Treaty Making: Critical Reflection on Critiques from Abroad

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Introduction

One of the fundamental challenges to contemporary treaty-making processes in Australia is the historical absence of negotiated agreements. The British Crown and successive Australian governments failed to seriously consider entering into treaties with Aboriginal and Torres Strait Islander peoples. It has left Australians with little familiarity over what is and what is not a treaty, as well as limited capacity to set up the mechanisms and institutions necessary to engage in productive negotiation.

As Northern Territory Treaty Commissioner Mick Dodson explains in this collection, neither First Nations nor Australian governments are 'close to being "treaty ready"'.[1] Thankfully, there is a wealth of international experience from which First Nations and governments can draw. Treaties are accepted around the world as the means of resolving differences between First Nations and those who have colonised their lands; they have been made in the United States, Aotearoa New Zealand, and are still being negotiated in Canada today.[2]

Comparative examination of modern treaty processes in Canada is valuable. Jill Gallagher, the Victorian Treaty Advancement Commissioner, has spoken openly of her desire that treaty processes in Australia look closely at the experience in Canada. Modern treaty processes in that country demonstrate that contemporary treaties are possible; 'we can learn from what they did'.[3] In 2018, Gallagher and a group of Aboriginal Victorians travelled to North America to meet with First Nations leaders engaged in treaty negotiations and treaty implementation:

> We witnessed the incredible transformation that treaty can offer our communities. We witnessed how treaties gave communities control over their affairs, how they can embed culture in their social services, design a justice system that doesn't just lock up their children, develop housing policies that reunite communities, not divide.[4]

The experience in North America and Aotearoa New Zealand suggests that treaties can rebuild and re-empower First Nations, providing a legal and practical carapace within which they may play a meaningful role in solutions to problems faced by their communities. And yet, for a variety of reasons, modern treaty processes have often failed to realise these ambitions. If modern treaty processes in Australia are to succeed, close examination of those challenges is vital.

In this chapter, we outline and analyse the critiques of modern treaty processes in Canada, focusing on criticisms levelled at the comprehensive land claims ('CLC') processes at the federal level and, at the provincial level, the process undertaken by the British Columbia Treaty Commission (BCTC). First Nations peoples involved in Australian treaty processes are aware of the issues we articulate here, but they are important to re-state. Indeed, it is vital that non-Indigenous peoples recognise that although modern treaties can promote meaningful settlements that benefit both First Nations and non-Indigenous

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[1] See Chapter 9.
[2] See generally George Williams and Harry Hobbs, *Treaty* (Federation Press, 2nd ed, 2020).
[3] Jill Gallagher cited in Jade Bate, 'Victorian Treaty Advancement Commissioner Jill Gallagher visits Horsham to Discuss Treaty Advancements', *The Winmera Mail-Times* (online, 19 June 2018) <https://www.mailtimes.com.au/story/5473474/wimmera-weighs-in-on-treaty-advancements-videos/>.
[4] Jill Gallagher cited in David Donaldson, '"Please Don't Be Bystanders": Treaty Commissioner Calls for Public Support', *The Mandarin* (online, 10 September 2018) <https://www.themandarin.com.au/98384-please-dont-be-bystanders-treaty-commissioner-calls-for-public-support/>.

communities, working within the state-based legal status quo brings its own challenges. Modern treaties that reproduce hierarchical relations perpetuate settler-colonialism and can disadvantage First Nations.[5]

Treaty processes in Australia reflect, to some degree, lessons learned in Canada. However, there are also key distinctions between Canada and Australia which must be borne in mind when considering modern processes in Australia. Perhaps most significant is the legal status of any settlement. Unlike the situation in Canada, where treaties are constitutionally protected,[6] any Australian treaty will be susceptible to federal legislative override.[7] Reflecting this difference, the calls for treaty takes place in a context that also calls for broader structural changes to governance in Australia. As the *Uluru Statement from the Heart* makes clear, treaty in Australia should be nested within a wider project of constitutional reform aimed at empowering Aboriginal and Torres Strait Islander peoples to 'take *a rightful place* in [their] own country'.[8] This larger project exceeds the more limited mandates of the CLC and BCTC. Nonetheless, embracing broader ambitions does not mean that the treaty processes themselves are impervious to the challenges also experienced in Canada. Close attention of criticisms levied at the Canadian processes is thus important for Australia.

We divide our chapter into three parts. We begin by providing background on historic treaty making between First Nations and the state in Canada. We then outline the more recent CLC and BCTC processes. In the second part we examine several of the main critiques directed at those processes, separating them into three distinct elements: the legal status of these agreements, the negotiation stage, and the implementation stage. We articulate the issues in this way to show that they are interrelated and ultimately manifestations of the ongoing settler-colonial relationship between the state and First Nations peoples.

It is for this reason that although treaty is often held up as a means through which First Nations can transcend colonialism, it is by itself unlikely to achieve these aims. This conclusion is not intended to dismiss modern treaties. Treaty remains a key aspiration of Aboriginal and Torres Strait Islander peoples and treaty can secure important outcomes for both parties. To this end, we conclude with a series of critical reflections on the important lessons we hope to glean from treaty processes within Canada.

Treaty-making in Canada

There have been four periods of treaty-making between First Nations peoples and European powers in North America. Relationships between First Nations and colonists, British and French, were initially based on trading arrangements. In the eighteenth century, colonists sought to formalise these deals into strategic alliances, or 'peace and friendship treaties', to protect and promote their interests. After the British established themselves as the dominant European power on the continent, King George III issued the Royal Proclamation of 1763, guaranteeing Aboriginal 'Nations or Tribes' undisturbed possession of their territories, unless purchased by the Crown or ceded via treaty.[9]

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[5] Harry Hobbs and Stephen Young, 'Modern Treaty Making and the Limits of the Law' (2020) 71 *University of Toronto Law Journal* 234. The notion of settler colonialism stems from Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide Research* 387.

