# VICTORIA: GROUNDWORK FOR A TREATY?

**Eleanor Bourke and Mark Brett**

A nation 'does not make a treaty with itself', John Howard has said, but Malcolm Fraser points out that New Zealand, Canada and the USA all have treaties with their Indigenous minorities. Amongst these former colonies of Great Britain, Australia stands in the uniquely invidious position of having no treaty with the traditional owners of its land base.

A treaty process could make symbolic and practical contributions to some unresolved issues at the foundations of Australian identity. Our nation-state rests uneasily on its racist beginnings, and it is not too late to take action to remedy the situation.

Any presumption that Australia is undivided in its sovereignty – and therefore cannot make treaties with itself – obscures the complex realities of our system of government. There are different kinds of 'sovereignty', not least because the authority of 'the Crown' in Australian history has shifted from a monarch to the will of the people.

Federation gave birth to the different levels of Commonwealth, State and local government which collectively represent the Crown's mysterious and somewhat murky genealogy. Apart from a Constitution that shares sovereignty between the Commonwealth and the States, sovereign powers are divided between the parliament, the executive and the judiciary. In short, our multi-layered self-government is formed by a system of agreements between separate jurisdictions. Indigenous jurisdictions could be added to the federated mix.

In 1992, the *Mabo* judgement of the High Court belatedly recognized that traditional Indigenous groups exercise an internal jurisdiction in defining their own laws. In this landmark decision, native title rights and interests were identified as 'inherent': that is, they were recognized rather than 'granted' by the Crown. But instead of seeing the inherent system of traditional rights as implying a sovereign system of law (as in North America), the *Native Title Act* 1993 raised new questions about the ways in which Indigenous polities could be recognized in Australia.

An unfortunate consequence of these uncertainties was the High Court's 2002 decision against the *Yorta Yorta* people. This decision found that innovations in Aboriginal law over the last two centuries are not relevant to native title since the Court recognized 'no parallel law-making system' in territories over which the British Crown had asserted its sovereignty.

This blinkered legal logic meant that Yorta Yorta traditional owners would only have been recognized as native title holders if they had continuously maintained their legal system since 1788. Their sovereignty was presumed by Justice Olney to have been extinguished.

However, in December 2005, Justice Ron Merkel's judgement in the Wimmera was positive: the Wotjobaluk and Wergaia peoples are the first native title holders in Victoria. Their traditional law and custom has *not* been 'washed away by the tide of history'.

There are promising signs that the Gunditjmara Nation in south-west Victoria will reach agreement with the State Government. Negotiations to resolve native title matters for several other groups across the State are in progress. The tide is turning for native title, but is it time to reconsider a treaty process?

A treaty is not the only instrument that could be used to establish the legal recognition and rights due to Indigenous people, but it is perhaps the most appropriate way of reconciling the competing sovereignties that trouble our national imagination.

A treaty will only be legitimate if all the First Nations sign up. An ATSIC-style "representative" body could not achieve legitimacy of this kind. Australian Indigenous peoples are made up of nations whose sovereignty has never been ceded. Groundwork for a treaty could involve negotiations with those nations one by one – as part of a reconciliation process.

The *Native Title Act* (section 86F) allows governments to negotiate agreements beyond the narrow definitions of native title. This provision would allow for 'treaty-style' processes which address the First Nations on their own terms.

Victorian Government Ministers Thwaites, Hulls and Jennings have commenced negotiations with a statewide group of First Nations' representatives – the Victorian Traditional Owner Land Justice Group. These Ministers have a unique chance to do something significant for all Victorians.

A statewide policy framework might include the key principles of a treaty: recognition and acknowledgment, cultural heritage rights of traditional owner groups, the return or joint management of culturally significant lands, jurisdictional issues, customary allocations of natural resources, and economic strategies.

In the long run, treaties would ideally need to be secured by Commonwealth legislation or a Constitutional amendment. In the shorter term, every First Nation could be recognized in arrangements enabled by the *Native Title Act*. The State Government is well placed to begin the groundwork for something historic. Has the tide of history turned?

Prof. Eleanor Bourke is a Wergaia elder and co-chair of Reconciliation Victoria
Dr Mark Brett is the policy officer at Native Title Services Victoria