

Factsheet
Sovereignty
2022

ANTAR



Sovereignty

In her first speech in the Australian Parliament, Wiradjuri woman Linda Burney – the first First Nations woman elected to the House of Representatives – declared:

“...these lands are, always were and always will be Aboriginal land – sovereignty never ceded.”¹

It is now customary in public gatherings when performing a Welcome or Acknowledgement to Country to affirm that Aboriginal and Torres Strait Islander sovereignty was never ceded. But what is meant by this? What do First Nations peoples mean when they speak in the language of ‘sovereignty’? And can Australian law recognise Aboriginal and Torres Strait Islander sovereignty?



¹ Commonwealth, Parliamentary Debates, House of Representatives, 31 August 2016, 163-170 (Linda Burney).

What does 'sovereignty' mean?

Sovereignty can mean many different things. At its most basic, it is about ideas of power and authority. In international law a distinction is sometimes made between external and internal sovereignty. External sovereignty is about the relationship between a country and other countries. Internal sovereignty, on the other hand, is about how power is shared and exercised within a country. For instance, both the New South Wales and Commonwealth governments can make laws that apply in Sydney – we might say that sovereignty is shared.

Understanding Key Terms

- **Self-determination:** A peoples' collective right to determine their own political status and develop their own institutions of governance.
- **First Nations:** A collective term that refers to Indigenous peoples of a country or region. First Nations recognises the diversity of Aboriginal and Torres Strait Islander peoples and their collective right to sovereignty and self-determination.
- **Settler:** A person who has moved to another area and established permanent residence. Settler colonialism is a specific form of colonialism that seeks to replace the original inhabitants of an area with settlers.
- **Terra Nullius:** A latin word meaning literally, '**land belonging to no one**'. Estimates suggest that around 1 million First Nations peoples lived on the continent when the British arrived. However, British colonisation proceeded on the basis that First Nations peoples had no rights to their land. The concept of *terra nullius* was only officially discarded in 1992 in the Mabo decision.

In Australia, laws are debated and enacted by the Commonwealth Parliament. Because of this, it is often said that we operate under a form of 'parliamentary sovereignty'. But Parliament only holds its power because citizens vote for our representatives. So, it can also be said that 'popular sovereignty' is ultimately held by the Australian people.

There are other ways of thinking about sovereignty. Indigenous peoples often talk about the personal aspect of sovereignty. For Eualeyai and Kamillaroi scholar Larissa Behrendt, sovereignty 'is about exercising autonomy, both at an individual level and as a "people". On this view First Nations people can assert sovereignty in their day-to-day actions: there is a personal aspect to sovereignty'.²

Aboriginal and Torres Strait Islander peoples describe sovereignty as being intimately connected to their country. Goenpul lawyer, Pakeri Ruska, and Ambēyan scholar, Callum Clayton-Dixon point out that sovereignty stems from:

"The ancient reciprocal relationship we have with our lands. This relationship finds its roots in our connection to kind and country, manifesting in our song, dance and story, our language, ceremony and law. It is vested in the individual, the tribe and the nation. Our sovereignty has endured since the first sunrise – it cannot be handed to us or taken from us. Aboriginal sovereignty can only be expressed or suppressed."³

This is how the Uluru Statement from the Heart expresses the idea of sovereignty. As the Statement explains, sovereignty is:

'A spiritual notion: the ancestral tie between the land, or "mother nature", and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors.'⁴

Because Indigenous sovereignty is connected to country, it is a right of each Aboriginal or Torres Strait Islander nation. The Wiradjuri people are sovereign; so too are the Wik peoples and the Yorta Yorta Nation.

²Larissa Behrendt, *Achieving Social Justice* (Federation Press, 2003) 100-101

³Pakeri Ruska and Callum Clayton-Dixon, 'Words of the Struggle' (2015) 1 *Black Nations Rising* 10, 10.

⁴[Uluru Statement from the Heart](#), 26 May 2017.

In exercising their right to sovereignty, First Nations may choose to coalesce to support each other, or act independently.

Some Aboriginal and Torres Strait Islander peoples use the term sovereignty in its external sense. And some speak of a pan-Aboriginal sovereignty. For example, the [Aboriginal Provisional Government](#) has proposed an 'Aboriginal Nation' and has issued Aboriginal passports on the basis that the Aboriginal Nation 'is separate to the Australian Nation'.

