



**“Strengthening Partnership between States and
indigenous peoples: treaties, agreements and other
constructive arrangements”**

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**Positional Paper to the seminar on "Strengthening Partnership between
Indigenous Peoples and States: treaties, agreements and other constructive
arrangements"**

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*The views expressed in this paper do not necessarily reflect those of the
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United Nations Declaration on the Rights of Indigenous Peoples:

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

The original inhabitants of the land commonly known as Australia have never relinquished their sovereign rights over Our land. Throughout this paper, I shall reject the terms Indigenous, Aborigine or traditional peoples (and relative adjectives), preferring to them the more appropriate term Tribal peoples. The Tribal peoples of the land known as Australia, challenge all claims by British 'colonial' settlers to any and all forms of sovereignty over the Pacific Island Continent commonly known as Australia. Among other arguments, the Tribal peoples' assertions to the continuity of Our never ceded sovereignty over Our own land are based on the legal principles of the British 'colonial' settlers themselves and it is some of these principles that this paper sets out to explore.

It is a statutory requirement that any act made by a United Kingdom Parliament must be recorded in writing. This is because the UK parliament is a parliament of record with all sovereign authority vested in the Monarch in Parliament in accord with the *Act Establishing the Coronation Oath 1689 UK*, the *Coronation Oath Act 1689 UK*, and the *Act of Settlement 1701 UK*. Such requirement must therefore include any assertion of any acquisition of sovereignty over another land or peoples must be recorded in writing in an official document by the UK Parliament.

The *Act of Settlement 1701 UK* provides that '*no person who shall hereafter come to the possession of this Crown, shall go out of the dominions of England, Scotland, or Ireland, without the consent of Parliament*' and demonstrates the requirement of the UK parliaments consent for any act to occur being in place prior to the act itself being undertaken. As with all legal instruments granting or denying UK parliamentary consent, consent must be recorded for future evidentiary and other purposes.

The *Act Establishing the Coronation Oath Act 1689 UK* provides that

Whereas by the law and ancient usage of this Realm, the Kings and Queens thereof have taken a solemn oath upon the Evangelists at their respective coronations, to maintain the statutes, laws, and customs of the said Realm, and all the people and inhabitants thereof, in their spiritual and civil rights and properties: but forasmuch as the oath itself on such occasion administered, hath heretofore been framed in doubtful words and expressions, with relation to ancient laws and constitutions at this time unknown: to the end therefore that one uniform oath may be in all times to come taken by the Kings and Queens of this Realm, and to them respectively administered at the times of their and every of their coronation: may it please your Majesties that it may be enacted.

The relevant legal instruments and reports that explicitly deal with issues of sovereignty over the land now known as Australia include but are not limited to the *Report into the Commission of Enquiry Into Aboriginal People Wherever British Settlements Were Made (1836-1840)*, the *Pacific Islander Protection Act 1875 UK*,

the 63 & 64 Victoria Chapter 12 An Act to Constitute the Commonwealth of Australia 1900 UK (Sections 9.51.26 and 9.127). The *Pacific Islander Protection Act 1875* UK (issued as an Order in Council) provides, under the Title 'Saving of the Rights of the Tribes':

Nothing herein or in any such Order in Council contained shall extend or be construed to extend to invest Her Majesty with any claim or title whatsoever to dominion or sovereignty over any such islands or places as aforesaid, or to derogate from the rights of the tribes or people inhabiting such islands or places, or of chiefs or rulers thereof, to such sovereignty or dominion.

In what appears an unquestionable acceptance of tribal sovereignty, the UK parliament specifically prohibited within its own legislation the Monarch to 'extend or construe to extend' Her sovereignty or dominion over the Tribes and their lands on ~2nd August 1875 in the *Pacific Islander Protection Act 1875* UK. It is very clear that this British Act identifies, *within the British' own law*, the right of the Tribes to maintain their sovereignty **well after** the settlement of British subjects upon Tribal lands.

Furthermore, the *Letters patent establishing the Province of South Australia 19 February 1836* provide the following:

*And we do hereby fix the Boundaries of the said Province in manner following (that is to say) On the North the twenty sixth Degree of South Latitude On the South the Southern Ocean—On the West the one hundred and thirty second Degree of East Longitude— And on the East the one hundred and forty first Degree of East Longitude including therein all and every the Bays and Gulfs thereof together with the Island called Kangaroo Island and all and every the Islands adjacent to the said last mentioned Island or to that part of the main Land of the said Province **Provided Always** that nothing in those our Letters Patent contained shall affect or be construed to affect the rights of any Aboriginal Natives of the said Province to the actual occupation or enjoyment in their own Persons or in the Persons of their Descendants of any Lands therein now actually occupied or enjoyed by such Natives*

The High Court of Australia, in a number of judgments and statements, has admitted that the Constitution (again, an Act of the British parliament) does not provide any clarification as to the issue of sovereignty. In the matter of *Mabo V Queensland (No 1)* the High Court of Australia even admitted that it could not determine the issue of sovereignty to the detriment of the Tribes. It has further been admitted publicly by members of the bench of the High Court that the Constitution 'holds no element of Sovereignty'.