[6] *Constitution Act, 1982* (Canada), s 35(1).

[7] The Commonwealth Parliament could make a law to overturn or weaken any State-based treaty through the race power in s 51(xxxvi) of the *Constitution*. Under s 109 of the *Constitution* Commonwealth laws prevail over State laws to the extent of any inconsistency. The Commonwealth Parliament could use the territories power in s 122 of the *Constitution* to act likewise in the Northern Territory and the ACT.

[8] *Uluru Statement from the Heart*, Uluru, 26 May 2017 ('*Uluru Statement*') <https://ulurustatement.org/>.

[9] *Royal Proclamation of 1763* 4 Geo 3.

The Proclamation led to an 'era of unsystematic treaty making'.[10] In this phase, First Nations surrendered large tracts of land to the British in return for defined reserves, annual payments, and rights to hunt, fish and undertake cultural activities over their traditional lands. Following Confederation in 1867, a third era emerged. From 1871, Canada entered into eleven 'Numbered Treaties' with various First Nations to pursue settlement, agriculture, and resource development in the West and North. The signing of Treaty 11 in the Northwest Territories in 1921 marked the final numbered treaty, but considerable areas of the country had never been subject to treaty, including 'most of British Columbia, Northern Quebec, Newfoundland and Labrador, and parts of Yukon Territory and Northwest Territories'.[11]

The parties viewed treaty making differently. While the British and Canadian Crowns viewed the agreements as an inexpensive way to acquire land and resources, First Nations signed treaties as a means to protect their traditions, culture and community.[12] It is through these treaties that the Crown maintains that it legitimately acquired sovereignty to lands and territories. However, many First Nations continue to question whether the Crown's claims to sovereignty were ever legitimate.[13] That question is particularly thorny where the Canadian Crown claims sovereignty and jurisdiction over land that was not subject to treaties. As Andrew Woolford noted, the absence of treaties in British Columbia, for example, meant that 'the spectre of Aboriginal title … haunted the provincial governments claim to jurisdiction over lands and resources'.[14] In 1973, that spectre manifested itself in law when the Supreme Court of Canada found the common law could recognise Aboriginal title.[15] Prime Minister Pierre Trudeau responded by announcing that his government would develop a new policy based on 'Aboriginal self-determination, Aboriginal and treaty rights, and self-government'.[16] The fourth era of treaty-making soon emerged.

The Comprehensive Land Claims Process

The Canadian government developed two processes. A Specific Claims process deals with problems arising from the administration of existing treaties, while a Comprehensive Land Claims process was designed to generate agreements with First Nations that had not signed treaties.[17] CLCs follow a structured six-stage process. To begin, a First Nation must submit a Statement of Claim to the federal government. The Statement must: establish that the group has not previously signed a treaty and that it continues to use and occupy its traditional land; include a description and map detailing the extent and location of its traditional land; and demonstrate that it is an identifiable group. Upon receipt of the Statement, the relevant federal Minister reviews the documentation and accepts or rejects the claim within 12 months. If accepted, preliminary negotiations aimed at developing a framework agreement (which determines the scope, process, topics and parameters for negotiation) will be initiated between the First Nation, and the federal and provincial and/or territorial government. The next stage requires finalising a non-legally binding Agreement-in-Principle. After First Nations and the federal government

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[10] Christina Godlewska and Jeremy Webber, 'The *Calder* Decision, Aboriginal Title, and the Nisga'a' in Hamar Foster, Heather Raven and Jeremy Webber (eds), *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (UBC Press, 2007) 1, 12.

[11] Christopher Alcantara, 'Implementing Comprehensive Land Claims Agreements in Canada: Towards an Analytical Framework' (2017) 60(3) *Canadian Public Administration* 327, 329.

[12] Derek Whitehouse, 'The Numbered Treaties: Similar Means to Dichotomous Ends' (1994) 3 *Past Imperfect* 25.

[13] Douglas Sanderson, 'The Residue of *Imperium*: Property and Sovereignty on Indigenous Lands' (2018) 68(3) *University of Toronto Law Journal* 319.

[14] Andrew Woolford, 'Negotiating Affirmative Repair: Symbolic Violence in the British Columbia Treaty Process' (2004) 29(1) *Canadian Journal of Sociology* 111, 113.

[15] *Calder v Attorney-General of British Columbia* [1973] SCR 313, 328–9 (Martland, Judson and Ritchie JJ), 394 (Hall, Spence and Laskin JJ).

[16] Augie Fleras and Jean Leonard Elliot, *The 'Nations Within': Aboriginal-State Relations in Canada, the United States, and New Zealand* (Oxford University Press, 1992) 45 (citations omitted).

[17] Williams and Hobbs (n 2) 184; Christopher Alcantara, 'To Treaty or Not to Treaty? Aboriginal Peoples and Comprehensive Land Claims Negotiations in Canada' (2007) 38(2) *Publius* 343.

re-endorse it, the parties negotiate a Final Agreement. A Final Agreement must be formally ratified by the First Nation and enacted in legislation passed by the relevant parliaments.

