle in the Gibson Desert. The media referred to them as 'the lost tribe' or 'the last nomads'.

The Government passed the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 ('Heritage Protection Act')*. This act allows the Government to protect sites and objects significant to Indigenous Australians, particularly when state and territory laws are inadequate or not in use.

1987: The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) began, ending in 1991. The report investigated ninety-nine deaths occurring between 1980 and 1990 and made 339 recommendations. A 2018 report from Deloitte revealed that only 64% of these recommendations had been implemented, and that while deaths in custody have halved, the incarceration rate of Indigenous Australians has doubled.

Kevin Gilbert published a draft treaty, in which he called for a separate 'Sovereign Aboriginal Nation State'.

1988: In January, more than 40,000 people marched in protest against the Bicentennial celebrations in Sydney, drawing attention to the presence of Indigenous people prior to colonisation, and to the past and current dispossession and inequality faced by Indigenous Australians.

At the Barunga Festival in June, the Northern and Central Land Councils presented Prime Minister Bob Hawke with the Barunga Statement. The Statement called for 'a Treaty recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedom.' The Hawke

Government had announced its support for a treaty in the previous week, as part of its policy platform of reconciliation. After receiving the Statement, Hawke affirmed this position. However, the Hawke Government never concluded a treaty.

1990: The Federal Government established the Aboriginal and Torres Strait Islander Commission (ATSIC), designed to replace the Department of Aboriginal Affairs and the Aboriginal Development Commission. Indigenous Australians voted on members of ATSIC, who formed regional councils. Until its abolition in 2005, ATSIC played an integral role in the governance, advocacy and administration of Indigenous affairs.

1991: Prime Minister Hawke announced a mining ban at Guratba, after the Federal Resource Assessment Commission found that mining would negatively impact the Jawoyn people and their culture.

1992: *Mabo v. Queensland (No. 2)* overturned *terra nullius* (the idea that prior to colonisation, Aboriginal people did not claim possession of the land) and created the legal doctrine of native title. Native title would be enshrined in law the following year.

On 26 January, protestors restablished the Tent Embassy and presented the Minister for Aboriginal and Torres Strait Islander Affairs, Robert Tickner, with a Declaration of Aboriginal Sovereignty.

In May, Tickner invoked the *Heritage Protection Act* to protect women's sites near Alice Springs from a dam development.

On 10 December 1992, Prime Minister Paul Keating delivered the 'Redfern Speech', in which he accepted responsibility for white Australia's role in Indigenous dispossession: 'We took the traditional lands and smashed the traditional way of life. We brought the diseases. The alcohol. We committed the murders. We took the children from their mothers. We practised discrimination and exclusion. It was our ignorance and our prejudice. And our failure to imagine these things being done to us.'

1993: In response to the Government's drafts of the *Native Title Act 1993*, a group of Indigenous leaders wrote the Eva Valley Statement, urging the Government to fully embrace the weight of the Mabo Decision, to create a consistent law across all states and territories, and to guarantee Indigenous land rights. However, the *Native Title Act* did not encompass all their demands.

In response to the findings of the RCIADIC, the Government established the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner; Mick Dodson was its first Commissioner.

In *Coe v The Commonwealth (1993)*, the High Court struck out Isabel Coe's claim, on behalf of the Wiradjuri people, to Aboriginal sovereignty. Justice Mason did not see this as inconsistent with the Mabo Decision, arguing that Indigenous Australians did not have a separate sovereignty to that of the Commonwealth.

1995: The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families began; its chairs were Sir Ronald Wilson and Mick Dodson. The Inquiry was partially prompted by the Going Home conference of Stolen Generations members, held in Darwin the previous year. The Inquiry allowed many members of the Stolen Generations to publicly share their stories for the first time, and for non-Indigenous Australians to learn about past and present injustices. The chairs tabled a report, *Bringing Them Home*, in 1997; they recommended awarding compensation to the Stolen Generations and for the Government to formally say sorry to those affected. Prime Minister John Howard expressed regret but refused to apologise.

