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Reflections on the Treaty from a Torres Strait Islander Lawyer

by Heron Loban

In the Torres Strait there already exists a treaty.^[1] This treaty recognises the traditions and customs, the traditional way of life and livelihood of Aboriginal and Torres Strait Islander people living in the Torres Strait. However, Torres Strait Islanders are not a party to this treaty, and protecting and preserving Torres Strait culture is not a primary concern of this treaty. The recognition and protection of certain rights in the treaty has been beneficial for Indigenous people living in the Torres Strait to the extent that these rights are protected in a treaty governed by international law, but inadequate to the extent that such rights are limited by and subject to domestic legislation.

The rights of Aboriginal and Torres Strait Islander peoples are not adequately protected by current laws relating to discrimination, native title and cultural heritage, or other laws and policies that concern the rights and interests of Indigenous people.

In the Torres Strait we are seeking greater control and enjoyment of the significant commercial fishing industry which operates in the Torres Strait. So far this has not been forthcoming through fisheries legislation, and it is uncertain whether the amount of control and enjoyment sought by Torres Strait Islanders will be granted through native title processes. In New Zealand the Treaty of Waitangi has led to Maori being able to control and benefit economically from a significant share in the New Zealand commercial fishing industry.

A single key document such as a treaty which forms a solid basis for the proper and continued recognition of Aboriginal and Torres Strait Islander people as traditional owners could afford Indigenous people in Australia the same level of rights, or greater rights than those that treaties have provided for other Indigenous peoples.

The process of reaching an agreement on a treaty provides a further opportunity for the wider Australian community to be educated about the history of this country's Indigenous people, understand our issues as we see them, and develop a better understanding of the position of an Indigenous person in this country. I hope that it will be an opportunity for non-Indigenous and Indigenous Australia to reconcile, rather than an opportunity for scaremongering and racist hysteria tactics. Some individuals and sectors of the Australian public unfortunately engaged in such scaremongering at the advent of native title.

A treaty has the ability to create real opportunities and produce real outcomes for Aboriginal and Torres Strait Islander people as treaties have done for other Indigenous people. Such opportunities and outcomes have not been forthcoming to any satisfactory degree under any previous or current Australian political, legal or social regime. Reliance on political will from the parliament to recognise the rights of Indigenous people in relation to matters such as land ownership and protection of cultural heritage, is and has been an unsatisfactory state of affairs for Aboriginal and Torres Strait Islander people. To be successful a treaty would need to have real practical outcomes and avoid having its application frustrated by irrelevant concerns or parties.

While the treaty process and product should be thorough and representative it should also be timely. Many processes which Indigenous people are involved in are lengthy and financially consuming with little reward. A flexible treaty that would meet the needs of both Aboriginal and Torres Strait Islander people living in remote, rural and urban areas is essential.

A treaty seems to have been a successful tool for many Indigenous peoples of the world in the recognition of their traditional social, economic and land rights. There is no reason why this cannot be the case for Aboriginal and Torres Strait Islander people too.

Heron Loban is a Torres Strait Islander lawyer who has practised in native title law. Heron is currently employed as an associate lecturer in the Oodgeroo Unit, Queensland University of Technology, where she is also completing a master of laws degree.

[1] *The Treaty between Australia and the independent State of Papua New Guinea concerning sovereignty and maritime boundaries in the area between the two countries, including the area known as Torres Strait and related matters* reproduced in the *Torres Strait Fisheries Act 1984* (Cth), Schedule.