The British Columbia Treaty Claims Process

British Columbia resisted the treaty process for several years following the *Calder* decision. However, it eventually joined the negotiating table after a number of judicial decisions raised the possibility that aboriginal title to large swathes of the province would be recognised.[18] Nonetheless, instead of adopting the CLC process, British Columbia elected to develop its own framework. It began in 1990 by establishing the British Columbia Treaty Claims Taskforce. The Taskforce was supported by First Nations who did not want 'to be caught without a thoughtful, strategic position or to be put into a position where they could be outflanked by more skilled government negotiators'.[19] It comprised two representatives from both the federal and provincial Canadian governments, and three representatives from First Nations. Although the four non-Aboriginal representatives outnumbered the three First Nations representatives, First Nations were given three (instead of two) representative-seats to ostensibly 'counteract a potential power imbalance between Aboriginal and non-Aboriginal representatives,' and more accurately represent First Nations' interests.[20]

The Taskforce recommended that the parties commit to 'a new relationship based on mutual trust, respect, and understanding' by establishing a treaty commission to facilitate political negotiations.[21] Established in 1993, the BCTC is an independent and impartial body.[22] It is composed of five commissioners, two appointed by First Nations, one each by the Federal Government and the Provincial Government, and one further commissioner agreed to by the three parties. The BCTC facilitates treaty negotiations by 'monitoring developments and by providing, when necessary, methods of dispute resolution'.[23] It consists of a similar six-stage process. With a larger involvement of First Nations representatives in its design, however, it was hoped that the Commission would avoid imposing a monocultural version of justice on First Nations communities.[24]

The development of the CLC process and the BCTC reveal the desire within government to finalise contested questions over land in Canada in a manner that respects First Nations' status and position. However, these processes have been less successful than its proponents had hoped. Since 1973, only 26 comprehensive land claim and/or self-government agreements have been finalised, while around 100 other treaties are at various stages of negotiation.[25] Frustrated with the extremely slow process and potential settlement outcomes offered, many First Nations have walked away from the negotiation table. In the following part, we explore several reasons why negotiations have stalled.

Critiques of Modern Treaty Making in Canada

It is expected that reaching agreements will take time, but the slow progress of treaty making in Canada suggests that the process is beset by major problems. In this part we explore several concerns that centre

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[18] See Christopher McKee, *Treaty Talks in British Columbia* (University of British Columbia Press, 3rd ed, 2009) 29.
[19] Ibid 32.
[20] Andrew Woolford, *Between Justice and Certainty: Treaty Making in British Columbia* (University of British Columbia Press, 2005) 194 n 2.
[21] British Columbia Claims Taskforce, *The Report of the British Columbia Claims Task Force* (Report, First Nations of British Columbia, Government of British Columbia, Government of Canada, 28 June 1991) 42 Appendix 6 Recommendations 1, 3.
[22] *British Columbia Treaty Commission Act*, SC 1995, c 45, ss 4–5.
[23] McKee (n 18) 33.
[24] Woolford (n 14) 14.
[25] 'General Briefing Note on Canada's Self-government and Comprehensive Land Claims Policies and the Status of Negotiations', *Government of Canada* (online, 16 August 2016) <https://www.rcaanc-cirnac.gc.ca/eng/1373385502190/1542727338550>.

on the practice of modern treaty-making itself. Even if some First Nations see modern treaty-making as a continuation of their pre-colonial practices,[26] modern treaties are domestic agreements that operate within and according to the legal framework of the state. This is apparent at every stage of the treaty making process. It influences the legal status of these agreements, how state actors conceive of themselves and their aims during the negotiation, and during the implementation of modern treaties.

Focusing on this fact reveals two further points. First, it is not possible to address the problems identified in the Canadian processes in isolation or sequentially. Each challenge is tied to one another and connected to the broader overarching issue that modern treaties are domestic agreements that gain their legal force through the enactment of state legislation. Second, for this reason, it is unlikely that Australian treaty processes, on their own, can avoid some of the challenges experienced by their Canadian counterparts without attention to broader structural changes. Nevertheless, far from suggesting that treaty making is futile for failing to provide a clear exit from settler-colonialism, we argue that experiences in Canada can assist all Australians to understand the potential value and limits of modern treaty making, as well as the need to push for broader societal change.

Legal Status

Historic treaties negotiated in North America and Aotearoa New Zealand were understood at the time to be nation-to-nation agreements. Modern treaties are different from their historical antecedents.[27] The processes of colonialism and state formation has meant that agreements negotiated today are not international covenants between independent sovereign states.[28] Agreements struck between the state and First Nations today are legally enforceable when the state enacts legislation to that effect.[29] For critical scholars attentive to structures, this is inherently problematic.[30] Taiaiake Alfred, for example, asserts that the BCTC process in Canada is nothing more than an attempt to extinguish Indigenous nationhood by 'bringing Indigenous peoples into Canada's own domestic political and legal structures with certainty and finality'.[31] Similar concerns have already been raised about the treaty processes in Australia.[32]

The legal status of modern treaties leads Alfred to reject the BCTC process *tout court*. Alfred asserts that because British Columbia does not have a legitimate basis to make claims to the land or jurisdictional authority (other than racist ideology), the treaty processes are nothing more than a means

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[26] Vanessa Sloan Morgan, Heather Castleden, Huu-ay-aht First Nations, '"Our Journey, Our Choice, Our Future": Huu-ay-aht First Nations' Self-Government enacted through the Maa-nulth Treaty with British Columbia and Canada' (2019) 51(4) *Antipode* 1340.

[27] Williams and Hobbs (n 2) ch 1; Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 1. The government of Canada also distinguishes 'traditional' from 'modern treaties': 'Treaties and Agreements', *Government of Canada* (online, 30 July 2020) <https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231>.

[28] On the process as to how states were able to remove 'the Indigenous question' 'from the sphere of international law' and place it within its own exclusive competence, see: Miguel Alfonso Martinez, Special Rapporteur, Studies on Treaties, *Agreements and Other Constructive Arrangements between States and Indigenous Populations*, UN Doc E/CN.4/Sub.2/1999/20 (22 June 1999) 24 [192].