1996: The *Wik Peoples v The State of Queensland & Ors*; The *Thayorre People v The State of Queensland & Ors* (Wik Decision) found that native title and pastoral leases can co-exist;, if there is conflict, the rights of the pastoralist prevail over those of the native title holders.

Mandatory sentencing begun in the Northern Territory; although repealed in 2001, the Government reintroduced it in 2008. These measures, which involve minimum sentences for certain crimes, have disproportionately affected Indigenous Territorians.

1997: At the Australian Reconciliation Convention, approximately one hundred delegates turned their backs on Prime Minister Howard, upset at the lack of an apology and feeling that his speech had downplayed dispossession.

1998: The Parliament passed the *Native Title Amendment Act 1998*, following its release of a 'ten point plan' the previous year. This legislation gave greater certainty to governments and pastoralists; many Indigenous people felt this came at the expense of their rights. The United Nations Convention on the Elimination of All Forms of Racial Discrimination later ruled that this amendment went against its Convention.

The first National Sorry Day occurred on 26 May, the anniversary of the release of *Bringing Them Home*.

From 17 to 20 August, approximately 800 Indigenous Territorians gathered at Kalkaringi to discuss the impending referendum on Northern Territory statehood. They issued the Kalkaringi Statement, in which they demanded 'good faith negotiations between the Northern Territory Government and the freely chosen representatives of the Aboriginal peoples of the Northern Territory leading to a Constitution based upon equality, co-existence and mutual respect.' They affirmed that they would 'withhold their consent' from the establishment of a new state until this occurred.

2000: On 28 May, approximately 150,000 people walked across the Sydney Harbour Bridge in the People's Walk for Reconciliation. This was part of Corroboree 2000, during which the Council for Aboriginal Reconciliation presented the Government with two documents detailing Reconciliation aims and strategies. One of their recommendations was for a treaty; the Government would later reject this.

In *Cubillo v. Commonwealth*, two members of the Stolen Generations unsuccessfully sued the Commonwealth for its role in their dispossession.

2001: In *Commonwealth v Yarmirr* (The Croker Island Decision), the High Court recognised that non-exclusive native title could exist offshore.

2007: The report *Little Children Are Sacred* revealed problems with sexual abuse among Indigenous communities in the Northern Territory; in response, the Government enacted the Northern Territory Emergency Response (the NTER or the Intervention). The Intervention did not cohere with the proposals made in the report. Instead, the Government suspended the *Racial Discrimination Act 1975*, removed the permit system for Aboriginal land, banned pornography, restricted alcohol, introduced an income management system, dismissed the use of customary law in sentencing, and gave the Commonwealth greater access to and control over Aboriginal land.

The United Nations finalised the Declaration on the Rights of Indigenous Peoples; Australia was one of four countries (including the United States, Canada and New Zealand) who refused to endorse it. Australia expressed support for the Declaration in 2009.

2008: On 13 February, Prime Minister Kevin Rudd delivered the National Apology to the Stolen Generations, stating: 'we apologise for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians.'

On 23 July, the leaders of thirteen clans in Arnhem Land presented Rudd with the Yirrkala Statement, calling for constitutional recognition as 'fundamental to our place within the Australian nation.'

The Blue Mud Bay Decision occurred one week later, and meant that Yolngu people could restrict non-Aboriginal fishing on their shores.

Despite the new 'Closing the Gap' policy, the Rudd Government kept most of the NTER measures intact. As a result, a group of mostly Warlpiri Yuendumu residents presented a petition to Jenny Macklin, Minister for Indigenous Affairs, on 28 October 2008: 'the Government is abusing us with this Intervention. We want to be re-empowered to make our own decisions and control our own affairs. We want self-determination.'