There exists a number of other indications as to the continuous sovereignty of the Tribes prior to and post British settlement upon Tribal lands. Early in the days of the settlement in the territory known by the British as 'Victoria', for example, a man named Batman entered into a private negotiation with local Tribes in relation to the purchase of certain portions of Tribal lands. The negotiation was rebuffed by British colonial powers on the basis that British citizens were not able to Treaty with the Tribal people concerned, only the British sovereign (and Her representatives) could do so. Also, during the early years of the settlers being upon Tribal lands, the British identified some individual Tribal people as leaders of the Tribes and issued them with plates called 'Kings' plates. These plates were used to identify members of the Tribes who held a certain status in the Tribes. This being a tacit recognition also of a structure of law and legal status amongst the Tribes, for example.

It appears, from the documents discussed above, that colonial documentary evidence indicates an explicit acknowledgment of the sovereign rights of the Tribes of Australia as far as almost 100 years after the initial act of British ships unloading their citizens on Australian shores. That being the case, British arrival to this land is to be

construed as the act of *settlers*, and not of *colonisers*, similarly to what has historically happened in places such as China, Hawaii or Japan. It is also important to note that the British themselves referred to such arrivals as 'settlers'.

Consequently, all colonial laws apply – and have always applied – to British subjects only. Section 6 of the *Pacific Islander Protection Act 1875* UK clearly identifies the following:

Power of Her Majesty to exercise jurisdiction over British subjects in islands of the Pacific Ocean; to erect a court of justice for British subjects in the islands of the Pacific ... It shall be lawful for Her Majesty to exercise power and jurisdiction over her subject within any islands and places in the Pacific Ocean not being within Her Majesty's dominions, nor within the jurisdiction of any civilized power, in the same and as ample a manner as if such power or jurisdiction had been acquired by the cession or conquest of territory, and by Order in Council to create and constitute the office of High Commissioner in, over, and for such islands and places, or some of them, and by the same or any other Order in Council to confer upon such High Commissioner power and authority, in her name and on her behalf, to make regulations for the government of her subjects in such islands and places, and to impose penalties, forfeitures, or imprisonments for the breach of such regulations. It shall be lawful for Her Majesty, by Order in Council, to create a court of justice with civil, criminal, and Admiralty jurisdiction over Her Majesty's subjects within the islands and places to which the authority of said High Commissioner shall extend.....

The above section very clearly highlights that any and all statutes of the UK Parliament applied only to Her Majesty subjects. The question then arises in regards to whether documentary evidence identifies Tribal peoples as subjects of Her Majesty. On the contrary, however, Tribal people are not and never have been British subjects. Instructions to Governor Phillip regarding his lawful right of intercourse with the Tribes was set out in the following terms, as recorded in his personal journal, and required that he were:

*to endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoining all **Our subjects** to live in amity and kindness with **them**. And if any of **Our subjects** shall wantonly destroy **them**, or give **them** any unnecessary interruption in the exercise of **their** several occupations, it is Our will and pleasure that you do cause such offenders to be brought to punishment.*

The terms of the Commission and Instructions governing the British settlers were based upon a very explicit distinction between the Monarchs' subjects and 'them': that is, the sovereign Tribes.

Furthermore, the *Admiralty Offences (Colonial) Act 1859* UK provides that:

If any person within any colony shall be charged with the commission of any treason, piracy, felony, robbery, murder, conspiracy, or other offence, of what nature or kind soever, committed upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, or if any person charged with the commission of any such offence upon the sea, or in any such haven, river, creek, or place shall be brought for trial to any colony, then and in every such case all magistrates, justices of the peace, public prosecutors, juries, judges, courts, public officers, and other persons in such colony shall have and exercise the same jurisdiction and authorities for inquiring of, trying, hearing, determining, and adjudging such offences, and they are hereby respectively authorized, empowered, and required to institute and carry on all such proceedings for the bringing of such person so charged as aforesaid to trial, and for and auxiliary to and consequent upon the trial of any such person for any such offence wherewith he may be charged as aforesaid, as by the law of such colony would and ought to have been had and exercised or instituted and carried on by them respectively if such offence had been committed, and such person had been charged with having committed the same, upon any waters situate within the limits of any such colony, and within the limits of the local jurisdiction of the courts of criminal justice of such colony.

This act demonstrates a lack of power of British authorities over Tribal lands, their power being limited only over British subjects, proving their status as *settlers* rather

than *colonists*. It also identifies the fact that the Jurisdiction of the UK parliament was limited to one of an Admiralty jurisdiction as all matters were dealt with by the Admiralty on board 'one of Her Majesties ships'. Consequently, the Tribes maintained Our sovereign power to exercise Tribal law upon and over Our own lands.

Given that the Monarch of the UK parliament was, until August 2011, also the Lord High Admiral of the UK, it follows that their Admiralty jurisdiction must have been unlawfully applied to Tribal people upon Our lands.