[29] See for example *Nisga'a Final Agreement*, 4 May 1999 (entered into force 11 May 2000); *Nisga'a Final Agreement Act,* SBC 1999, c 2; *Nisga'a Final Agreement Act*, SC 2000, c 7.

[30] See for example Taiaiake Alfred, *Peace, Power, Righteousness: an indigenous manifesto* (Oxford University Press, 1999) 119–28; Wolfe (n 5) 388; Andrew Woolford, 'Transition and Transposition: Genocide, Land and the British Columbia Treaty Process' (2011) 4(2) *New Proposals: Journal of Marxism and Interdisciplinary Inquiry* 67.

[31] Taiaiake Alfred, 'Deconstructing the British Columbia Treaty Process' (2001) 3 *Balayi: Culture, Law and Colonialism* 37, 40.

[32] See, for example, Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015. See also Sarah Maddison, Julia Hurst and Dale Wandin in Chapter 8.

for the Canadian governments to legitimate its 'occupation and governance in this territory'.[33] These agreements force First Nations to 'formally define themselves and seal their rights in a document which is not subject to evolution or alteration', but which helps produce certainty for the economic and political climate that 'promotes corporate investment and a stable context for business on Indigenous lands'.[34]

Those participating in the processes recognise these challenges but still see value in treaty. The Huu-ay-aht First Nations, for example, understand the BCTC process as a modern iteration of a long-standing, pre-colonial practice of negotiated agreements between equal sovereigns.[35] Huu-ay-aht First Nations were 'aware of the impaction and often asymmetrical nature of modern treaties', but, nonetheless, engaged in the process to re-form their relationship with British Columbia and Canada in ways they considered valuable.[36] Indeed, Huu-ay-aht First Nations continue to view the treaty 'as a tool for advancing the Nation's self-determination',[37] and they have begun commissioning independent social services studies to work toward bringing children home while expanding its economic options.[38] The same is true of the Nisga'a. For these communities, modern treaties confirm that power and authority reside in the First Nations themselves. As such, they are a medium through which, in the words of Edward Allen, CEO of the Nisga'a Lisims Government, 'we have negotiated our way into Canada, to be full and equal participants of Canadian society'.[39]

Negotiation

Treaties between First Nations and states should have a dual character. While both parties enter negotiations in the desire to secure legal certainty over a range of claims and interests, these agreements are more than simply legal covenants. They are also declarations of enduring relations that seek to connect 'different peoples through constitutional bonds of multicultural unity'.[40]

The relational character of First Nations-State treaties persists in the language of contemporary agreements across Canada. The preamble to the *Nisga'a Final Agreement*, for example, notes that a treaty is a symbol of 'equal partnership', based on 'mutual recognition and sharing'.[41] The importance of this character stems from the fact that it is only through constructive relationships that First Nations and state actors are able to envisage and share in the design of a mutual future, where political power is consensually distributed.[42] However, the legal status of modern treaties limits the capacity of these agreements to extricate First Nations from the state or transcend settler-colonialism. Several limitations become apparent at the negotiation stage.

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[33] Alfred (n 31) 42
[34] Ibid 43–4. See further Sharon Verne, 'Crown Title: A Legal Lie' in Peter McFarlane and Nicole Schabus, *Whose Land is it Anyway? A Manual for Decolonization* (Federation of Post-Secondary Educators of British Columbia, 2017); Aileen Morton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press, 2015).
[35] Morgan, Castleden, Huu-ay-aht First Nations (n 26).
[36] Ibid 1158.
[37] Huu-ay-aht First Nations et al, 'Implementing A Modern Treaty in British Columbia: Lived Experiences from Huu-ay-aht First Nations—Maa-nulth Treaty signatories' (2019) 6:2 *Northern Public Affairs* 41, 44.
[38] Ibid 44–5.
[39] Edward Allen, 'Our Treaty, Our Inherent Right to Self-Government: An Overview of the Nisga'a Final Agreement' (2004) 11(3) *International Journal on Minority and Group Rights* 233, 234.
[40] Robert Williams Jr, *Linking Arms Together: American Indian Visions of Law and Peace* (Oxford University Press, 1997) 105.
[41] *Nisga'a Final Agreement* (n 29) preamble. See further Patrick Macklem, 'Indigenous Peoples and the Ethos of Legal Pluralism in Canada' in Patrick Macklem and Douglas Sanderson (eds), *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (University of Toronto Press, 2016) 17, 21–3.
[42] Russel Lawrence Barsh and James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (University of California Press, 1980) 270.

First, negotiations can become problematic where state actors understand their role narrowly, in a manner according to and structured by the legal status of the agreement. Where this occurs, the relational character of treaties may fail to develop. In an early article challenging the approach of British Columbian and Canadian negotiators, James Tully identified this problem. Tully argued that the status of these agreements mean that each side understands their role in two 'very different' ways.[43] While 'First Nations see themselves *as* "First Nations" entering into treaty relations with the Crown … on an equal footing – on a "nation to nation" basis',[44] state actors may regard themselves as 'representatives of the Crown entering into negotiations with "minorities" within Canada' who 'are already in a relationship of subordination and some fort of subjection to the Crown'.[45] In Tully's view, the legal status of the agreement can foreclose state actors' capacity to engage meaningfully with First Nations peoples' priorities and interests.

