FNP

A Policy Framework for Economic Self Determination

CHAPTER 1: OPTIMISING THE FRAMEWORK FOR FIRST NATIONS TREATY AND SETTLEMENT ACROSS AUSTRALIA

PRELIMINARY DRAFT ONLY

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Marramarra murru is a local Ngambri, Ngunnawal and Wiradyuri term that describes the creation of pathways. The pathways were created by Biyaami, the creator and protector who gifted and shared them with the ancestors. Passed on from generation to generation, these pathways serve to ensure survival and wellbeing through the maintenance and transfer of knowledge, lore, custom and cultural authority, as well as facilitating trade.

Like these ancient pathways, the *Marramarra murru* First Nations Economic Development Symposium identified contemporary pathways to economic self-determination for Australia's First Nations peoples.

We speak to each other in many different ways such *widyung* (which way?), *widyundhu* (which way you?) or *widyunggandhu* (how you?). First Nation languages can be described as free word order languages which have a different foundational principle from that of English, a fixed word language. In fixed word order European languages such as English, everything is based on one framework or another of continuum (linear) logic. In the free word order of Australian Indigenous languages, it appears that the foundational frame is one of an unchanging (although manipulative) network of relationships. Behind these two different systems of logic is a different basic assumption about the nature of the cosmos.[1]

Australian Indigenous people place a very high value on relationships and identity and constantly think about relationships with other people, with the spiritual world, with place, and with the things in the living and spiritual world. The identity of all things (and people) is defined by their relationships with, or to, all 'identities' in the social, the spiritual and the physical environment.[2]

Our identity, relationship, actions, focus and transformation help keep our people 'on track'. A Ngambri, Ngunnawal and Wiradyuri term for this is *murru waaruu*.

Foreshadowed by the *Marramarra murru* Symposium, the *Murru waaruu* First Nations Economic Development Seminar Series, the subject of this document, will comprise a series of topic-specific seminars that are designed to bring together leading scholars and practitioners to develop solutions for specific relevant issues, ensuring we remain on track to deliver a compelling, evidence-based case to transition the existing First Nations economic development policy paradigm in Australia to one the supports economic self-determination.

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All artworks and creative designs in this *Marramarra waaruu* Seminar Background Paper have been created by Rohit Rao. Rohit is a young artist and graduate students at the Australian National University Fenner School of Environment and Society.

Rohit is interested in using art and stories to challenge and communicate complex social and ecological issues and working with communities to imagine and implement alternatives to meet them.

[1] Grant, S. and Rudder, J. 2014, *A Grammar of Wiradjuri Language*, Restoration House, Canberra, page 4.
[2] Ibid.

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Nature and purpose of this preliminary draft

This document is a preliminary draft of a chapter in a policy position paper that will be prepared by the Australian National University First Nations Portfolio (ANU FNP) at the completion of the *Murru waaruu* seminar series. Its purpose is to socialise the outcomes of *Murru waaruu* Seminar 1: Treaty and Settlement with participants in that workshop and other key stakeholders for their review and further input.

The discussion herein represents a synthesis of the *Murru waaruu* Seminar 1 Background Paper[3] and the deliberations of the seminar that was facilitated by the ANU FNP on 15 February 2022 in Canberra. The background paper will be an appendix to the final policy paper and should be read in conjunction with this preliminary draft chapter.

As a preliminary draft that remains subject to review and feedback, the discussion contained herein should not be considered comprehensive or final and is subject to change as the *Murru waaruu* seminar series progresses.

Further information on the *Murru waaruu* First Nations Economic Development Seminar Series and the *Marramarru murru* First Nations Economic Development Symposium that preceded the seminar series can be sourced from:

https://anufirstnations.com.au/murru-waaruu-on-track-seminar-series/

https://anufirstnations.com.au/first-nations-economic-development-symposium/

Introduction

Whether historical or contemporary, formal agreements between organisations representing the interests of First Peoples and governments that are a product of historical colonisation, that establish the dimensions and details of the contemporary relationship between First Peoples and those governments under a unified nation state are of fundamental importance to modern nation states that have evolved from former British colonies.