Whenever any Tribal man, woman or child was (or is) subjected to Her Majesties Admiralty jurisdiction via the courts or other oppressive means, it follows that the UK and Australian Parliaments' agents have unlawfully brought such Tribal people before such courts for trial under Her Majesties laws, in complete disregard for their own legal provisions relating to the lawful protection of Tribal law, and of international law.

To this day, the UK and Australian Parliaments continue to allow the abuse of their own law against the Tribes in direct contravention to the actual and intended legal limitation of the exercise of such laws.

Another important consequence of the point raised above is that the piece of UK legislation that is referred to as the Commonwealth of Australia Constitution is a result of the creation and enactment of British laws that only applied to British subjects. In its original form, the Constitution affirmed the prohibition of the use of UK and Australian laws against the tribes in Sections 51.26 and 127.

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (xxvi) The people of any race, other than people of the aboriginal race, for whom it is deemed necessary to make

127. In reckoning the number of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

In a referendum of the British subjects (to whom this law applied) which was taken on 27 May 1967, the text '*other than people of the aboriginal race*' was removed from Section 51 (xxvi), and Section 127 was repealed entirely. Despite these sections being repealed, however, there was no positive statement introduced to the Constitution of the Commonwealth of Australia of any lawful right for the Parliaments to make laws for the Tribes. *No* positive law has *ever* been created by the Parliaments giving a right to the UK or the Australian Parliaments to make laws for Tribal people or to count Tribal people as part of the Commonwealth. Nor have the Tribes given formal acquiescence to any such law. This can not be remedied by any alteration to the Preamble to the Constitution of the Commonwealth as Tribal law does not allow for the absorption of the Tribes into nor under the laws of another Sovereign entity.

On the contrary, evidence indicates that in fact the Commonwealth acknowledges the continued existence of Tribal law. One such continually documented affirmation can be found in the Commonwealth government printed 'ABSTUDY' application document. At page 4 of this document, at question 16, the Commonwealth acknowledges the existence of Tribal law. This document alone is an equitable estoppel on the UK and Australian Parliaments from claiming they do not recognise the continued existence of Tribal law and from using British law against or in respect of the Tribes. That all said, it doesn't matter what the British laws claim, they have and had no right under Our law to usurp Our Sovereignty.

It is a requirement of those claiming sovereignty that the laws of the deposed or replaced sovereign/s must be ceased from practice. The acknowledged continuity of Tribal law, contained for example in the above document and in the recognition of *Native Title*, proves that the sovereignty of the Tribes has never been ceded, acquired by conquest or ceased *de facto*.

Clear evidence the Tribes remain the Sovereigns over Ourselves and Our lands.

The Tribes continue to conduct and practice Our Tribal law. Our Tribal law is an integral part of Our Tribal sovereignty and neither can be denied as being valid and continuing in Our lands. It is a fact that the Tribes rebut the UK and Australian Parliaments' assertions of sovereignty over the Continent. Tribal peoples do not accept, nor have We ever accepted any of the claims by the UK and Australian Parliaments to sovereignty over Our Tribal lands and selves. Tribal sovereignty has never been ceded, nor have the Tribes acquiesced to the UK Parliament's, Australian Parliament's, or any other entity's claim to sovereignty over Us. We rebut the claim that We are possessions, subjects, Natives or any other form of possession or protected person of the Monarch of the UK and or Australian parliaments nor the parliaments themselves. We retain today – and have retained throughout the entire colonial period – our sovereign rights in tact as they were prior to the arrival of settlers in Our lands.

The continuing practice of Our law and other ceremonies and all of Our Tribal legal practices demonstrate that the Sovereignty of Our Tribes has always been here including since the arrival of the British, and that the best position available to the British/Australians parliaments to claim is that there are – and have been from 1788 – two (or better, multiple) distinct sovereign legal systems active upon the continent. Those of the Tribes and those of the UK and Australian Parliaments. Any time a Tribal person engages at law with Australia this engagement does not happen within the law of Australia but is the result of the interaction between distinct sovereign entities.

According to UN Resolution 2625 (XXV) of 24 October 1970, Australia has an obligation as a UN member State not to subject the Tribal peoples of this continent to the alien subjugation and laws of either the UK or Australian parliaments. Nonetheless, the Australian Parliaments and agents continue to commit ethnic cleansing of the Tribes through the subjugation of the Tribal people by using Australian laws, courts, prisons and other governance systems to force Tribal people to drop their claims to the right to stand in and exercise Our Sovereignty.

The UN and its member States have an obligation to protect the Tribes from such interference, subjugation and ethnic cleansing by another of its member States, namely, Australia pursuant to Resolution 2625 (XXV) in accord with, amongst other instruments, the United Nations Declaration on the Rights of Indigenous Peoples, including but not limited to Article 37 thereof, etc... or any other mechanism that denies the fact we are peoples for the purposes of International law, that we are true subjects and not objects of International law. It is not for the States to make decisions nor undertake business for, nor on behalf of the Tribes without Our consent and blessing. That consent and blessing has never, to date, been granted.

Definitions:

Tribal: means those men, women and or children of the various original Sovereign collectives present on the Pacific Island Continent known as 'Australia' prior to the settlement there of British settlers.