**UN Seminar of the Expert Mechanism on the Rights of Indigenous Peoples**

29 November to 1 December 2021

***“Treaties, agreements and other constructive arrangements, between indigenous peoples and States, including peace accords and reconciliation initiatives, and their constitutional recognition.”***

**Concept Note**: Examine the Barriers (structural, political, economic, and social) to, and the enabling conditions necessary for the *implementation* of treaties, agreements, and other constructive arrangements, including peace accords and reconciliation initiatives, and their constitutional recognition.

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Greetings Chair, Vice Chair and Expert Members.

I acknowledge the Moderator of this session and thank the Expert Members for this opportunity to discuss what I think are barriers to “building trust” and enabling “a political climate [which is] conducive to fair and full deliberations” between Indigenous peoples and States.[[1]](#footnote-2)

I begin by paying respects to the original sovereign Indigenous nations around the world. I acknowledge and honour their ongoing efforts in defending their territories of land, and in maintaining and asserting their distinct and separate cultural and political identities. I pay my respects to Gugu Badhun country, to the Gugu Badhun ancestors, and greater Gugu Badhun Nation, from which my cultural and political identity originates from.

As the UN Declaration on the Rights of Indigenous Peoples provides a framework for implementation of treaty rights, the barriers and enabling conditions that I am going to discuss stem principally from Articles 3, 5, 9 and 37[[2]](#footnote-3):

* **Article 3** articulates Indigenous peoples right to self-determination and their right to determine their own political status.
* **Article 5** – outlines Indigenous peoples right to maintain and strengthen their own distinct cultural and political institutions.
* **Article 9** - states that Indigenous peoples and individuals have the right to belong to an indigenous ***nation***;
* and **Article 37** outlines Indigenous peoples right to conclude treaties, agreements, and other constructive arrangements with the State.

Recent Treaty discussions with Aboriginal and Torres Strait Islander peoples conducted across Australia have demonstrated the tendency of Australian Governments to direct negotiations via networks of Native Title corporate entities which are legally recognised and sanctioned within Australian domestic legislative frameworks.[[3]](#footnote-4) This network of native title corporate entities build from local level Native Title Body Corporates, that represent the native title rights and interests of a local level Indigenous Nations, Regional representative bodies called ‘Land Councils’[[4]](#footnote-5) which form alliances at the Australian state and territory levels of government, and the national peak body of Land Councils, the ‘National Native Title Council’.[[5]](#footnote-6)

Preferring economies of scale for reasons of expediency and efficiency, this practice of Australian Governments perhaps underlies an assumption that local level self-determined, self-governing Indigenous polities are willing to forgo a right to represent themselves through their own political institutions.

The power foundations for these present Treaty negotiations are **corporate-to-sovereign** and limited by Australian domestic legal frameworks, as opposed to a negotiation platform which are **sovereign-to-sovereign** or **nation-to-nation**; and, as I will discuss likely to produce reductionist outcomes.

Native title corporations are a state constructed apparatus for native title governance and administration.[[6]](#footnote-7) The State, defines the terms for which these corporations have been constituted; and through these Native Title legal frameworks significantly restrict Indigenous peoples rights to lands, territories and resources. Aboriginal and Torres Strait Islander Nations must question whether these corporate entities are suitable vehicles for the negotiation of Treaties.

Since the commencement of Australia’s Native Title system in the 1990s, there have been a growing number of Aboriginal and Torres Strait Islander corporations established to oversee, represent, and exercise the rights and interests of common law native title holders. Nationally, as of October 2021, 232 Registered Native Title Body Corporates have been compulsorily incorporated under the *Corporations (Aboriginal and Torres Strait Islanders) Act 2006* (Cth).[[7]](#footnote-8) With further native title determinations to be finalised across Australia within the Federal Court system, this network of incorporated bodies represent an expanding sector of Aboriginal and Torres Strait Islander corporations whose collective governance and political potential are yet to be realised.[[8]](#footnote-9) Whilst local level native title corporations hold significant prospect in exercising broader cultural, social, and economic aspirations of an Indigenous Nation, the primary design and function of these entities is for the corporate governance and administration of native title.

There is much evidence to demonstrate that the governance capacity of local level native title corporations is overwhelmed and incapacitated by the high volumes of complicated Native Title policy, administrative and negotiation arrangements.[[9]](#footnote-10) The current levels of bureaucracy required in response to local, state, and federal levels of Australian Governments make it difficult for the Indigenous Nations to reach their full potential as effective self-determined instruments of self-government. Nevertheless, when these corporate entities transform into effective and capable organisations, they can enhance the collective self-determined political representative capacity of an Indigenous Nation.[[10]](#footnote-11)

Even though they hold significant governance potential, they are not built on principles of Indigenous sovereignty, self-determination,and self-government. The foundational principles here are ***sovereignty and self-determination***, through which operational actions of self-government reinforce the cultural integrity and political legitimacy required for political participation and representation of Indigenous Nations.