These agreements, typically referred to as 'treaties', serve a number of functions, including:

- Validation of the fact that prior to colonisation, societies with their own culture, systems of governance and notions of sovereignty lived on the lands that were the subject of colonisation, and that this 'First Nations' sovereignty was either never ceded or if ceded, subject to terms;
- First peoples have contemporary social, cultural, governance and economic rights enforceable under national and international laws;
- First peoples are legally entitled to compensation and recompense from national and jurisdictional governments that were born out of colonisation; and
- First peoples and the governments that are a legacy from colonisation wish to co-exist in a nation state that recognises both cultures, legitimises and recognises First Nations rights and interests and is harmonious and characterised by equality.

In the context of this policy paper, treaties and associated compensation settlements are a vital asset for economic self-determination – the associated compensation provides land, sea country, water and financial assets that underpin economic development and treaties can be structured

[3] The background paper can be sourced at https://anufirstnations.com.au/wp-content/uploads/2023/02/FNP-Background-Paper-Seminar-One-2023.pdf

to provide greater autonomy in how First Nations use those assets to give effect to economic self-determination.

What is a treaty and why is it an important economic asset?

A ‘treaty’ is an agreement between recognised nation states. Under current international law, Article 2(1)(a) of the *Vienna Convention on the Law of Treaties 1969*[4] defines a treaty as an international agreement concluded between States in written form and governed by international law, whether embodied in a single or multiple instruments and whatever its particular designation. In this context a treaty is an agreement between nation-states or in some cases international organisations, whereby those parties agree that the agreement is binding at international law.

In the case of former British colonies that are, in terms of historical colonisation circumstance and current systems of government, broadly comparable to Australia (deemed to be the United States, Canada and New Zealand[5]), treaties between Britain and subsequent colonial governments and First Nations were entered into at and around the time of colonisation. While, the terms of these treaties were, in all cases, subsequently reneged by Britain and subsequent colonial governments and all three nations navigated a period where national and subnational parliaments passed discriminatory legislation designed to control the lives of their First Peoples, these initial treaties provide precedence that a form of First Nations sovereignty pre-dated colonisation and was recognised at the time of colonisation. This precedence is further ratified by the recognition of First Nations and treaties with them in the constitution and nation founding documents of the United States, Canada and New Zealand. As societal attitudes toward First Nations have modernised, this strong precedence has resulted in the reinstatement of treaty rights and the formation of new treaties and various mechanism.

The circumstance of British colonisation of Australia are quite different to each of the United States, Canada and New Zealand. Because Britain’s claim to sovereignty over Australia was founded in the international doctrine of *terra nullius* (land deemed to be unoccupied or uninhabited), Britain saw no legal reason to enter into treaties with Australia’s First Nations. Therefore, historical treaties between Australian governments and its First Nations do not exist. Furthermore, Australian First Nations did not participate in the formation of the Commonwealth of Australia and until the 1967[6] referendum, First Nations Australians (Aboriginal and Torres Strait Islander peoples) were only mentioned in the Australian Constitution in a discriminatory sense. Since 1967, the Australian Constitution has been silent on Australia’s First Nations. This is despite the fact, that in 1992, Australia’s highest court rejected Britain’s claim of *terra nullius.*[7]

Of course, Australia’s First Nations aren’t without some statutory pathways and pathways created by jurisprudence for redress for Colonisation. Both jurisdictional legislation (such as the *Aboriginal Land Rights (Northern Territory) Act 1976*) and Federal legislation (*Native Title Act 1993* (Cth)) provide a statutory mechanism for First Nations to reclaim some interests in land, sea country and water. The Federal and jurisdictional legislative framework and High Court jurisprudence, also provides some framework for limited recompense. For example:

- Division V of the Native Title Act provides for native title holders to apply to be compensated for acts taken by the Crown in the right of the States, Territories or the