Second, as domestic agreements that presuppose a legal status within the state, the negotiation of modern treaties may become structured around non-Indigenous ways of knowing. As Christopher Alcantara has explained, First Nations 'must adopt western forms of knowledge, proof, and discourse' to participate in treaty negotiations.[46] They need to 'produce maps, hire white anthropologists, linguists, lawyers and historians' to prepare their negotiation strategies and arguments.[47] These practices can further entrench the epistemologies of state actors that Tully has identified, positioning federal, provincial and territorial governments as 'rights-granting entities' and First Nations as 'petitioners, forced to prove the validity of their claims to the governments'.[48]

It can also limit the potential for innovative and distinct settlements. Michael Coyle has noted that the legal status of modern treaties means that that the political or legal imagination of the state 'risk becoming the presumed baseline from which new ideas are developed and adjudged'.[49] When that occurs, there is a real concern that western 'cultural values and legal norms will be privileged over Indigenous norms in the creation of new Indigenous jurisdictions'.[50] More recently, Robert Hamilton and Joshua Nichols have made a similar point, arguing that the modern treaty process 'has been hamstrung by…an insistence on the part of the Crown of fitting Aboriginal peoples into a judicially mediated rights framework'.[51] Common to these critiques is the notion that First Nations institutions, epistemologies and approaches to social ordering will be ignored in favour of those recognisable to the state.

The most cogent criticism along these lines has been made by Taiaiake Alfred. Drawing on the legal status of modern treaties, Alfred maintains that the BCTC process 'perpetuates and is oriented towards further embedding the colonial frame of mind and practice, and all of its incumbent assumptions, prejudices and biases'.[52] For Alfred, modern treaty processes in British Columbia use 'the present manifestation of colonialism (the state of relations with Indigenous peoples and present status of

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[43] James Tully, 'Reconsidering the BC Treaty Process' in British Columbia Treaty Commission, Speaking Truth to Power: A Treaty Forum (British Columbia Treaty Commission, 2001) 7.
[44] Ibid 8.
[45] Ibid.
[46] Alcantara, 'To Treaty or Not to Treaty' (n 17) 353.
[47] Ibid.
[48] Ibid 354.
[49] Michael Coyle 'Establishing Indigenous Governance: The Challenge of Confronting Mainstream Cultural Norms' in Ghislain Otis and Martin Papilllon (eds), *Fédéralisme et governance autochtone: Federalism and Aboriginal Governance* (Presse de l'université Laval, 2013) 141, 149. See further Michael Coyle, 'Transcending Colonialism? Power and the Resolution of Indigenous Treaty Claims in Canada and New Zealand' (2011) 24 *New Zealand Universities Law Review* 596.
[50] Coyle, 'Establishing Indigenous Governance' (n 49) 151.
[51] Robert Hamilton and Joshua Nichols, "The Tin Ear of the Court: *Ktunaxa Nation* and the Foundation of the Duty to Consult" (2019) 56(3) *Alberta Law Review* 729, 733 n 13.
[52] Alfred (n 31) 40–1.

Indigenous communities) as a starting point for future discussions'.[53] These so-called 'treaty processes' do not and cannot question Canadian epistemological assumptions and the Canadian Crown's assumption of sovereignty. Instead, they operate as a

> base form of manipulation of Indigenous peoples' post-epidemic poverty and weakness in the attempt to validate and legitimate the conditions and structures that are an inherent part of the economic dependency foisted on them, and to achieve a final and crucial degree of control over the futures of Indigenous peoples by binding and subsuming their identity and political existence to that of the Canadian state.[54]

In this view, colonisation 'proceed[s] *through* treaties and recognition'.[55]

Third, the legal architecture within which negotiations are conducted can constrain the status of any settlement and structure the treaty processes themselves. Of course, the negotiation position of the state does not fully determine any result, but it does set parameters around settlement outcomes.[56] Land is a prime example, because it is a key element of any modern treaty. As Alcantara has noted, restitution of land supports the cultural and spiritual needs of First Nations, delivers justice for past wrongs and provides for the establishment of an economic base.[57]

In practice, however, the quantum of land transferred through modern treaty processes in Canada has been underwhelming. For instance, a review of land allocation in modern treaties in the mid-1990s found that allocations ranged considerably, 'from 0.83 km^2 per capita in James Bay to 18.5 km^2 per capita in the Eastern Arctic'.[58] That study found a general pattern: 'as one moves from the more densely to the least densely populated parts of the nation, land quantum tends to increase', likely because more remote areas of the country have fewer third-party interests that must be managed.[59] Yet, this justification does not account for all allocations. For instance, although the Nisga'a are located in the remote Nass Valley in north-west British Columbia, they obtained title to only eight per cent of their traditional territories.[60] In other cases, First Nations have been dismayed and disappointed that the state is unwilling to discuss 'compensation for the loss of ancestral lands'.[61]

More problematic is the different way that non-Indigenous parties and First Nations typically understand land. The Canadian Crown and respective provinces typically enter into negotiations with First Nations to secure access to natural resources or certainty around property rights at issue. When state actors do so, they privilege and presuppose a western-legal epistemology that views land as a commodity, a resource to divide or allocate amongst various groups with competing interests. First Nations, as Woolford has written, may understand land as a 'part of the group', and 'a key *participant* in the relationships that allow for the self-reproduction and ongoing negotiation' of First Nations identities.[62] When there are strong linkages between self-identity and relation to territory, then state

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[53] Ibid 41 (parenthesis in original).
[54] Ibid.
[55] Elizabeth Strakosch, *Neoliberal Indigenous Policy: Settler Colonialism and the 'Post-Welfare' State* (Palgrave Macmillan, 2015) 71.
[56] See discussion in Harry Hobbs, 'Treaty Making and the UN Declaration on the Rights of Indigenous Peoples: Lessons from Emerging Negotiations in Australia' (2019) 23(1-2) *International Journal of Human Rights* 174, 184–86.
[57] Alcantara (n 17) 353.
[58] Frank Duerden, 'Land Allocation in Comprehensive Land Claim Agreements: The Case of the Yukon Land Claim' (1996) 16(4) *Applied Geography* 279, 280.
[59] Ibid.
[60] *Nisga'a Final Agreement* (n 29) ch 3.
[61] Inter-American Commission on Human Rights, *Report No 105/09 Petition 592/07 Admissibility Hul'qumi'num Treaty Group Canada* (30 October 2009) [12]. For a discussion on 'compensation', see Woolford (n 14) 123–4.
[62] Woolford (n 20) 68; Woolford (n 14) 114–15.