8.5. NT Constitutional Legal Timeline

A chronology of Northern Territory constitutional and statehood milestones 1825–2007

Dr Nicholas Horne
31 May 2007

Milestones	Details
1825	The western boundary of the Colony of New South Wales is extended from 135 degrees east longitude to 129 degrees east longitude; this adds the area of what will become the Northern Territory to the Colony.[i]
1856	The province of South Australia establishes a bicameral parliament (House of Assembly and Legislative Council). Suffrage for House of Assembly elections is extended to males aged 21 or over and suffrage for Legislative Council elections is extended to males aged 21 or over meeting certain property thresholds.[ii]
1863	South Australia annexes those lands of the New South Wales Colony northward of the twenty-sixth parallel of south latitude, and between the one hundred and twenty-ninth and one hundred and thirty-eighth degrees of east longitude, together with the bays and gulfs therein, and all and every islands adjacent to any mainland.[iii]
1869 - 70	The capital site of Palmerston (later Darwin) is surveyed and established.[iv]
1882	South Australia incorporates the Northern Territory in the state electoral district of Flinders.[v]
1888	The Northern Territory is constituted as an electoral district for the election of two members to the South Australian House of Assembly and as an electoral division for the election of members to the South Australian Legislative Council.[vi]
1894	South Australia extends suffrage to women.[vii]
1900	The definition of 'The States in the Australian Constitution' cites South Australia as including the Northern Territory of South Australia.[viii]
1901	South Australia, including the Northern Territory, is a single Commonwealth electorate for the first Commonwealth election in 1901.[ix]
1901 02	South Australia and the Commonwealth negotiate for the surrender of the Northern Territory to the Commonwealth by South Australia.[x]

1903	The Commonwealth electoral divisions of Adelaide, Angas, Barker, Boothby, Grey, Hindmarsh and Wakefield in South Australia are proclaimed. The division of Grey is specified as including the Northern Territory.[xi]
1906 07	South Australia and the Commonwealth resume negotiations for the surrender of the Northern Territory to the Commonwealth and enter into an agreement for the surrender. South Australia legislates to approve and ratify the agreement and surrender the Northern Territory to the Commonwealth.[xii]
1910	The Commonwealth legislates to approve and ratify the Northern Territory surrender agreement and to accept the Northern Territory as the Northern Territory of Australia.[xiii] The Commonwealth also provides for the provisional government of the Northern Territory and for the office of Administrator.[xiv]
1911	The *Northern Territory Acceptance Act 1910* (Cwlth) and the *Northern Territory (Administration) Act 1910* (Cwlth) commence by proclamation on 1 January 1911. The Commonwealth establishes: The office of Administrator, to be charged with the duty of administering the Government of the Northern Territory on behalf of the Commonwealth. The Administrator's powers and functions are to be exercised by him in accordance with the tenor of his Commission, and in accordance with such instructions as are, from time to time, given to him by the Minister and include the appointment and suspension of magistrates and the execution of Crown land leases and dispositions; A Council of Advice to advise the Administrator. The Council is to consist of up to six appointed members, and the Northern Territory Supreme Court.[xv]
1912	The first Administrator of the Northern Territory is appointed (Dr J. A. Gilruth).[xvi]
1913	The Commonwealth establishes a Northern Territory public service.[xvii]
1922	The Commonwealth provides for one Northern Territory member of the House of Representatives; the member has no voting rights, cannot be chosen to be the Speaker or Chairman of Committees, and is not counted for quorum or majority determination purposes in the House. [xviii]
1926	The Commonwealth divides the Northern Territory along the twentieth parallel of South Latitude into the separate territories of North Australia and Central Australia, each with a Government Resident, Advisory Council and discrete administration. A North Australia Commission is also established to progress the development of North Australia.[xix]