[4] 1155 UNTS 331
[5] See Barnett, R. (2023), *Murru waaruu Economic Development Seminar Series, Seminar 1 – Treaty and Settlement: Background Paper*, First Nations Portfolio, Australian National University
[6] See Appendix 3 IN: *Murru waaruu Economic Development Seminar Series, Seminar 1 – Treaty and Settlement: Background Paper*, First Nations Portfolio, Australian National University
[7] Mabo v Queensland No. 2, [1992] HCA 23 – 175, CLR 1

Commonwealth that have impaired or extinguished[8] native title rights. This compensation is payable on 'just terms'.[9] However, unless explicitly requested by the entitled party (a request which can be refused), may only be comprised of monetary payments. Further compensation is only payable on:

  - *Past acts* - which are those that occurred before 1 July 1993 (if legislation) or before 1 January 1994 (if any other act) that because of the *Racial Discrimination Act 1975* (Cth) may have been invalid by virtue of their discriminatory effect on native title rights;
  - *Intermediate period acts* – which are those that involve the granting of freehold or leasehold by the State between 1 January 1994 and 23 December 1996, per the date of the *Wik* decision, and which affect native title lands[10]; and
  - *Future acts* – which are prospective acts of the State not yet done which will affect native title rights and interests, typically development or declaration of conservation estate.

- Timber Creek series of cases[11] provides an indicative framework for calculating 'just terms' that includes components of economic loss (including time value of money) and cultural loss.

- Settlements under State jurisdiction such as those conducted under the *Traditional Owners Settlement Act 2010* (Vic) in Victoria and the Noongar South West and Yamatji Nations settlements in Western Australia.

While these agreements continue to evolve in their sophistication and represent a pathway to the more robust arrangements seen in the United State, Canada and New Zealand, they fall well short of the treaty-settlement arrangements required to optimally activate an environment conducive to economic self-determination in Australia, as is seen in other comparable jurisdictions.

The following Figure 1, summarises the differences in constitutional recognition of First Nations and treaty rights across United States, Canada, New Zealand and Australia.

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[8] s227, *Native Title Act 1993* (Cth)
[9] ss51, 53, *Native Title Act 1993 (Cth)*
[10] *Wik Peoples v Queensland* (1996) 187 CLR 1
[11] *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900; *Northern Territory of Australia v Griffiths* [2017] 256 FCR 478; *Northern Territory v Griffiths* (2019) 269 CLR 1

Constitutional recognition

- First Nations recognition by virtue of Supreme Court interpretation of Article 1, Section 8, Clause 3:

The Congress shall have the power to…regulate commerce with foreign nations, and among several states, and with the Indian Tribes.

- Supreme Court has determined that Tribal governments are not 'states' or 'foreign states' as contemplated by the constitution, but rather 'domestic dependent states'
- There are currently 573 sovereign United State Tribal Nations

- Complex history, dating back to Treaty of Paris 1763 and Royal Proclamation regarding Indian Lands
- Patriated hybrid Canadian Constitution of 1982:

Section 25: 'guarantees' that the Canadian Charter of Rights and Freedoms shall not be construed to abrogate or derogate treaty rights

Section 35: recognises and affirms existing treaty rights

- Treaty of Waitangi is a recognised nation forming document under Aotearoa/New Zealand's uncodified constitution
- Continues to define the relationship between Government and Māori people:
  - Tribal autonomy
  - Māori Council
  - Waitangi Tribunal
  - Māori reserved seats in Parliament

- Prior to 1967 referendum, only discriminatory reference to Australia's First Peoples
- **Now the Australian Constitution is silent on Australia's First Nations and their peoples**

Historical and contemporary treaties

- More than 500 treaties established between 1778 and 1871, 374 of which were ratified by Congress
- Terms pertaining to trade, land access for infrastructure, service delivery, settlements, industrial development, right of passage, mining rights, knowledge transfer and service provision.
- Treaty-making ceased with the *Indian Appropriations Act 1871*