Most Indigenous Nations are not seeking secession — the common goal is *cultural sovereignty* and a political relationship with Australian Governments that are based on autonomy and self-government.[[11]](#footnote-12) This is reflected within Indigenous peoples’ collective call for Treaties with Australian Governments.[[12]](#footnote-13) Indigenous Nations see the recognition of Indigenous sovereignty as the starting point for self-determination and self-government.[[13]](#footnote-14) Indigenous Nations desire a level of control over their ancestral territories, over decision-making required for their internal affairs, and over designing their social, cultural, economic, and political interests and how these interests should be pursued as per Article 3 and Article 4 of the Declaration.[[14]](#footnote-15)

The concepts of Indigenous sovereignty, self-determination, and self-government highlight the significant differences between the Native Title system and a Treaty process. The limitations of the Native Title system are emphasised by the ‘severity of the extinguishment rules’, ‘the narrow ambit of rights that [statutory] recognition offers’, and a ‘disconnect from other government policy areas which encourages social and economic development’.[[15]](#footnote-16) With the onus on Indigenous peoples to prove ongoing connection to land, the Native Title system severely penalises those who have been dispossessed of their ancestral homelands by the violent realities of colonisation.[[16]](#footnote-17) A Treaty, however, presents an opportunity for those dispossessed by Native Title’s ‘ongoing connection’ rules to negotiate terms with Australian governments, that stem from the recognition of Indigenous sovereignty pre-existing British proclamations.

“Modern treaties should reflect the reality that indigenous peoples do not stand in opposition to, nor should be subjugated by, the sovereignty of modern States.[[17]](#footnote-18) If the original spirit and intent of Treaties is to characterise a **nation-to-nation** agreement, as a formal exchange of recognition and respect — Treaties present an opportunity for demonstrations of good faith by the State, not only in matters of redress and compensation, and the recognition of legal rights, but for the types of innovation and change which can provide real remedies that address Indigenous peoples’ experiences of social, cultural, political and economic disadvantage.[[18]](#footnote-19) Therefore, the scope of Treaty negotiations should include terms of autonomy and authority, based on shared or parallel judicial, political and economic jurisdictions.[[19]](#footnote-20) Many have suggested this be done through a model of Treaty Federalism, facilitated by multilateral and bilateral agreements that represent the plurality of cultures, characterised by diversity of languages and spiritual connections to territories of lands[[20]](#footnote-21).

Treaty processes continue to offer the best means for achieving reconciliation between the prior presence of Indigenous peoples and the sovereignty of modern States.[[21]](#footnote-22) Treaty processes are an opportunity to negotiate a new frameworks and new relationships between Indigenous Nations and the State that “address rights to the use of lands and resources, and the exercise of governance and lawmaking powers” and not the simply reinforcement of existing domestic laws, policies and programs that affect Indigenous peoples.[[22]](#footnote-23)

As the Native Title system preceded the commencement of Treaty discussions within Australia, the limited rights framework of the Native Title system will influence the bargaining base line of both the Australian state and Indigenous nations.[[23]](#footnote-24) Without regard for the kinds of local level political institutions an Indigenous nation needs to ***action*** and assert Indigenous sovereignty, self-determination and self-government, Treaty negotiations are potentially ineffective and impotent. For Indigenous Nations with limited capacity and economic resources, it is a daunting task to build self-governing political institutions from the ground up. The process can be doubly daunting if this work must be undertaken at the same time Treaty discussions are being accommodated. Nonetheless, it is important to acknowledge that not all local level Native Title Corporations are politically inert.[[24]](#footnote-25) But it takes time to design and build political institutions that uphold and enhance the cultural integrity, political legitimacy, and representative authority of a discrete Indigenous Nation.

In conclusion, local level claims to Indigenous sovereignty, self-determination and self-government must be exercised through a political status and ***voice of a* *nation***, otherwise treaty discussions between Indigenous peoples and States risk being restricted in potential and scope.