1931	The Commonwealth repeals the *Northern Australia Act 1926*; the previous system of administration is reinstated.[xx] The Commonwealth provides for the office of Deputy Administrator. [xxi]
1936	The Commonwealth enables the Member for the Northern Territory to vote on disallowance motions for Territory Ordinances.[xxii]
1942	First bombing of Darwin (19 February). The Northern Territory is placed under military administration by the Commonwealth (initial military commander is Major-Gen. D. V. J. Blake followed by Major-Gen. E. F. Herring).[xxiii]
1945 46	Military administration of the Northern Territory ends, civilian administration is resumed.[xxiv]
1947 1947 (13 December)	The Commonwealth establishes the Northern Territory Legislative Council. The Council is comprised of the Administrator as Council Chairman, seven appointed members and six elected members and is empowered to make ordinances for the peace, order and good government of the Territory, subject to limitations such as assent by the Administrator and provision for disallowance.[xxv] The electoral districts of Alice Springs, Batchelor, Darwin, Stuart and Tennant Creek are also established for the purposes of electing members to the Legislative Council (two members are to be elected for the district of Darwin).[xxvi] The inaugural general election for the Legislative Council is held. Total enrolment is 4443.
1948 (19 February)	The inaugural sitting of the Legislative Council is held.[xxvii]
1959	The Commonwealth gives the Member for the Northern Territory full voting rights on proposed laws relating to the Territory and on disallowance motions relating to regulations made under Territory ordinances. [xxviii] The Commonwealth also increases the number of elected members of the Legislative Council from six to eight and the number of appointed members from seven to nine (not including the Administrator); provides for the establishment of eight new electoral districts for elections for the Council; and establishes an Administrator's Council to advise the Administrator consisting of the Administrator and Council members.[xxix]
1962	The Commonwealth enables the Legislative Council to make ordinances declaring and providing for the exercise of its powers, privileges and immunities within certain limits.[xxx] The Commonwealth enables Indigenous Australians to enrol and vote in Commonwealth elections.[xxxi]

1965	The Commonwealth provides for the office of President of the Legislative Council. The President is to be chosen from Council members.[xxxii]
1968	The Commonwealth gives the Member for the Northern Territory equality of powers, immunities and privileges with members from the states (full voting rights for the Member for the Australian Capital Territory were granted in 1966).[xxiii] The Commonwealth also increases the number of elected members of the Legislative Council from eight to 11, sets the number of appointed members at six, and provides for the requisite electoral districts for elections for the Council. [xxiv]
1971 (23 October)	The final general election for the Legislative Council is held. Total enrolment is 25 338.[xxxv]
1972	The Commonwealth establishes the new Department of the Northern Territory.[xxxvi]
1973	The Commonwealth Parliament's Joint Committee on the Northern Territory is established. The Committee resolves to conduct an inquiry into forms of government and constitutional development in the Northern Territory.[xxxvii]
1974	The Commonwealth provides for two senators to represent the Northern Territory and for two senators to represent the Australian Capital Territory. The senators have equality of powers, immunities and privileges with state senators, but their terms are concurrent with those of members of the House of Representatives.[xxxviii] The Commonwealth establishes the Northern Territory Legislative Assembly. The Assembly is comprised of 19 elected members with a Speaker to be chosen from the members (the Legislative Council continues in existence until the inaugural election of the Legislative Assembly in October 1974).[xxxix] The Commonwealth also alters the composition of the Administrator's Council so that it consists of the Administrator and five members of the Legislative Assembly. An electoral distribution in the Northern Territory resulting in 19 electoral districts is carried out by a distribution committee appointed by the Commonwealth Minister for the Northern Territory under the *Northern Territory (Administration) Act 1910 74* (C'th).[xl]
1974 (19 October)	The inaugural general election for the Legislative Assembly is held. Total enrolment is 39 027.
1974 (20 November)	The inaugural sitting of the first Legislative Assembly is held.