- 70 (historical) treaties between 1701 and 1923, evolving through phases of commerce, military and political requirements.
- Calder Supreme Court decision paved pathway to Comprehensive Land Claims Policy (modern treaties)
- Modern Treaties are implemented through legislation and cover issues such as ownership, use and management of land and resource and in many cases degrees of self-government
- 26 Modern Treaties and 13 self-government agreements

- Waitangi Tribunal (1975) is a permanent commission of inquiry charged with hearing, investigating and making recommendations on claims brought by Māori interests in relation to breaches of the Treaty of Waitangi
- Tribunal reports inform settlements negotiations with the Office of Māori-Crown Relations
- Settlements include apology, financial redress, land and natural resources
- Enacted through legislation

- *Terra nullius* and no treaties
- Division V of the Native Title Act 1993 (Cth) provides for compensation for Past, Intermediate and Future Acts
- Timber Creek cases provide and indicative formula for calculating 'just terms'
- Traditional Owners Settlement Act 2010 (Vic)
- Western Australia

Figure 1 – Key differences between constitutional recognition of First Nations and treaties – United States, Canada, New Zealand and Australia

In Australia we cannot turn back the clock and implement historical treaties and have them recognised in the Australian Constitution. However, we can put it in place legal structures and institutions that bring Australia up to world best practice with respect to modern First Nations treaty and agreement making.

Given the fundamental chasm between Australia's treaty and agreement making environment and that of the comparable nations, it is not surprising that the key operational components of the Uluru Statement from the Heart – a constitutionally enshrined 'Voice' to Parliament and by virtue of this, constitutional recognition, and the Makarrata Commission – emulate mechanisms and

institutions that form key components of the modern treaty and agreement making process in comparable jurisdictions.[12]

So, why does Australia need a treaty process?

While the multi-dimensional agreements that have been put in place more recently in Western Australia and Victoria are seen as a significant step forward, overall, the process summarised above and detailed in the Seminar Background Paper falls way short of Treaty and agreement making mechanisms used in other jurisdictions:

- Inadequate scope: the main national mechanism for compensation, Division V of the *Native Title Act*, only recognises acts that impacted native title interests in land after abolition of the *Racial Discrimination Act 1975* (Cth) in 1994. They therefore do not address the majority of land, water and sea country dispossession that occurred as a result of colonisation or the other major impacts such as assimilation, unjust incarceration, massacres and destruction of cultural sites.

- Absence of truth telling: whist associated mechanisms such as the *Noongar (Koorak, Nitja, Boordahwan) (Present, Past and Future) Recognition Act 2016* (WA), recognise that specific First Nations pre-existed colonisation and the Mabo High Court decision rejects the legitimacy of Britain's claim to *terra nullius*, none of the abovementioned mechanisms go so far as to acknowledge the process of colonisation and its detrimental impact on First Nations.

- Absence of periodic review: even though there is precedence for historically negotiated settlements in Australia to be renegotiated (e.g. Rubibbi, Esperance Nyungar and Gunaikurnai settlements), the abovementioned mechanisms do not provide a robust and transparent framework for revisiting compensation as evolving circumstances may require.

- Silent on power sharing and service delivery: while the abovementioned frameworks may include co-management arrangements, they are silent on detail and more broad power sharing and service delivery arrangements that are common to agreements in comparable jurisdictions.

Towards best practice framework for treaty and settlement in Australia

In light of the deficiencies in the existing Australian settlement and compensation framework, it is widely recognised by Australian First Nations leaders that while settlements under Division V of the *Native Title Act* and particularly those given effect under unique arrangements in Victoria and Western Australia, create a step toward treaties, they fall well short of exhibiting the characteristics of treaties. For as long as this remains the case, the potential for Australian First Nations to achieve optimal economic self-determination will remain constrained.