efforts to divide and demarcate land or exploit natural resources 'can be experienced as an assault upon the group itself'.[63]

In the same way that land allocation and understandings of land can be contentious, problems have emerged with regard to funding. First Nations require adequate financing to prepare and engage in complex negotiations that could last decades. For many years, however, the amount of funding offered by the state, and stringent obligations to repay that funding, caused considerable challenges. In 1995, for example, the BCTC noted:

> In no case could the Commission provide the level of funding requested by any First Nation. The amount of funds provided over the long term does not appear to be sufficient to accomplish the goals expressed by the Task Force. Even with savings through such steps as information sharing, the gap between First Nations needs and available funds will widen because the financial needs of First Nations are expected to increase as they progress through the process.[64]

Funding has increased since 1995. In 2020, the BCTC identified that since 1993, $789 million in negotiation support funding had been allocated.[65] It is a considerable sum, although it is not clear whether this quantum is sufficient.

Nonetheless, the larger problem faced by those participating was that the majority of funding initially came in the form of a loan. Only 20 per cent of funding allocated to First Nations consisted of a non-repayable contribution,[66] with the remaining 80 per cent viewed as an 'advance on the cash transfer component'.[67] That means of the $789 million that has been allocated via the BCTC, over $631 million would have to be repaid,[68] leaving the anticipated capital transfer to First Nations through treaty 'substantially offset by their loan debt'.[69]

This is especially true for smaller nations and those engaged in negotiations for substantial periods of time. The Hul'qumi'num peoples, for example, found that engaging in the BCTC process led them to 'accumulate $13 million in debts' which 'made it impossible for it to continue with the administrative challenges' created by the State, all of which perpetuated a cycle of extreme poverty.[70] Inquiries into these processes revealed that the debt burden was an 'unsustainable barrier to progress'.[71] It had been condemned by government-commissioned reports,[72] the Special Rapporteur on the Rights of Indigenous Peoples,[73] and the Inter-American Commission on Human Rights.[74]

In 2018 the Canadian government reassessed its approach, declaring that it would directly support First Nations in negotiations through non-repayable contributions.[75] It extended its commitment in 2019,

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[63] Woolford (n 20) 68.
[64] British Columbia Treaty Commission, *Second Annual Report 1994-1995* (1995) 15.
[65] British Columbia Treaty Commission, *Annual Report 2019* (2019) 53; British Columbia Treaty Commission, *Annual Report 2020* (2020) 52.
[66] British Columbia Treaty Commission, *Annual Report 2019* (n 65) 53.
[67] Douglas Eyford, Ministerial Special Representative on Renewing the Comprehensive Land Claims Policy, *A New Direction: Advancing Aboriginal and Treaty Rights* (2015) 61.
[68] British Columbia Treaty Commission, *Annual Report 2018* (2018) 57.
[69] Eyford (n 67) 61.
[70] Inter-American Commission on Human Rights (n 61) [16], [37].
[71] James Lornie, *Final Report with Recommendations Regarding the Possibility of Accelerating Negotiations with Common Table First Nations that are in the BC Treaty Process, and Any Steps Required* (30 November 2011) 29.
[72] Eyford (n 67) 61
[73] James Anaya, *Report of the Special Rapporteur on the Rights of Indigneous Peoples: The Situation of Indigenous Peoples in Canada*, UN Doc A/HRC/27/52Add2 (4 July 2014) 16 [61].
[74] Inter-American Commission on Human Rights (n 61) [38]–[39] (in obiter dicta).
[75] Government of Canada, *Budget 2018* (2018) 140.

announcing that it would forgive all outstanding loans and reimburse First Nations who had already repaid loans.[76] This is significant because treaties cannot be built on policies that require First Nations to borrow money to 'get their land back',[77] or, worse, assume debt to prove what is already theirs. In any event, adequate financing is not merely about spending money. Dedicating time, effort and resources to talking treaty can funnel effort and attention into a process that may not work for First Nations, lead to no benefits, and distract from other priorities and issues. Australian governments involved in treaty processes should take note.

Implementation

The legal status of modern treaties can affect the parties' understanding of their role and responsibility and structure the negotiation stage of treaty-making. Unfortunately, First Nations who have been able to reach an agreement with the state have found that the same challenges can reappear during implementation. Consider the experience of the Huu-ay-aht First Nations, one of five signatories to the BCTC *Maa-nulth First Nations Final Agreement*.[78] In 2019, the community explained how 'colonial dynamics persist not only during [negotiation], but also through implementation' of modern treaties.[79] For Huu-ay-aht First Nations, the power asymmetries generated through the treaty negotiation process became part of their daily lives in the finalised agreement. Huu-ay-aht First Nations explain

> [a]fter nearly two decades of active engagement and relationship-building at the negotiation table, the federal and provincial negotiating personnel were replaced with implementation personnel … leaving Huu-ay-aht feeling "divorced" from the relationship.[80]

Huu-ay-aht First Nations remains positive about its agreement but called on 'government representatives whose work involves implementation' to 'develop a relational understanding of the territories (including lands, waters, and sockeye) as well as the basic geography of' the treaty lands.[81] The experience of the Huu-ay-aht First Nations reveals that governments need to build institutional knowledge to ensure they understand the peoples and territories they are working with to construct appropriate agreements as well as meet their obligations and responsibilities when implementing that agreement. The ability to cultivate this type of relationship relies on parties listening to each other and being conscious of the purpose of agreement-making.