1974 (November)	The Joint Committee on the Northern Territory produces its report on forms of government and constitutional development in the Territory. Recommendations include: • The introduction of all state-type matters which are the responsibility of the Commonwealth into the Legislative Assembly; • The transfer of functions of local significance to the Territory Executive; • Discussion between the Commonwealth and the Territory on Territory administrative/operational involvement in (or control over) functions of national importance; and • The creation of a new Territory administration comprising the existing Northern Territory Public Service and Commonwealth officers engaged in those functions to be transferred to the Territory Executive.
1975	The Commonwealth (ALP Government) abolishes the Department of the Northern Territory (and the Department of Northern Development) and establishes a new Department of Northern Australia.
1975 (18 November)	Prime Minister Malcolm Fraser (LIB-NCP Coalition Government) announces that Northern Territory statehood will occur within five years. The Commonwealth abolishes the Department of Northern Australia and re establishes the Department of the Northern Territory.[xli]
1976	The Commonwealth provides for the granting of title to particular lands in the Northern Territory to Aboriginal Land Trusts and establishes Aboriginal Land Councils for the Territory.[xlii] The Commonwealth provides for the transfer of certain executive responsibilities and functions to the Territory.[xliv] Arrangements are made for the transfer of certain Northern Territory Public Service, statutory authority, and Department of the Northern Territory functions to the Northern Territory on 1 January 1977. The Legislative Assembly enacts a range of pertinent ordinances. A new Northern Territory public service is established.[xlv]
1977	The Legislative Assembly enacts further ordinances pertinent to the transfer of responsibilities. Agreement is reached between the Commonwealth and the Northern Territory for Territory self-government to be achieved over the period January 1978 July 1979.[xlvi] A successful constitutional referendum is held to enable Northern Territory (and Australian Capital Territory) electors to vote in constitutional referendums. S. 128 of the Constitution is altered accordingly.[xlvii]

1978	The Commonwealth confers self-government on the Northern Territory to commence from 1 July 1978. Provisions include: • The establishment of the Northern Territory of Australia as a body politic under the Crown; • Conferral of power on the Legislative Assembly to legislate for the peace, order and good government of the Territory; • The establishment of an Executive Council to advise the Administrator; • The establishment of ministerial offices as determined by the Administrator; and • The conferral of executive authority in respect of matters specified in Regulations. Regulations to the *Northern Territory (Self-Government) Act 1978* (Cwlth) specify a range of matters in respect of which Territory ministers are to have executive authority such as land use, planning and development, and public works and utilities, but exclude certain matters such as uranium mining and Indigenous land rights under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth). Other limitations on self-government include provision for the disallowance of laws by the Governor-General and provision for the acquisition of Territory land by the Commonwealth without compensation. The Legislative Assembly enacts ordinances and acts pertinent to self-government.[xlviii]
1979 80	The Legislative Assembly enacts further legislation pertinent to self-government. The Legislative Assembly provides for the regulation of Assembly elections. The office of Chief Electoral Officer is established as well as a Distribution Committee for the determination of electoral divisions.[xlix]
1985	The Legislative Assembly establishes the Select (later Sessional) Committee on Constitutional Development. Terms of reference include inquiring into, reporting and making recommendations on a constitution for the new state and the principles upon which it should be drawn and the issues, conditions and procedures pertinent to the entry of the Northern Territory into the federation as a new state.[l] The Northern Territory Government establishes a Statehood Executive Group to examine statehood issues.[li]
1995	A Joint Commonwealth/Northern Territory Statehood Working Group is established to examine the implications of statehood and the level of popular support for statehood.[lii]