Further, if “Treaties constitute Nation-to Nation agreements based on mutual recognition, consent, good faith, and respect” Treaties must not represent corporate-to-sovereign agreements because Indigenous Nations are ***polities*** not corporations.[[25]](#footnote-26)

1. Expert Mechanism on the Rights of Indigenous Peoples, *Compilations of Conclusions and Recommendations from the United Nations Seminars no Treaties, Agreements and other Constructive Arrangements*, 7th sess, UNDOC A/HRC/EMRIP/2014/CRP.1 (7-11 July 2014), See conclusion xxvii on of the *Report of the United Nations Expert Seminar on Strengthening Partnership between Indigenous Peoples and States: Treaties, Agreements and other Constructive Arrangements*, Geneva, 16-17 July 2012, p.5. [↑](#footnote-ref-2)
2. **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 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; and **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 respect 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. [↑](#footnote-ref-3)
3. Federation of Victorian Traditional Owner Corporations [FVTOC], (2020). *Treaty,* Viewed at Federation of Victorian Traditional Owner Corporations < <https://www.fvtoc.com.au/treaty-1>>; Australians for Native Title and Reconciliation [ANTAR], (2020) *Treaty in Your State* ANTAR, < <https://antar.org.au/campaigns/time-treaty>>. [↑](#footnote-ref-4)
4. In the Torres Strait, the Torres Strait Regional Authority is the regional native title representative body. [↑](#footnote-ref-5)
5. Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS). (2018). *Australian Institute of Aboriginal and Torres Strait Islander Studies, ‘Registered Native Title Bodies Corporate – Prescribed Bodies Corporate Summary’*, (Web Page, July 2018), <<https://aiatsis.gov.au/sites/default/files/products/whats_new_in_native_title/whats_new_in_native_title_-_july_2018.pdf>>; National Native Title Council, (2020). *About the NNTC* (June 2020) National Native Title Council < <https://nntc.com.au/about/>> [↑](#footnote-ref-6)
6. Office of the Registrar of Indigenous Corporations [ORIC], (2020). *Registered Native Title Bodies Corporate*, ORIC, 22 October 2020, <https://www.oric.gov.au/top-500/2015-16/RNTBCs> [↑](#footnote-ref-7)
7. Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS). (2021). *Prescribed Bodies Corporate National Snapshot* (May 2021) Australian Institute for Aboriginal and Torres Strait Islander Studies, viewed 22 June 2021 at < <https://nativetitle.org.au/learn/role-and-function-pbc/pbc-national-snapshot>>; Of the 232 nationally: 92 were in Queensland (21 of the 92 located in the Torres Strait region); 71 in Western Australia; 35 in Northern Territory; 21 in South Australia; 9 in New South Wales; and 4 in Victoria. [↑](#footnote-ref-8)
8. Weir, J. (2007), Native Title Governance: The Emerging Corporate Sector Prescribed for Native Title Holders, 3(9) *Land Rights, Laws: Issues for Native Title*, <<https://aiatsis.gov.au/publications/products/native-title-and-governance-emerging-corporate-sector-prescribed-native-title-holders>> ; Buchanan, G. (2015). Gender and generation in native title: director demographics and the future of prescribed bodies corporate. *Land, Rights, Laws., 6*(3), 1–18; and Burbidge, B. (2017), National picture: growth of Prescribed Bodies Corporate. *Native Title Policy Paper 4*<<https://aiatsis.gov.au/sites/default/files/products/policy_paper/native_title_policy_paper_4.pdf>>. [↑](#footnote-ref-9)
9. Weir, J. (2007); Buchanan, G. (2015); and Bauman, T., Smith, D. & Keller, C. (2014). AIATSIS and AIGI survey of gaps and challenges in Indigenous governance research and practical tools: Draft summary of responses’,  <<https://aiatsis.gov.au/sites/default/files/products/research_outputs_statistics_and_summaries/2014-bauman-smith-keller-survey-summary-indigenous-governance-research-tools_0.pdf>>.  [↑](#footnote-ref-10)
10. Cornell, S. E., Curtis, C., & Jorgensen, M. (2004). The concept of governance and its implications for first nations. *Joint Occasional Papers on Native Affairs* (2004-02); Jorgensen, M.  (2007). Editors Introduction, in M. Jorgensen (ed.), *Rebuilding Native Nations: Strategies for Governance and Development*, University of Arizona, Tucson, pp.xi-xiv.   [↑](#footnote-ref-11)
11. Coulthard, G. S. (2014). *Red skin, white masks: rejecting the colonial politics of recognition*. Minneapolis: University of Minnesota Press; Behrendt, L. (2003a). Practical Steps Towards a Treaty: Structures, Challenges and the Need for Flexibility. In *Treaty: Let’s Get it Right* (pp. 18–29). Aboriginal Studies Press.  [↑](#footnote-ref-12)