At this early stage of the process, it is not possible to delineate the full details of an optimal treaty and settlement framework for Australia. The work undertaken through the *Murru waaruu* process to date, identifies a preliminary, principles-based, framework for optimal treaty and agreement

[12] See Implementation of the Uluru Statement and treaty and settlement IN: Barnett, R. (2023), *Murru waaruu Economic Development Seminar Series, Seminar 1 – Treaty and Settlement: Background Paper*, First Nations Portfolio, Australian National University

making in Australia that is comprised of three key components – equitable negotiation and agreement making settings, enduring treaty and evolving compensation. Provided for the purpose of peer review and comment, this proposed framework is set out in the following subsections.

Equitable negotiation and agreement making settings

Empowered First Nations

Currently, in the vast majority of cases, negotiations between First Nations groups and the Federal or jurisdictional governments are characterised by a significant skew of negotiating power toward government. This isn't to imply that governments necessarily enter negotiations with the intent of using that power to achieve less than optimal outcomes for the First Nations counterparty. But that this unequal balance of power is obvious and inevitably plays-out in the negotiation process.

A number of factors play to the advantage of governments in negotiations, including:

- Capability and capacity: the financial capacity and legal expertise of the Federal or any jurisdictional government in Australia is significantly greater than the wider Australian First Nations community, let alone any individual First Nation group.
- Legislation: First Nations interests under legislation that pertains to First Nations affairs is subordinate to those of the State and in many instances subordinate to those of third parties. For example, almost all land tenure afforded to First Nations interests in Australia includes caveats that restrict how that tenure may be used, and/or subordinate the First Nations tenure to the tenure of other interests. Further, in most cases where financial resources are provided to the benefit of First Nations interests, control of those financial assets is vested with the government or a third party.
- Counter-party dependency: in many instances, the viability of First Nations institutions and communities are highly dependent on ongoing financial support from governments and government funding is often required to support the negotiating capacity of First Nations groups, creating a natural conflict.
- Dominant culture: because negotiations occur in the context of standard Western practices and frameworks, First Nations cultural nuances can be lost in the deliberations and negotiated terms, resulting in misinterpretation of contractual intent and poor outcomes.
- Politics: while societal norms and values are shifting more towards the favour of First Nations interests, achieving optimal self-determination outcomes for First Nations people remains poorly understood across Australia and is not a priority for most Australians, providing government with a negotiating advantage. That is, it is unlikely that significant political capital will not be lost if negotiated terms are unfavourable to First Nations interests.

Addressing this imbalance in negotiating power will take time. Arguably, there are several conditions precedent to creating a more level negotiating table, namely:

- Constitutional recognition: attaining constitutional recognition will elevate the social, political and legal standing of First Nations in Australia, increasing their negotiating power. The extent to which this is achieved will depend on the language used to give effect to that recognition and the rights that it expressly provides or implies.

- Truth telling: Nation-wide recognition and acceptance of:

    - The historical facts associated with the colonisation of Australia, including the falsehood of *terra nullius* and specific acts of dispossession, massacre, mass

incarceration and assimilation, as a very significant and undeniable component of Australia's official history; as well as
    - The resulting inter-generational trauma, ongoing discrimination and consequential low socio-economic status as major contemporary national issues will result in greater national empathy toward the plight of First Nations Australians, leading to a stronger political basis for negotiation.

- Strengthening of culture: strong, flourishing culture binds and empowers First Nations people. The restoration and growth of First Nation cultures is vital to project individual First Nations identity in the negotiating process and ensure that First Nations are united and aligned in their objectives.

- Negotiation capability building: while there is a widely held view that particularly the multi-dimensional negotiated settlements in Western Australia and Victoria are not treaties, their relative complexity compared to other settlement agreements in Australia, helps build negotiating and deal structuring expertise within First Nations communities.

- Financial and political capacity: progress in all of the abovementioned conditions precedent will advance the financial and political capacity of First Nations groups. However, strong political advocacy and collaboration that achieves scale (see next section) will further empower First Nations groups.