Similar challenges have emerged in other modern treaties. Terry Fenge notes that numerous problems emerged when implementing treaties with the Gwich'in, Nunavut and Inuvialuit peoples. These included '[l]ack of capacity, inadequate funding, institutional timidity, disagreements as to the meaning and intent of certain provisions, and inherent difficulties in breathing life into conceptually broad agreements'.[82] For those First Nations, a major problem was that Canada does not contain a central agency that has the responsibility for coordinating its obligations, duties and responses. Whether a central agency is necessary or desirable in a country as large as Canada (or Australia), it suggest that institutional knowledge and capacity is required to ensure that implementation proceeds as smoothly as possible. It is not simply a matter of signing a treaty and then hoping that implementation of duties and obligations spontaneously occurs. After all, reflecting the relational character of these instruments, a treaty is a marriage, not a divorce.[83]

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[76] Government of Canada, *Budget 2019* (2019) 129 (at a cost of $1.4 billion).
[77] Eyford (n 67) 62.
[78] *Maa-nulth First Nations Final Agreement*, signed 24 July 2008 (entered into force 1 April 2011).
[79] Huu-ay-aht First Nations et al (n 37) 41–2.
[80] Ibid 43.
[81] Ibid 44.
[82] Terry Fenge, 'Implementing Comprehensive Land Claims Agreements' (July-August 2008) *Policy Options* 81, 82.
[83] Cited in Carole Blackburn, 'Producing Legitimacy: Reconciliation and the Negotiation of Aboriginal Rights

While it is not clear in advance how every implementation problem can be resolved, Alcantara has developed a typology to evaluate whether problems are likely to become intractable. Alcantara focuses on two main areas of inquiry: actor congruence/incongruence and treaty provision coherence/incoherence. Alcantara suggests that a typology along these lines can reduce several complex factors into an easily understandable method for determining whether a treaty may be successful. For Alcantara, whether treaties are viewed as successes depends on actors agreeing about the main goals of treaty implementation, which he calls 'actor congruence', and whether the provisions are vague or specific in terms of goals and means, called 'provision coherence'.[84]

Under his analysis, little conflict arises when there is strong actor congruence, and the provisions are coherent.[85] Essentially, when treaty provisions are clear and coherent and the actors agree on how to enact those provisions, little conflict will arise. Where there is strong actor congruence and weak provision coherence, then weak conflicts arise.[86] In other words, where treaty provisions are unclear, but the parties work well together and have similar aims, then the parties can typically agree on how to achieve or work-around those ambiguities that would otherwise lead to conflicts. In cases where there is weak actor congruence – so the parties have different goals and aims – but strong policy coherence, strong conflicts will arise.[87] This is because one set of actors may disagree with the goals of the policy or provisions that are sought by the other. Finally, where treaty provisions are ambiguous and actors are incongruent, then serious conflict will prevent any implementation from occurring at all.[88] In these cases, perhaps it is a wonder that a treaty was signed in the first place.

Whether challenges arise in negotiation or implementation, they ultimately stem from the legal status of the agreements. That modern treaties are governed by and subject to the law of the state, rather than international agreements between independent sovereigns structures every stage in the process. When state actors conceive treaties as furthering a domestic agenda, they will view the obligations to maintain relationships narrowly, inhibit the possibility that institutional forms embrace non-western epistemologies and practices, place arbitrary limits on key terms, and weaken the likelihood that settlements are implemented effectively. These are real problems. In the final part, we reflect on these challenges and the lessons they offer Australian treaty processes.

Critical Reflections and Closing Remarks

Canada is a settler-colonial state. This legal structure presents hurdles to achieving equality amongst parties to any treaty negotiation. Indeed, as critiques of the modern treaty processes have revealed, it is difficult to clearly ascertain how contemporary agreements can enable First Nations to break free from non-Indigenous epistemologies or transcend settler-colonialism. Nonetheless, this does not mean that treaties are per se undesirable or otherwise bad, even if they may prove to be unsuitable or ineffective in particular circumstances. As Huu-ay-aht First Nations has noted, 'Treaty is not the path for every First Nation in terms of answering the land question'.[89] Alcantara agrees, suggesting that First Nations should employ alternative strategies depending upon their own ultimate goals.[90] Perhaps litigation will be more effective for land-based claims, while negotiation could be preferable for achieving broader

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in Canada' (2007) 13(3) *Journal of the Royal Anthropological Institute* 621, 627.
[84] Alcantara (n 11) 332.
[85] Ibid 333.
[86] Ibid 333–35.
[87] Ibid 335.
[88] Ibid.
[89] Morgan, Castleden and Huu-ay-aht First Nations (n 26) 1359.
[90] Alcantara (n 17) 358–61, discussing *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 and *Taku River Tlingit First Nation v British Columbia*, 2004 SCC 74, [2004] 3 SCR 550, self-governance agreements, bilateral agreements, and First Nation Land Management Acts.

political ends. Whether entering into a treaty is the right path is a choice that First Nations will have to make for themselves. There are risks and benefits involved in all political strategies.