Not all First Nations peoples see sovereignty in this same way. For many, sovereignty does not entail a separate state but rather a renegotiation of power within Australia to recognise the rights and interests of Aboriginal and Torres Strait Islander peoples. As one First Nations person in Newcastle told the Expert Panel on Constitutional Recognition in July 2011:

“We want sovereignty along with recognition. It is not realistic for us to have our own government, but we can look at the positions within government and areas for us to have power over. If the consensus in the community is that we should have a say in how this country is run then we should have a piece of it.”⁵

The Uluru Statement from the Heart understands sovereignty in the same way. It declares that Aboriginal and Torres Strait Islander sovereignty '**co-exists with the sovereignty of the Crown**'.⁶

How does Australian law deal with First Nations sovereignty?

No treaties were negotiated on the Australian continent.

⁵Commonwealth of Australia, Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel (January 2012) 97.

⁶[Uluru Statement from the Heart](#), 26 May 2017.

One consequence of the failure to engage in treaty-talks is that Australian law is built on the notion that Aboriginal and Torres Strait Islander sovereignty no longer exists. The British colonists simply ignored the rights and interests of Aboriginal and Torres Strait Islander peoples. In the 1889 decision of *Cooper v Stuart*, the Judicial Committee of the Privy Council, the highest court in the British legal system, declared that at the time of the British acquisition of sovereignty, the continent was **'a tract of territory practically unoccupied, without settled inhabitants or settled law'**.⁷

In *Mabo (No 2)*, the High Court of Australia held that *Cooper v Stuart* was incorrect. However, the High Court has consistently maintained two points. First, the acquisition of sovereignty by the British cannot be challenged in an Australian Court. Second, that when the British Crown arrived and claimed sovereignty over the Australian continent in 1788, Aboriginal sovereignty was displaced. In the 2003 *Yorta Yorta* decision, for instance, the Court explained that the assertion of sovereignty by the British Crown **'necessarily entailed...that there could thereafter be no parallel law-making system'**.⁸

A similar statement was found in the recent case of *Love v Commonwealth; Thoms v Commonwealth*. In this case the High Court found that Aboriginal people who are not citizens cannot be deported as aliens. However, the Court was once again clear, First Nations sovereignty did not persist **'after the assertion of sovereignty by the British Crown'**.⁹

Many Aboriginal and Torres Strait Islander peoples contest this position. The idea that the British could obtain the whole of the Australian continent by a simple flag raising ceremony at Port Jackson in 1788 is unconvincing in their view. As Yawuru man and law professor Mick Dodson explains, **'the sovereign pillars of the Australian state are arguably, at the very least, a little legally shaky'**.¹⁰

⁷(1889) 14 App Cas 286, 292.

⁸*Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 444 [44] (Gleeson CJ, Gummow and Hayne JJ).

⁹*Love v Commonwealth; Thoms v Commonwealth* [2020] HCA 3, [356] (Gordon J).

¹⁰Michael Dodson, 'Sovereignty' (2002) 4 *Balayi: Culture Law and Colonisation* 13, 18.

The position in Australia is also at odds with that of Canada, the United States and Aotearoa New Zealand. In these countries, histories of treaty-making have resulted in a different legal framework. Courts in these countries have no problem recognising that Indigenous sovereignty not only exists but does not threaten the sovereignty of the State.

Moving Forward

The Australian Courts are clear that they cannot recognise Aboriginal and Torres Strait Islander sovereignty. The change must come through Parliament, a political act that represents the will of the Australian people. Modern treaty processes underway in several Australian states and territories suggest that some governments may be willing to rethink this issue. For example, in the 2018 [Barunga Agreement](#), signed by the Northern Territory government and the Territory's four Aboriginal Land Councils, both sides agreed that Aboriginal Territorians '**never ceded sovereignty of their lands, seas and waters**'. In Western Australia, the 2016 Noongar Settlement was characterised by Deputy Opposition Leader Roger Cook as a process whereby the Noongar people and the Western Australian government '**recognis[e] each other's sovereignty**'.¹¹

At the Federal level, momentum continues to drive the Uluru Statement from the Heart forward. The Statement is a clear expression of Aboriginal and Torres Strait Islander sovereignty. It calls for a First Nations Voice to advise the government and parliament on laws that affect Aboriginal and Torres Strait Islanders peoples, and a Makarrata Commission to supervise a process of agreement-making and truth telling. It is through these institutions that Aboriginal and Torres Strait Islander peoples can exercise their sovereignty within the Australian nation.

¹¹ Western Australia, Parliamentary Debates, Legislative Assembly, 19 November 2015, 8688 (Roger Cook, Deputy Opposition Leader).

© ANTAR 2022

Email: hello@antar.org.au

Phone: 02 9280 0060

PO Box 77

Strawberry Hills NSW 2012

With thanks:

This background report was authored by
Dr Harry Hobbs, Research Consultant.

**ANTAR is proud to acknowledge and pay our respects
to First Nations Peoples as the traditional owners
of the lands on which we work across the continent.**

For more information visit:

ANTAR.ORG.AU