Scale

Whilst there are some exceptions such as the Wiradjuri Nation of south-eastern Australia and the Noongar Nation of south-western Australia, most Aboriginal and Torres Strait Islander First Nations are characterised by relatively small populations, and there are many of them, resulting in diluted individual negotiating power. To put this issue in context, the current First Nations population of Australia is estimated at 984,000[13], representing approximately 4 percent of the Australian population. Using the total number of Native Title determinations made by Australian Courts to date (579)[14] as a proxy for estimating the number of distinct First Nations groups in Australia, each First Nation has, on average, approximately 1,700 constituents. The more populous First Nations also tend to be those whose traditional lands intersect with major population centres.

Where it is culturally appropriate and achievable, individual First Nations groups will achieve greater negotiating power where they are able to align their interests under a formal collaborative structure and negotiate with government as a single entity. This doesn't mean that individual First Nations have to lose their specific cultural identity, but where possible and appropriate use cultural relationships and similarities with other First Nations to collaborate as a negotiating entity.

To an extent, this has been achieved in Western Australia under the Noongar South West and Yamitji Nations settlements and settlements that have been conducted under the Victorian Act.

Certainty of terms and primacy of jurisdiction

Ambiguous terms in treaties and settlement and compensation agreements will invariably lead to protracted litigation. Further, where treaties and agreements are made under instruments that are the subject of subordinated judicial or parliamentary jurisdiction, they are vulnerable to protracted appeals processes associated with that litigation. A protracted agreement making and

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[13] Australian Bureau of Statistic (2023), *Census 2021: estimate of resident population of Aboriginal and Torres Strait Islander Australians*, Australian Government, Canberra
[14] National Native Title Tribunal (2023), Statistics, (http://www.nntt.gov.au/Pages/Statistics.aspx)

agreement implementation process will consume significant amounts of scarce resources and significantly delay the realisation of benefits.

Enduring treaty

In the Australian context, First Nations treaties will be more akin to the modern treaty making process in Canada. Australian treaties should set out an agreed principles-based framework that sets the heads of power for the parties and establishes the dimensions and nature of the relation in perpetuity, leaving details of compensation to subsidiary agreements that are able to evolve as circumstances and knowledge changes over time (see next subsection).

To this end treaties should include:

- Preamble: that explains the parties, the impact of colonisation on the specific First Nations party, the parties' desire to co-exist within the Australian nation and the requirement for the government party to compensate the First Nation party for the impacts of unjust colonisation.

- Articles that set out the agreed principles that define the ongoing relationship between the First Nations Group and the government counterparty, including articles pertaining to:

  - *Recognition of UNDRIP* – Australia has been a signatory to the United Nations Declaration on the Rights of Indigenous People (UNDRIP) since 2009. While UNDRIP is not legally binding on Australian Governments, in so far as Australia has capitulated to the convention, it has an international obligation to comply with its articles. To this end, treaties should reference the relevant articles of UNDRIP as principles that guide the relationship of the parties.

  - *Power sharing* – treaties should establish clear areas of power-sharing where government and traditional decision-making processes and governance frameworks work collaboratively to give effect to the implementation of the treaty, including in the delivery of specific services to the relevant First Nations community.

  - Service delivery arrangements – treaties should provide a mechanism that allows the government party to outsource the delivery of certain services to the First Nations party under terms and conditions prescribed by subsidiary compensation agreements.

  - *Transfer of assets* – treaties should provide a mechanism for governments to transfer land, water, sea country and financial assets to the First Nations party under terms set out by subsidiary compensation agreements.

  - *Timebound subordinate compensation agreements* – treaties should provide a mechanism for the parties to negotiate and agree subordinate compensation agreements that provide detailed terms with respect to delivering against the aforementioned articles over a prescribed period of time.