1996	The Sessional Committee on Constitutional Development produces its final report which includes a draft constitution for the Northern Territory. Recommendations include: • The adoption of a new constitution by the Northern Territory to replace the *Northern Territory (Self-Government) Act 1978* (Cwlth); and • The referral of the draft constitution to a Constitutional Convention for finalisation and then to a referendum for approval.[liii] The Joint Commonwealth/Northern Territory Statehood Working Group produces its final report; the report surveys the implications of, and the level of popular support for statehood.[liv]
1997	The Commonwealth uses its constitutional power to legislate for the Northern Territory. The Northern Territory *Rights of the Terminally Ill Act 1995* is rendered ineffective and without force as a law of the Territory and the legislative power of the Legislative Assembly is specified to not extend to the making of laws permitting euthanasia or assisting suicide.[lv]
1998	The Northern Territory Government convenes a constitutional Statehood Convention. The Convention submits a draft constitution to the Legislative Assembly and recommends, *inter alia*, statehood for the Northern Territory as soon as possible. A draft constitution is adopted by the Assembly.[lvi] The Legislative Assembly establishes the Standing Committee on Legal and Constitutional Affairs with a reference to inquire into, report and make recommendations on legal and constitutional matters referred to it by the Northern Territory Attorney-General or the Legislative Assembly[lvii]. The Legislative Assembly provides for the conduct of referendums in the Territory.[lviii]
1998 (3 October)	A Referendum is held in the Northern Territory on whether the Territory should become a state. The result is a majority (51.3%) 'No' vote.[lix] The Legislative Assembly resolves that the Standing Committee on Legal and Constitutional Affairs inquire into appropriate measures to facilitate statehood by 2001.
1999	The Standing Committee on Legal and Constitutional Affairs produces its report on measures to facilitate statehood. Recommendations include: • The recommencement of the statehood process (with no fixed target date for statehood) and the institution of a public education program on statehood; • That the Committee be given a reference to research and prepare recommendations on the staging of a future Constitutional Convention with popularly elected representatives; and • The further development of a Northern Territory Constitution.[lx]

2000	The Northern Territory is redistributed into the two Commonwealth electoral divisions of Solomon and Lingiari for elections to the House of Representatives.[lxi]
2001	Two Northern Territory members are elected to the House of Representatives for the electoral divisions of Solomon and Lingiari in the Commonwealth general election.[lxii] The Legislative Assembly broadens the reference of the Standing Committee on Legal and Constitutional Affairs to enable it to inquire, report and make recommendations on: • Any matter concerned with legal or constitutional issues including law reform, parliamentary reform, administrative law, legislative review and inter-governmental relations; • The legal or constitutional relationship between the Northern Territory and the Commonwealth and any proposed changes to that legal or constitutional relationship, including the admission of the Northern Territory as a new state of the Commonwealth; • Any proposed changes to the Australian Constitution that may affect the Northern Territory and/or its residents; and • With the approval of the Northern Territory Attorney-General, any other matter concerning the relationship between the Northern Territory and the Commonwealth and/or the states.[lxiii]
2003 (22 May)	Northern Territory Chief Minister Martin announces a new community-based statehood campaign, including a new Constitutional Convention and further work on a draft Northern Territory constitution; a target date of 1 July 2008 is set for a second statehood referendum.[lxiv]
2004	The Commonwealth legislates to preserve the two-member representation of the Northern Territory in the House of Representatives.[lxv] The Legislative Assembly endorses the establishment of a Northern Territory Statehood Steering Committee to advise and assist the Standing Committee on Legal and Constitutional Affairs on constitutional development and on statehood education and awareness; membership of the Steering Committee is to be appointed by the Standing Committee on Legal and Constitutional Affairs.[lxvi]
2005	The Commonwealth provides for the selection of a site in the Northern Territory for a radioactive waste management facility and for Commonwealth acquisition of such a site.[lxvii] The Commonwealth House of Representatives Standing Committee on Legal and Constitutional Affairs commences an inquiry into the federal implications of statehood for the Northern Territory and recent statehood developments.[lxviii]

2006	The Northern Territory Statehood Steering Committee reports to the Legislative Assembly. The report concludes that the continued provision of education to Territory residents on statehood is essential.[lxix] The first Northern Territory Minister for Statehood is appointed.[lxx]
2007 (28 May)	The Commonwealth House of Representatives Standing Committee on Legal and Constitutional Affairs concludes its inquiry into statehood and produces its report. The Committee recommends that: • The Commonwealth Government update and refine its position on Northern Territory statehood and re-commence work on unresolved federal issues.[lxxi]

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