Reflecting on the critiques posed to the modern treaty processes in Canada, suggests a number of points for Australian treaties. First, the legal status of modern treaties will remain an impediment, and it may lead many First Nations in Australia to decide not to take part in negotiations. This is an individual decision for each First Nation. It will not be taken lightly but will be made in recognition of their own aspirations and their considered view as to the best political strategy to realise those goals. The Yorta Yorta Nation, for instance, has chosen to not take up its designated seats in the Victorian First Peoples Assembly. It has voiced concern that participation could 'provide a fast track toward the disempowerment of the sovereign Yorta Yorta nation and its people'.[91]

Second, it is also important to acknowledge the differences between the CLC and BCTC processes and those that are developing within Australia's borders. Modern treaty making in Canada is an outgrowth and responses to the Canadian Supreme Court's development of aboriginal title. The treaty processes were explicitly designed as a non-litigious pathway to establish aboriginal title to land and potentially recognise a degree of self-government. That is why Alcantara has argued that First Nations in Canada should consider alternatives, using negotiated agreements only when there are broader issues to discuss, like self-governance.[92] To some degree, the treaty processes forming within Australia are also outgrowths and responses to the iterative development of native title, both through legislative reforms and judicial decisions,[93] but they are also more than that. The *Uluru Statement from the Heart* is explicit in its ambition to exceed the limitations imposed by native title jurisprudence. Its vision is both national and structural. It calls 'for reforms to the constitution of Australia – both the legal text and the broader cultural existence of the Australian nation'.[94]

It is here that another key difference between Canadian and Australian treaty processes emerge. Canada's *Constitution* recognises and affirms 'existing aboriginal and treaty rights of the aboriginal people in Canada'.[95] This means that any treaties between First Nations, Canada and its provinces or territories cannot be altered by ordinary legislation.[96] By contrast, the Australian *Constitution* does not recognise or affirm Aboriginal and Torres Strait Islander peoples or their rights. The lack of constitutional protection leaves any State treaty legally vulnerable to Commonwealth, as well as subsequent State government interference.

The *Uluru Statement* too recognises the pitfalls and problems of working with and within the settler state, as well as critiques arising from within Canada. Those Aboriginal and Torres Strait Islander delegates who drafted and endorsed the *Uluru Statement* were keenly aware that constitutional recognition by itself is not sufficient to achieve the broader structural changes necessary to embed and protect reform. That is why, Eddie Synot explains, the *Uluru Statement*

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[91] Jedda Costa and Joseph Dunstan, 'First Peoples' Assembly Calls for Sovereignty and Truth in Victorian Treaty Negotiations', *ABC News* (online, 10 December 2019) <https://www.abc.net.au/news/2019-12-10/first-peoples-assembly-meets-for-victorian-treaty-negotiations/11783312>.
[92] Alcantara (n 17) 357–61.
[93] Williams and Hobbs (n 2) 218–19, 225–26.
[94] Eddie Synot, 'Arresting the Tide of History: The Uluru Statement from the Heart', *Third World Approaches to International Law Review* (online, 29 January 2020) <https://twailr.com/arresting-the-tide-of-history-the-uluru-statement-from-the-heart/>.
[95] *Constitution Act* 1882 (Canada), s 35.
[96] But see *R v Sparrow* [1990] 1 SCR 1075, where the Supreme Court held that constitutionally protected treaty rights can be justifiably infringed where the government can demonstrate a compelling and substantial legislative objective and its actions are nonetheless consistent with the honour of the Crown.

> addresses the symbolic and practical needs of reform by providing the respect and recognition that should be afforded Indigenous peoples coupled with the required structural changes to ensure substantive reforms are achieved.[97]

The *Uluru Statement* envisions reform and the development of a treaty through a sequential procedure called 'Voice Treaty Truth'.[98] Megan Davis explains that '[t]he sequencing of the reform is that the Voice would supervise the process of agreement-making or treaty', and come before processes related to Truth, to counter-act Australia's contemporary 'political realities'.[99] It is an attempt to engender Constitutional recognition while altering the structural conditions that foreclose or inhibit meaningful reform.

Constitutional reform is difficult in Australia. Altering political and legal governance structures to empower Aboriginal and Torres Strait Islander peoples requires non-Indigenous individuals engage in critical reflection. Davis writes that the *Uluru Statement* was 'tactically issued to the Australian people, not Australian politicians, because it is we, as a united people, who can unlock that potential'.[100] For Synot, Aboriginal and Torres Strait Islander peoples must 'take up the responsibility to engage with non-Indigenous peoples and institutions and understand clearly the local nature of our position'.[101] That will be unsuccessful unless non-Indigenous peoples can listen, reflect and learn. Only together will we be able to work together to alter the structures that positively support and negatively impact some far more than others. Treaty is part of that path.

In this chapter, we have outlined and analysed the critiques of modern treaty processes arising in Canada. The central problem identified by Indigenous and non-Indigenous scholars is that working within the state-based legal status quo can perpetuate settler-colonialism. Challenges arise through negotiations when state actors understand their roles narrowly. When that occurs, it can constrain dialogue and prevent innovative and imaginative settlement outcomes that may meet the aspirations of both parties. Challenges can also arise when agreements are implemented in circumstances where state actors have failed to build institutional knowledge about Indigenous systems and worldviews. Nonetheless, despite these issues, some First Nations have been able to work within these structures and further their agenda. Others have not been able to do so or have determined that the costs and risks are too high.

Aboriginal and Torres Strait Islander peoples are well aware of these issues. In the *Uluru Statement from the Heart*, they have proposed a broader, complementary project of social and constitutional reform that may be able to overcome the limits of modern treaty making. If non-Indigenous Australians observe the lessons from the Canadian context and act to counter the manner in which settler-colonialism can affect and influence modern treaties, it is possible that these agreements could realise a greater purpose. The *Uluru Statement* invites all Australians to begin that process by walking together 'in a movement of the Australian people for a better future'.[102] Treaties are challenging to get right. However, they remain a hopeful avenue that may be able to provide 'justice for the past, and hope for the future'.[103]

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[97] Synot (n 94).
[98] Megan Davis, 'The Long Road to Uluru: Walking Together – Truth before Justice' (2018) 60 *Griffith Review* 13, 32.
[99] Ibid, 43.
[100] Ibid.
[101] Synot (n 94).
[102] *Uluru Statement*.
[103] Jill Gallaher, in Chapter 10.