12. Behrendt, L. (2003b). Achieving social justice: indigenous rights and Australia’s future. Federation Press. [↑](#footnote-ref-13)
13. Behrendt, L. (2003b). p. 115. [↑](#footnote-ref-14)
14. Cornell, S., & Kalt, J. P. (2007). One Works, the Other Doesn't: Two Approaches to Economic Development on American Indian Reservations: Strategies for Governance and Development. In M. Jorgensen (Ed.), *Rebuilding Native Nations: Strategies for Governance and Development*University of Arizona Press; Cornell, S. (2015). Processes of Native Nationhood: The Indigenous Politics of Self-Government. *International Indigenous Policy Journal, 6*(4). doi:10.18584/iipj.2015.6.4.4.   See **Article 3** (above) and, **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. [↑](#footnote-ref-15)
15. Brennan, S., Gunn, B. & Williams, G. (2004). “Sovereignty” and its relevance to treaty-making between indigenous peoples and Australian governments. *The Sydney Law Review*, 26(3), 307–352, p.118.  [↑](#footnote-ref-16)
16. Atkinson, W. (2001). “Not one iota” of land justice: reflections on the Yorta Yorta native title claim 1994-2001. *Indigenous Law Bulletin, 5*(6), 19–23.  [↑](#footnote-ref-17)
17. Expert Mechanism on the Rights of Indigenous Peoples, *Compilations of Conclusions and Recommendations from the United Nations Seminars no Treaties, Agreements and other Constructive Arrangements*, 7th sess, UNDOC A/HRC/EMRIP/2014/CRP.1 (7-11 July 2014), see recommendations from *Report of the seminar on treaties, agreements and other constructive arrangements*, UNDOC E/CN.4/2004/111 (15-17 December 2003), p.21. [↑](#footnote-ref-18)
18. EMRIP (2004), see recommendations from *Report of the seminar on treaties, agreements and other constructive arrangements*, UNDOC E/CN.4/2004/111 (15-17 December 2003), p. 22. [↑](#footnote-ref-19)
19. Brennan, S. (2005a). Native title and the treaty debate: what’s the connection? [This Issues Paper first published in May (2004) as part of the Treaty Project at the Gilbert + Tobin Centre of Public Law at UNSW.]. *Balayi, Culture, Law and Colonialism, 7*(May 2005), 116–125; Brennan, S. (2005b).  [↑](#footnote-ref-20)
20. Tully, J. (2000). 'The struggles of indigenous peoples for and of freedom', in D. Iverson, P. Patton and W. Sanders (Eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge, Cambridge University Press); Appleby, G., & McKinnon, G. (2017). The Uluru Statement: The Uluru Statement calls for voice, treaty and truth and is much more than a singular constructive contribution to the conversation about recognition of Indigenous Australians in the Constitution: it asserts a right to an ongoing voice in the Australian political system. *LSJ: Law Society of NSW Journal*, 37; Castan, M. (2015). Constitutional recognition, self-determination and an Indigenous representative body. Indigenous Law Bulletin, 8(19), 15–18; McMillan, M. (2016) Is federalism being undermined in the current surge to ‘recognise’ Indigenous Australians in (and into) the Commonwealth Constitution? Indigenous law bulletin. 8 (25), 15–19; Lino, D. (2017). Towards Indigenous-settler federalism. *Public Law Review (North Ryde, N.S.W.), 28*(2), 118-137.   [↑](#footnote-ref-21)
21. EMRIP (2004), see recommendations from *Report of the seminar on treaties, agreements and other constructive arrangements*, UNDOC E/CN.4/2004/111 (15-17 December 2003), p.21. [↑](#footnote-ref-22)
22. EMRIP (2004), see recommendations from *Report of the seminar on treaties, agreements and other constructive arrangements*, UNDOC E/CN.4/2004/111 (15-17 December 2003), p. 21; **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. [↑](#footnote-ref-23)
23. Brennan (2005a). [↑](#footnote-ref-24)
24. Brennan, S., Gunn, B., & Williams, G. (2004); Cornell, S. (2013). Reconstituting Native Nations: Colonial Boundaries and Institutional Innovation in Canada, Australia, and the United States. In R. Walker, T. Jojola, & D. Natcher (Eds.), Reclaiming Indigenous Planning McGill-Queens University Press. [↑](#footnote-ref-25)
25. EMRIP (2004), see conclusions from *Report of the United Nations Expert Seminar on Strengthening Partnership between Indigenous Peoples and States: Treaties, Agreements and other Constructive Arrangements, Geneva, 16-17 July 2012,* p.4*.*  [↑](#footnote-ref-26)