For the treaty to be enduring, it should be entered into under a jurisdiction of primacy, whereby the prospect of laws made in other jurisdiction taking priority over its terms are limited. Options in this regard include:

- International law: (public) international law comprises the rules, principles and institutions that facilitate the conduct of states and international organisations in their relations with

each other and in some instances with individuals, groups and transnational companies. The intricacies of achieving this jurisdiction for Australian First Nations treaties are beyond the scope of this paper and may prove challenging. However, the formation of treaties under the jurisdiction of international law would place jurisprudence in the hands of a court that is independent from both parties, such as the United Nations Court of Justice, as well as bringing international eyes to the treaty and the conduct of the parties to the treaty.

- Australian constitutional law: the Australian constitution is the highest law in Australia. Recognition of the general structure of treaty frameworks and rights in the Australian constitution would render treaties the jurisdiction of the Australian High Court.

- Federal legislation: the Federal Parliament may use its powers in accordance with Section 51(xxvi) of the Australian Constitution to pass legislation that give effect to treaty frameworks and treaty rights that is binding on the Australian jurisdictions to the extent that is allowed by the Australian Constitution.

- State legislation: legislation passed by State parliaments to give effect to treaty frameworks and treaty rights will only be effective so far as they are not superseded by conflicting Federal legislation or contravene state law making powers provided under the Australian Constitution. Further, they will only apply to treaties made in their jurisdiction.

Responsive compensation agreements

A key aspect of the treaty and settlement and compensation process is the capacity for settlement terms to evolve such that they can respond to changing needs of First Nations and government parties, new information and knowledge, new opportunities for self-determination and mutual benefit and changing societal values, beliefs and expectations. The capacity for settlements and compensation to evolve is also important for progressing settlements, as in the case of First Nations treaties, parties will be more inclined to agree to settlement terms if don't represent full-and-final settlement.

There will be a view held by some that non-finalisation of settlements will create uncertainty for third parties such as developers. However, processes can be built into the settlement framework to reduce this uncertainty and in any event, final settlements that do not satisfy either party create greater uncertainty.

Settlement and compensation agreements can be structured as follows:

- Timebound: settlement and compensation agreements should be timebound so that they are, for reasons discussed above, not full-and-final settlement. However, they should be for a period of time that is adequate for meaningful resources and rights to be transferred and for the parties to achieve outcomes and learn from implementation, so that subsequent agreements can be continuously improved.

- Asset transfer: settlement and compensation agreements should be specific about the land, sea country, water rights and financial assets that are to be transferred within the time period, state of asset readiness for intended purpose (e.g. status of compliance with various regulations and approvals) and the terms that apply to those transfers and the use of those assets (particularly with respect to local state or Federal Government incumbrances pertaining to their usage).

- Capacity building: settlement and compensation agreements should be specific about capacity building resources that will be provided to the First Nations party and how those resources will be used over the time period.
- Institutional frameworks: settlement and compensation agreements should identify any institutional arrangements or institutions that are to be stood up within the time period and specify the function, deliverables and resourcing of those institutions.
- Services and service delivery: settlement and compensation agreements should identify services that are to be delivered by the First Nations party, the specifications of that service delivery and key performance criteria that are to be met, as well as resourcing for the service delivery.
- Co-management and power-sharing: settlement and compensation agreements should identify specific areas in which co-management and power-sharing rights exist, the terms of and processes associated with co-management and power-sharing arrangements.

This proposed conceptual treaty and settlement process is illustrated in the following Figure 2.

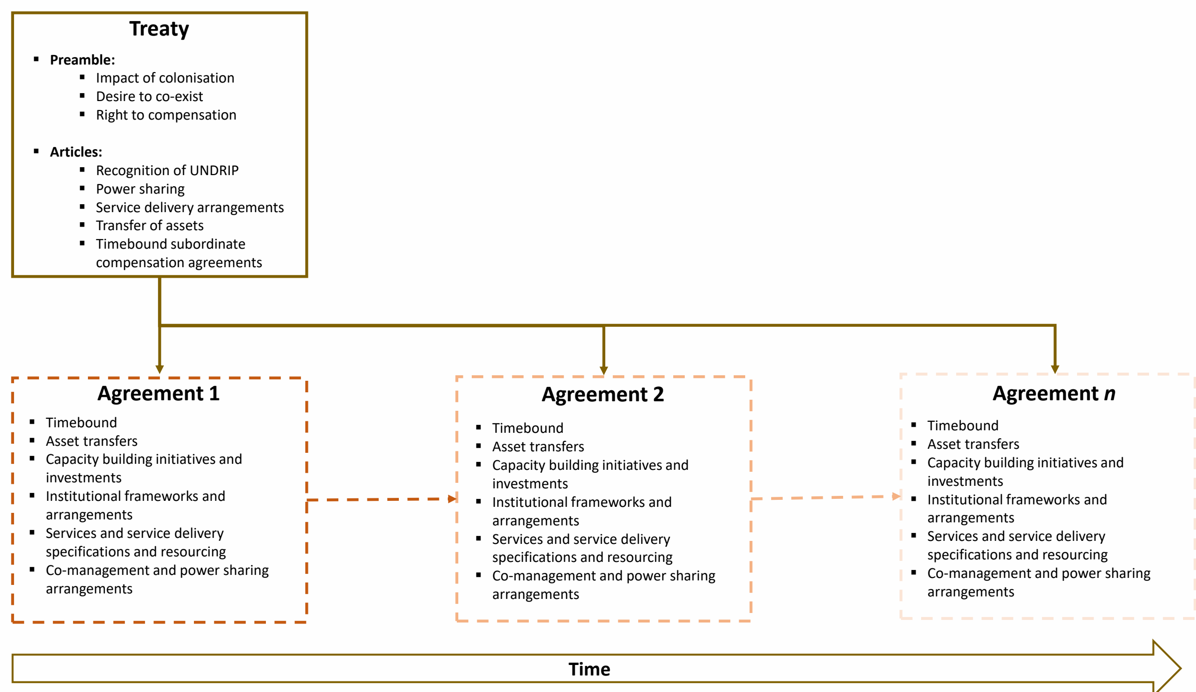
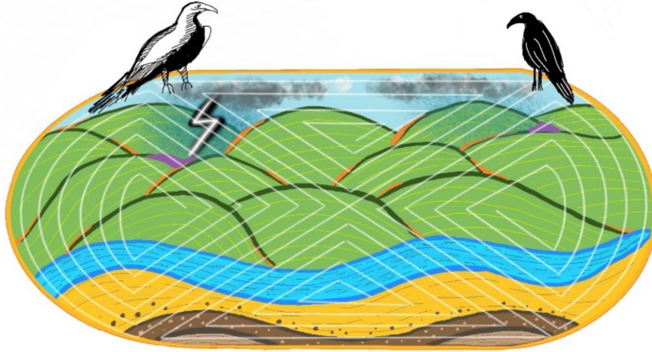


Figure 2 – Conceptual Australian treaty and agreement making framework

Yukeembruk Yibaay-maliyan mayiny

(The Crow and Eagle-hawk People)



Crow and Eagle-hawk men lived at opposite ends of the Brindabella (Goondawarra) mountain range. Between the two camps lived two sisters, who were under the protection of Yibaay-Maliyan because they were related to him. Yukeembruk wished to marry the sisters, but they were forbidden to him by kinship laws. Upset by Yibaay-maliyan's refusal to approve marriage, Yukeembruk decided to kill his enemy's son. While Yibaay-maliyan was out hunting he tricked the boy to eat and drink until his belly was full, then he speared him. Yibaay-maliyan returned from hunting early as he knew something was wrong. While hunting he missed two wallabies, which had never happened before. Yukeembruk tried to make Yibaay-maliyan believe that many men came to camp, killed the boy and wounded Yukeembruk himself in the leg. The two men dug a burial site, but Yibaay-maliyan who had not been deceived by the story, tricked Yukeembruk into testing the size of the grave, placed his boy's body on top of him and buried the murderer alive. Yukeembruk dug his way out like a wombat but was transformed into a Crow. Yibaay-maliyan's camp was struck by lightning and he was transformed into an Eagle.

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